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WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

KANSAS CITY, MO

WHEN: June 10; at 9:00 a.m.
WHERE: Room 147–148,
Federal Building,
601 East 12th Street,
Kansas City, MO
RESERVATIONS: Call the St. Louis Federal Information Center;
Missouri: 1–800–392–7711
Kansas: 1–800–432–2934

NEW YORK, NY

WHEN: June 13; at 1:00 p.m.
WHERE: Room 305C,
26 Federal Plaza,
New York, NY
RESERVATIONS: Call Arlene Shapiro or Stephen Colon at the New York Federal Information Center, 212–264–4810.

SPARKILL, NY

WHEN: June 14; at 9:30 a.m.
WHERE: Lougheed Library,
St. Thomas Aquinas College,
Route 340,
Sparkill, NY
RESERVATIONS: Call Olive Ann Tamborelle, 914–359–9500, ext. 291

WASHINGTON, DC

WHEN: June 16; at 9:00 a.m.
WHERE: Office of the Federal Register,
First Floor Conference Room,
1100 L Street NW., Washington, DC
RESERVATIONS: Maxine Hill, 202–523–5229

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Presidential Documents

Title 3—

The President

Proclamation 5827 of May 25, 1988

Take Pride in America Month, 1988

By the President of the United States of America

A Proclamation

Our beautiful land is blessed from sea to shining sea with bountiful natural and cultural resources on Federal, State, and local lands. We are also blessed that the American people possess a unique volunteer spirit rooted in our frontier tradition.

It is truly fitting that we take a special period of time to recognize our Nation's recreational and cultural resources and how they contribute to the economic and social well-being of our communities and our country. Through our stewardship of these natural wonders and great monuments to history, we can express our love for our country, our pride in America, and our desire to preserve our resources and our heritage for the future.

The Take Pride in America campaign, with its theme, "Take Pride in America: You Can Make a Difference," encourages all of us to do just this. The campaign is a partnership of public and private groups, Federal agencies, and State and local governments that fosters public awareness of the need for wise stewardship of our natural resources and for retention of our countless cultural resources as well. Let us remind ourselves often, this month and always, to do our share and "Take Pride in America."

The Congress, by House Joint Resolution 530, has designated May 1988 as "Take Pride in America Month" and authorized and requested the President to issue a proclamation in observance of this event.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim May 1988 as Take Pride in America Month. I call upon the people of the United States and government officials at every level to observe this month with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of May, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

Ronald Reagan

[FR Doc. 88-12163
Filed 5-26-88; 11:09 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 5828 of May 25, 1988

National NHS–NeighborWorks Week, 1988

By the President of the United States of America

A Proclamation

Socially, culturally, economically, spiritually, and in so many ways, our neighborhoods tell the American story of family, faith, and freedom. The motto *E pluribus unum*, or "Out of many, one," is an appropriate description of our myriad neighborhoods and their residents. We all love and cherish this blessed land of liberty; therefore, let us join together as partners and neighbors to enrich it, each other, and every one of our neighborhoods with all of the strengths our many heritages provide us. That is something for us to reflect upon, and observance of National NHS–NeighborWorks Week presents a fine opportunity for reflection and action in our communities.

Both reflection and action are already taking place around our land in neighborhoods where residents, business owners, concerned citizens, community groups, and government agencies are turning decay and despair into promise and prosperity. They are using some of the most powerful sources of America's greatness—our volunteer spirit, our spiritual strength, the love and caring of our families, our hard work and determination, our civic energy—to create opportunities and bring renewed inspiration and hope.

Among them are the groups from which this week of observance takes its name. NeighborWorks is a national organization composed of Neighborhood Housing Services (NHS), Apartment Improvement Programs, and Mutual Housing Associations, cooperative ventures that are resident-business-government partnerships relying primarily on volunteer effort and private and local resources. They are revitalizing more than 200 neighborhoods and have generated more than $4 billion in reinvestment funds. These efforts are clearly a major contribution to our Nation and deserve our gratitude, encouragement, cooperation, and emulation during National NHS–NeighborWorks Week and in the future as well.

The Congress, by Public Law 100–261, has designated the week of June 5 through June 11, 1988, as "National NHS–NeighborWorks Week" and authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the week of June 5 through June 11, 1988, as National NHS–NeighborWorks Week. I call upon the people of the United States to observe this week with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of May, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

Ronald Reagan

[FR Doc. 88-12104
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Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 401

[Amdt. No. 17; Doc. No. 5541S]

General Crop Insurance Regulations; Onion Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1988 and succeeding crop years, by adding a new subpart, 7 CFR 401.126, to be known as the Onion Endorsement. The intended effect of this rule is to provide the regulations containing the provisions of crop insurance protection on onions in an endorsement to the general crop insurance policy.

EFFECTIVE DATE: May 27, 1988.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC, 20250, telephone (202) 447–3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512–1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as December 1, 1992.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith adds to the General Crop Insurance Regulations (7 CFR Part 401), a new section to be known as 7 CFR 401.126, the Onion Endorsement, effective for the 1988 and succeeding crop years, to provide the provisions for insuring onions.

On Wednesday, March 2, 1988, FCIC published a notice of proposed rulemaking in the **Federal Register** at 53 FR 6654, to provide the regulations containing the provisions of crop insurance protection on onions in an endorsement to the general crop insurance policy. The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the rule published at 53 FR 6654 as a final rule.

Upon review of these regulations prior to issuing a final rule, FCIC determined that a clarification of section 5 was necessary. The intent of this change is not to modify the meaning of section 5, but to clarify any misconception as to the maximum number of units per county which an insured may have. Onion acreage may be divided into units by type (Red, Yellow, or White). Under the provisions of section 5.b. an insured would have a maximum of three units (by type) for insurance purposes. Under the provisions of section 5.c., when irrigated and non-irrigated practices are carried out, the insured grower would have the potential of three units per type for irrigated practice, and three units by type for non-irrigated practice, for a total of 6 units.

Inasmuch as this is a new program offering by FCIC and potential producer-insureds need as much time as possible to study the offer, good cause is shown for making this rule effective in less than 30 days.

List of Subjects in 7 CFR Part 401

General crop insurance regulations; Onion endorsement.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1988 and succeeding crop years, as follows:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR Part 401 is amended to add a new section to be known as 7 CFR 401.126 Onion Endorsement, effective for the 1988 and succeeding crop years, to read as follows:

§ 401.126 Onion endorsement.

The provisions of the Onion Endorsement for the 1988 and subsequent crop years are as follows:

UNITED STATES DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Onion Endorsement

1. Crop insured.

a. The crop insured will be onions planted for harvest as dry onions (bulb onions).

b. In addition to the onions not insurable under section 2 of the general crop insurance policy, we do not insure any onions planted for green (bunch) or seed onions, including chives, garlic, leek, or scallions.

c. A late planting agreement will be available.

2. Causes of loss.

The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

a. Adverse weather conditions;
b. Fire;
c. Insects;
d. Plant disease;
e. Wildlife;
f. Earthquake;
g. Volcanic eruption; or
h. If applicable, failure of the irrigation water supply due to an unavoidable cause occurring after the beginning of planting;

unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

3. Annual premium.

The annual premium is computed by multiplying the production guarantee times the price election, times the premium rate, times the insured acreage, times your share at the time of planting.

4. Insurance period.

In lieu of section 7 of the general crop insurance policy, insurance attaches on each unit or part of a unit when the onions are planted and ends at the earliest of:

(a) Total destruction of the onions on the unit;
(b) Five days after digging of the onions;
(c) Removal of the onions from the field;
(d) Final adjustment of a loss on a unit; or
(e) The following dates for the calendar year in which the onions are normally harvested:

Washington–Walla Walla Sweets and any other non-storage type onion—July 31
Colorado—September 30
All other Washington onions and all other states—October 15

5. Unit division.

Onion acreage that would otherwise be one unit, as defined in the general policy, may only be further divided into units by onion type (Red, Yellow, or White) if you agree to pay an additional premium as provided for by the actuarial table and if for each proposed unit by type:

a. You maintain written verifiable records of planted acreage and harvested production for at least the previous crop year and production reports by type based on those records are filed to obtain an insurance guarantee.

b. The acreage boundaries between onion types is clearly identifiable, the insured acreage is easily determined and the onions are planted in such a manner that the planting pattern does not continue into the adjacent field of different type (maximum number of units, three); or

c. The acreage planted to onions consists of acreage on which both irrigated and nonirrigated practices are carried out, provided:

(1) Onions planted on irrigated acreage do not continue into nonirrigated acreage in the same rows or planting pattern (Nonirrigated corners of a center pivot irrigation system are part of the irrigated unit. The production from the total unit, both irrigated and nonirrigated, is combined to determine the unit yield for the purpose of determining the guarantee for the unit); and

(2) Planting, fertilizing and harvesting are carried out in accordance with recognized irrigated and nonirrigated farming practices for the area (maximum number of units, six; three irrigated and three non-irrigated).

6. Notice of damage or loss.

In addition to the notices required in the general crop insurance policy and in case of damage or probable loss:

a. You must give us written notice if you want to harvest the onions (After such notice is given, we will appraise the potential production. If we are unable to do so before harvest, you may harvest the crop, provided representative samples are left for appraisal purposes.); and

b. Any representative sample must be at least 10 feet wide and the entire length of the field.

7. Claim for indemnity.

a. The indemnity will be determined on each unit by:

(1) Multiplying the insured acreage by the production guarantee;
(2) Multiplying the result by the price election;
(3) Subtracting therefrom the dollar amount obtained by multiplying the total production of onions to be counted (see subsection 7b.) by the larger of your price election or the local market price at the time the onions are appraised; and
(4) Multiplying this result by your share.

b. The total production (in hundredweight) to be counted for a unit will include all harvested and appraised production.

(1) The extent of any loss may be determined no later than the date onions are placed in storage or delivered to a packer or processor, whichever is earlier.

(2) Appraised production to be counted will include:

(a) Unharvested production on harvested acreage and potential production lost due to uninsured causes;
(b) Not less than the guarantee for any acreage which is abandoned or put to another use without our prior written consent or damaged solely by an uninsured cause;
(c) Not less than the guarantee for any acreage from which the harvested production is disposed of without our prior written consent and such disposition prevents accurate determination of production; and
(d) Any appraised production on unharvested acreage.

(3) Any appraisal we have made on insured acreage for which we have given written consent for another use will be considered production unless such acreage is;

(a) Not put to another use before harvest of onions becomes general in the county for the planting period and reappraised by us;
(b) Further damaged by an insured cause and reappraised by us; or
(c) Harvested.

8. Cancellation and termination dates.

The cancellation and termination dates are March 1st.

9. Contract changes.

The contract change date is December 31 preceding the cancellation date.

10. Meaning of terms.

"Harvest" means the digging of onions and placement of the onions into a container.

Done in Washington, DC on May 9, 1988.

Edward D. Hews,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 88–11930 Filed 5–26–88; 8:45 am]

BILLING CODE 3410–08–M

Agricultural Marketing Service

7 CFR Part 917

[Docket No. AMS–FV–88–041IR]

Fresh Pears, Plums, and Peaches Grown in California; Decrease in Size Requirements and Revision of Maturity Regulations for Plums

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule specifies maturity requirements and maturity variance procedures applicable to the handling of plums grown in California. This rule makes no changes in plum size requirements, except for changes which relieve size requirements for two varieties. This action is designed to facilitate plum maturity determinations and promote marketing of the crop. Interested persons are invited to comment on this rule change.

DATE: This interim final rule becomes effective May 27, 1988. Comments which are received by July 11, 1988 will be considered prior to issuance of the final rule.

ADDRESS: Interested persons are invited to submit written comments concerning this interim final rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085–S, Washington, D.C. 20090–6456. Three copies of the written material shall be submitted, and they will be made available for public inspection in the office of the Docket Clerk during regular business hours. The comments should reference the date and page number of this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Jerry N. Brown, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456; telephone 202–475–5464.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under Marketing Order No. 917 (7 CFR Part 917), regulating the handling of fresh pears, plums, and peaches grown in California. This order is effective under the Agricultural Marketing Agreement

Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

This interim final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 650 handlers of plums, peaches, and nectarines subject to regulation under marketing orders (7 CFR Parts 916 and 917), and there are approximately 2,030 producers of these commodities in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having gross annual revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of such fruit may be classified as small entities.

Shipments of California plums are regulated by grade, maturity, and size under Plum Regulation 19 (7 CFR 917.460, as amended and published in the **Federal Register** on April 29, 1987, 52 FR 15488). A proposed rule concerning the size and maturity regulations was published in the **Federal Register** on April 8, 1988, (53 FR 11672). Numerous comments were received, including a request for an extension of the comment period that was originally scheduled to expire on April 25, 1988. The Department granted this request on April 21, 1988, and the notice extending this request was published in the **Federal Register** on April 25, 1988, (53 FR 13413). Proposed changes to § 917.460 were recommended by the Plum Commodity Committee and the Department.

This interim final rule is based upon the Plum Commodity Committee's recommendation, information submitted by the committee, comments received both supporting and opposing the action, and other available information.

Inspected shipments, in packages, of California plums for the 1987 season totalled 17,399,500 and they were primarily marketed in the fresh market. In 1987, the total production value of California plums was about $75,361,000. Although this interim final rule would continue to impose requirements on plums, exemptions from the inspection and certification requirements would continue. These exemptions include provisions for the shipment of minimum quantities of the fruit.

In the proposal, paragraph (b) and (c) of § 917.460 would have been revised to increase the size requirements for 47 varieties of plums and to decrease the size requirement for the Sharron's Plum variety of plums. This was to be accomplished by decreasing the number of plums allowed in an eight-pound sample (count per pound requirements) for 47 varieties and by increasing the number of plums allowed in an eight-pound sample for the Sharron's plum variety for plums from 61 to 63. In addition, four-basket crate requirements for each listed count per pound size requirement were specified. Plums packed in four-basket crates were not to be subjected to the eight-pound sample test. When plums were packed in four-basket crates, the proposed four-basket crate requirements were to be used. The current minimum size regulations do not specify four-basket crate equivalents for each count per pound size requirement. When plums are packed in four-basket crates, the size is indicated by the arrangement of the fruit in the top layer. For example, the term "6x6" means that the top layer contains six rows with six pieces of fruit in each row and the term "4x5" means four rows with five pieces of fruit in each row. The minimum size for non-listed varieties was to continue to be 139 plums per eight-pound sample or "6x6" when packed in four-basket crates.

In addition, the proposal included changes to establish variety-specific size requirements for plums varieties now produced in commercially significant quantities and to remove one variety no longer produced in significant quantities from variety-specific size requirements. Specifically, the Ambra, Black Ace, Black Giant, Black Gold, Royal Diamond, Royal Garnet, and Shayna varieties of plums were proposed to be added to the variety-specific size requirements in paragraph (b) of § 917.460. The Bee Gee variety of plums was proposed to be removed from the variety-specific size requirements. Shipments of the varieties that were proposed to be individually regulated exceeded 10,000 packages during the 1987 season. Shipment of the variety that was proposed to be removed from the variety-specific size requirements fell below 5,000 packages during the 1987 season.

Numerous comments were received from interested persons supporting and opposing these recommendations. Those supporting the recommendations generally reflected the rationale of the committee in recommending the proposed size changes: namely, that the implementation of the recommended changes would help the California plum industry sell more fruit and encourage repeat purchases. The proponents further contend that the elimination of small-sized plums would respond to consumer demands for larger fruit. A consumer research study conducted and paid for by the committee indicated that the basic problem hurting plum sales was small size. Other commenters indicated that through cultural practices larger size fruit can be produced and yields can be increased throughout the production area.

The commenters opposing the size increases indicate that they have consistently found markets here and abroad for the plums proposed to be eliminated, and that the sale of these sizes has been profitable. Many expressed concern that if shipments of smaller-sized plums were eliminated, they would suffer severe economic hardships especially in the early production areas of Kern and southern Tulare counties. Others contended that the marketing problems experienced in 1984 and again in 1987 were due to an oversupply of plums, not because small plums were not desirable. Many in opposition indicated that it is too late for them to take the necessary cultural practices in recognition of the size increases of the magnitude proposed.

After further considering the committee's recommendation, its supporting information, and all of the comments received in response to the proposed size changes several things stand out. There is honest disagreement within the industry on whether there are or are not profitable markets for the plums proposed to be eliminated, whether or not the early-season sales of the plums to be removed do in fact adversely impact sales of plums from the later production areas, and whether or not shipments of some varieties of plums would be disproportionately reduced because of the higher size requirements. There is agreement that growers in both the early and later production areas would be affected in some way by the proposed size changes.

However, there is strong disagreement as to whether or not the impact on the growers and packers in the earlier production areas would be harsher than on those in the later growing areas. Finally, it is too late this season for growers to make any cultural changes on the basis of the proposed size increases if they have not already done so. Shipments of 1988 crop plums began the first week of May.

The wide divergence of views on these important issues within the industry indicates that further analysis of the proposed size increases is necessary by the committee to address these issues and determine: (1) How shipments of smaller plums affect the overall price structure for plums; (2) the impact smaller size plums have on the marketability of plums in general; (3) the effect of smaller plums on consumer acceptance and price; and (4) the effect of the size increases on the total supply marketed in domestic and foreign markets. Additional information also needs to be developed on the contention that the proposed increases would cause inequities.

Therefore, the Department has decided not to adopt the committee's size recommendation which would have: (1) Increased the size requirements for 47 varieties of plums by decreasing the number of plums allowed in an eight-pound sample (variety-specific count per pound requirements); and (2) added four-basket crate equivalents for each listed count per pound size requirement (plums packed in four-basket crates were not to be subjected to the eight-pound sample test).

Also, the Department has decided not to adopt the recommendation which would have added the Ambra, Black Ace, Black Giant, Black Gold, Royal Diamond, Royal Garnet, and the Shayna to the list of varieties subject to variety-specific size requirements. The requirements for these varieties were proposed at the higher levels with four-basket crate equivalents which the Department has decided not to adopt. The Department does not have the information necessary to accurately convert the proposed size requirements to an equivalent in the current system since these varieties were not previously covered under the current system. Therefore, these varieties will continue to be subject to the 139 plums per eight-pound sample requirements for non-listed varieties.

This action adopts without change the decrease in the variety-specific size requirements for the Sharron's Plum variety of plums, and the removal of the Bee Gee plum variety from the variety-specific size requirements. With regard to the Sharron's Plum variety, the number of plums allowed in an eight-pound sample of plums will be increased from 61 to 63. This is intended to more accurately reflect the sizing characteristics of this plum variety. The removal of the Bee Gee variety of plums from the variety-specific size requirements will subject such plums to the minimum size for non-listed varieties, which is 139 plums per eight pound sample. Both of these actions reduce the regulatory burden on handlers and would not be detrimental to the quality efforts of the California plum industry.

Further, the proposal included revisions in paragraph (a) of § 917.460 to clarify the plum maturity requirements and simplify the maturity determination system currently used by the plum industry. Among other things, the proposed revision of paragraph (a) specified that no handler can ship plums unless they are at least "well-matured," as defined in paragraph (d) and specified the role of Federal or Federal-State inspectors in making "well-matured" determinations.

It was proposed that the first sentence of paragraph (a) be revised to read: "No handler shall ship any lot of packages or containers of any plums unless such plums grade at least U.S. No. 1, except that the plums shall be 'well-matured,' rather than 'mature,' but not over-ripe or shriveled." This change was intended to clarify the fact that all plums marketed under this program must be "well-matured," rather than "mature" as defined in the U.S. grade standards for plums. Since May 19, 1980 (45 FR 33596; May 20, 1980) plums have been required to be "well-matured" rather than "mature," and this requirement has been implemented by the Federal-State Inspection Service since that time.

In addition to specifying that plums must be "well-matured" the proposed change defined "well-matured" to mean a condition distinctly more advanced than "mature." "Mature" is defined in the U.S. grade standards as follows: " 'Mature' means that the fruit has reached the stage of maturity which will insure a proper completion of the ripening process." This is a minimum standard of maturity which was in effect before the more recent advances in handling and distribution techniques and does not preclude inspecting to a higher degree of maturity. In 1980, in fact, it was determined that plums picked and packed at this minimum maturity level were poorly received by consumers because they lacked flavor and were too hard. Comments discussed later support the contention of proponents that the "well-matured" requirement has resulted in more consumer acceptance and expansion of markets for California plums.

To ascertain compliance with the "well-matured" standard with regard to each variety of plums, various tests are used. Since 1980, the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of plums and which test level (e.g., particular percent of color or particular color chip) is appropriate for each variety. When the Federal-State Inspection Service has sufficient experience with a variety to determine that a particular test or tests and a particular test level should normally be appropriate for the entire production area for every year, it has advised the committee of that determination. The committee has then ratified that determination, publishing it in its annual bulletin. After such a determination for a particular variety has been published, variances during the season or permanent changes between seasons have been made by the committee or its maturity subcommittee. The committee and its staff have provided advice to the Federal-State Inspection Service in making its maturity determinations, and likewise the Federal-State Inspection Service and the committee staff have advised the committee and its maturity subcommittee in making variances and changes.

To lessen the burdens on committee members, it was proposed that the responsibility for variances during the season and changes between the seasons be given to the Federal or Federal-State Inspection Service. This change would have simplified the procedures by assigning all maturity determinations and the application of those determinations to one group. In making this proposal, it was intended that the Federal or the Federal-State Inspection Service, while considering variances and changes, would seek the advice of the committee and its staff in order to draw upon their wealth of expertise. It was also intended that any changes and any variances would be applicable to all growers and handlers of the particular variety. Finally, it was intended that any changes and variances would be made at the supervisory level of the Federal or the Federal-State Inspection Service, rather than by the particular packinghouse inspector. This was intended to ensure that these decisions are made by those who have the greatest background and expertise and who are in a position to be knowledgeable concerning current

conditions throughout the entire production area.

Further, a table was proposed to be added to paragraph (a) of § 917.460 to specify color chips and other maturity guides which the Federal or the Federal-State Inspection Service intended to use for the specified varieties of plums.

For these varieties, it was proposed to continue the requirement that not less than 90 percent of any lot shall meet the surface color, flesh color, or spring requirements established for the variety, or not less than 90 percent of any lot shall meet the ground color standard established for that variety.

The varieties listed in the table were those described above where the inspection service has sufficient experience to determine a generally appropriate test or tests and test levels. It was proposed that the Federal or Federal-State Inspection Service would have the authority to make variances from the guides in the table during the season for any variety to reflect changes in crop and weather conditions that would make the guide an inappropriate measure of "well-matured." For varieties not listed in the table, the Federal or Federal-State Inspection Service would use such tests as it deems appropriate.

Several changes were proposed in the table from the list in the 1987 Plum Bulletin. The maturity guide for Roysum plums was proposed to be changed by adding "green streaking" as a maturity indicator with regard to ground color. This was intended to help make maturity determinations for this variety of plums more accurate. The "well-matured" guide for fresh prune/plums was proposed to be revised by changing the basis used in determining the soluble solids average from a base which requires the consideration of varying amounts of the least mature appearing fruits to one which only requires a representative sample. Experience has indicated that the current procedure is overly restrictive. Also, the soluble solids percentage for fresh French Prunes used as a guide by the Federal or Federal-State Inspection Service would be reduced from 19 percent to 18 percent. The French Prune has been developed for a one-pick harvest and some handlers have had difficulty meeting the 19 percent requirement in past seasons. In view of this, French prunes should be able to meet the well matured standard at 18 percent. "Soluble solids" percentages are highly correlated with the sweetness of the fruit juices. No comments were received with respect to these proposed changes. Therefore, they are adopted as proposed.

Numerous comments were received regarding other aspects of the proposed maturity requirements and variance procedures. Some commenters disagreed with or suggested modifications to the proposed requirements and procedures. Some commenters requested that the current "well-matured" requirements continue in effect. Other commenters thought that the maturity requirements should be returned to the level which existed in 1980 or to the mature requirements specified in U.S. No. 1 grade standards. Some thought that the variance procedures were lacking because an appeal process was not provided to review the setting of standards in the first place or for reviewing variance decisions. Two commenters suggested that the proposed definition of "well-matured" be clarified and made more specific as it related to the condition of fruit to make decisions on variances more objective.

In many instances, the favorable comments and other information sufficiently refuted the unfavorable comments, particularly regarding the desirability of continuing the "well-matured" requirement. Contrary to some commenters' contentions, at least one study has been conducted which indicates that the implementation of the "well-matured" requirement has resulted in greater consumer acceptance of the fruit than existed prior to 1980. Further, the shipments of "well-matured" fruit, as opposed to "mature" fruit have helped the industry's market expansion efforts. In fact, the requirement has been generally well received by the industry, retailers, and the consuming public.

In fact, one commenter submitted a *Final Report of California Summer Fruits Retailer Research* by Ervin D. Thuerk. Mr. Thuerk is a marketing consultant with the Thuerk Pro-Con Company in Westlake Village, California. Mr. Thuerk directed a project to, among other things, pursue individual retailers' attitudes and their wants and needs for fruit quality and maturity. Meetings were held with twenty-five companies in approximately twenty cities, representing nearly 17,000 retail supermarkets, which equals a 38.7 percent share of the total industry units operated. Information was obtained on: (1) Product needs in the fresh produce industry; (2) retail marketing trends and how they are changing; (3) consumer attitudes and their changing wants and needs; (4) the development of future programs for the marketing of California summer fruits; and (5) attitudes toward industry standards and marketing programs. The findings indicate that early season fruit which is picked immature does not provide satisfaction to the consumer and does not encourage repeat purchases, and does not benefit the market. Fruit has to look good to get the consumer to buy it, but it must also taste good to foster additional sales. There is definitely a lag effect on sales from poor eating quality on the varieties which follow. When this occurs prices are depressed because the pipelines are filled with poor fruit, according to the executives interviewed.

In addition, a marketing extension pomologist from the University of California at Davis indicated that in the late 1970's the post harvest performance of a number of commercial plum cultivars had been evaluated. In these tests, researchers found that low maturity fruit tended to be more susceptible to bruising (especially vibration bruising), and also more susceptible to flesh browning following bruising. He further indicated that size is generally correlated with maturity in fruits. Typically in any population of fruits, the smallest size fruits will be lower in sugars, and often less physiologically mature, than larger fruits. He went on to say that this is especially true in a climate like California, where the bloom period is normally prolonged and thus size may indicate the length of the growing season for the individual fruits.

The Thuerk report described earlier also addresses the comments that the "well-matured" requirement does not reflect the different needs of buyers in markets far from the production area compared to buyers in nearby markets.

In addition, a comment from the Executive Vice President of the Canadian Fruit Wholesalers Association indicated that some of its members feel that the current "well-matured" standard has played an important role in keeping high quality consumer, acceptable fruit grown in the United States available in Canadian markets. The members of the association polled felt that a change from the "well-matured" to the mature standard would be regressive and would hurt sales. Along the same lines, a buyer in Chelsea, Massachusetts, indicated that it is extremely important for California packers to maintain the high quality, taste, appearance, and shelf life that their customers have come to expect. To continue its trend of buying more and more fruit, the buyer indicated that the "well-matured" standard should be maintained.

In response to the commenter who asserted that the tests currently in effect are more restrictive than when the "well-matured" requirement was

implemented in 1980, there has been an increase in the number of color chips used. However, the initial chips were not considered adequate to cover the variations in color among the numerous varieties. As a result, gradations in color have been added to more accurately reflect the characteristics of the many varieties of plums. Therefore, the number of color chips *per se* does not support the contention that the color chips are more restrictive now than there were in 1980 and 1981.

One commenter stated that the price received for "well-matured" fruit has not adequately compensated for the increase in harvesting costs that have been incurred. However, the commenter did not document this claim. Further, the "well-matured" requirement has in general contributed to the economic health of the plum industry. More than 100,946,000 packages of California plums have been inspected and shipped since the "well-matured" requirement became effective in 1980. Also, when the growers under this program participated in 1986–87 in a referendum to determine industry support for the plum marketing order program, a majority of those voting favored continuance of the program. It is doubtful that growers would favor continuing a program that resulted in considerable lost profits.

Some commenters expressed the view that the maturity levels have been drastically raised to control volume as opposed to causing better consumer quality fruit to reach the market. One of these commenters indicated that this is evidenced by the decrease in packages shipped per acre from 1980 to 1987 even though increasing acreage was coming into production with a substantially higher number of trees planted per acre. However, this commenter's evaluation is inconclusive because he did not consider other factors in addition to the "well-matured" requirement that could affect the amount of plums shipped to the fresh market. Other factors could lead to a reduced number of cartons shipped per acre, such as age of the trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements.

One commenter indicated that the spring test for some plum varieties was arbitrary because results can vary depending on the strength of the inspector and how hard the inspector squeezes the fruit and the test, therefore, should be eliminated. While the Department acknowledges that the strength of inspectors can vary, the Department contends that the inspectors are trained in proper techniques for applying the spring test which should compensate for this difference in strength. Therefore, the difference in the strength among inspectors is not grounds for eliminating the spring requirement.

One commenter requested an exemption for "leaf spots" and recommended a 10 percent exemption from the "well-matured" requirement be established as long as the fruit otherwise meets the U.S. No. 1 standard. These recommendations are being referred to the committee for evaluation.

In view of the foregoing, this action adopts, the proposed maturity requirements described above to recognize the interest of California plum growers and handlers in maintaining the quality and maturity of the plums they market. As stated previously, in 1980, it was determined that plums picked and packed at the minimum standard of maturity, "mature," were poorly received by consumers because they lacked flavor and were too hard. The evidence indicates that the "well-matured" requirement in effect since that time has resulted in more consumer acceptance and the expansion of markets for California plums.

We do, however, believe that a more specific definition of "well-matured" could be helpful. Therefore, comments are invited on developing a definition with more specificity.

In addition to the comments received on the size and maturity requirements, the Department received comments on the variance procedures described in the proposed rule. The proposal stated that: "The Federal or the Federal-State Inspection Service has the authority to make variances for any variety from any guide or tests, including those in Table I, during the season to reflect changes in crop or weather conditions that would make the existent guide an inappropriate measure of "well-matured."

The purpose of this change was to relieve the maturity subcommittee of the burden of making variances during the season because committee members are dispersed over a wide geographic area and have daily responsibilities with regard to their own businesses.

However, comments from the committee and officials from the Federal-State Inspection Service indicated that the committee and its maturity subcommittee should continue to play a direct role in making final determinations on making changes and granting variances in the maturity guides used in determining whether the fruit meets the "well-matured" standard. The commenters indicated that these very important decisions should not rest solely in the hands of one group, but they should be fair and timely because of the perishability of the commodity.

Comments received from the California Department of Food and Agriculture (CDFA) indicated that full responsibility to allow or disallow variances from color chip requirements should not be placed on the inspection service. The comment indicated that the CDFA and Federal-State Inspection Service has provided and will continue to provide expert advice on the condition or maturity of the fruit.

The committee suggested that the first contact should be with the Federal-State Inspection supervisor so the supervisor would first be able to review the problem to determine if the problem is with maturity or with interpretation of an individual inspector. The committee pointed out that in the past, the supervising inspector has been able to resolve many issues by working with the grower or shipper and the packing house inspector. If the situation could not be resolved to the satisfaction of the inspection service and the requester, then the requester would ask for a maturity variance.

In view of this, the Department has decided to specify in the regulations procedures for handling variances during the current and subsequent seasons which are similar to those currently used. In addition, in order to respond to comments that there is no recourse to adverse decisions of the maturity subcommittee, this interim final rule establishes a procedure for appealing those decisions. These procedures are specified in paragraph (a)(3) of § 917.460.

Under these procedures, a grower or handler may make a request for a variance from the maturity guide by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. This fieldman would call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site. If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may attend public meetings or participate in telephone meetings and may provide

additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations, and recommendations of the fieldman and inspection official, and any other information provided by the requester. Decisions of the maturity subcommittee shall be made within two days from the time the request for variance is received.

Because of the perishability of the fruit, it is imperative that decisions on variances be made promptly. Because of the large geographical area involved and the need for timely decisions, the subcommittee may hold telephone meetings. A majority of the subcommittee must vote in favor of variance. The subcommittee shall prepare a written report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and to the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal as described later.

If after on-site review of the request neither the fieldman nor the inspection official believe a variance is warranted, the variance will not be granted and the matter will not be referred to the maturity subcommittee. The requester may however file an appeal from this determination in accordance with procedure described below.

To file an appeal, the requester shall notify the Plum Commodity Committee manager who will immediately refer the appeal to the Appeal Committee established by this rule. It is important that the members of the Appeal Committee are different from those serving on the maturity subcommittee which makes the initial determination. It is also important that members of the Appeal Committee are knowledgeable about crop and maturity conditions in the industry. Therefore, the Appeal Committee shall consist of the Chairman of the Peach Commodity Committee, the Chairman of the Nectarine Administrative Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Plum Commodity Committee manager is notified of the appeal, recognizing that a final decision must be made promptly. A majority vote of the Appeal Committee is needed to grant a variance. The Appeal Committee may hold telephone meetings in order to facilitate the decisionmaking process. The Appeal Committee shall prepare a written report of its determination and the reasons therefor.

A representative of the Appeal Committee shall, in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

Another change from the proposal is that any decision to grant a variance for a particular plum variety will not automatically apply to all growers and handlers of that variety throughout California. The committee and other commenters have pointed out that the granting of variances on an across-the-board basis throughout the state may not be appropriate. Because of the differences in weather and growing conditions that occur throughout the growing area a variety grown in the San Joaquin Valley may be "well-mature" at a lesser degree of color than an orchard of the same variety in the upper San Joaquin Valley. This condition is sometimes significant and can even occur in neighboring orchards.

The inspection and industry officials designated to make these variance decisions have the necessary background and expertise in fruit maturity and knowledge about growing conditions in the production area.

It is the Department's view that the change to delete one variety no longer produced in commercially significant quantities from the variety-specific (named-variety) size requirements and to decrease those requirements for one variety of plums will not be detrimental to small entities. These changes are responsive to the committee's request to decrease certain minimum size requirements. The change to clarify and revise the maturity requirements for plums is intended to foster and facilitate a greater understanding of these requirements within the plum industry and, as such, will not result in additional costs. The change to the well matured guides for French Prunes will relax present requirements.

Based on available information, the Administrator of the AMS has determined that the issuance of this interim final rule will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant information presented, including the committee's recommendations, the comments received in favor and opposition, and other information, it is found that this regulation, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that it is impracticable, unnecessary, and contrary to the public interest to give notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) Shipments of 1988 crop plums began the first week of May and this action should cover as much of the 1988 crop as possible; (2) the maturity requirements set forth below are substantially the same as currently implemented and should be made effective as soon as possible; and (3) this interim final rule decreases the minimum size requirements for two varieties of plums.

The actions set forth below are being issued on an interim final basis with opportunity for written comments rather than as a final rule so interested persons will be able to provide input on the maturity modifications and still allow the maturity procedures to be used for as much of the 1988 shipping season as possible. An opportunity needs to be provided for interested persons to file comments, but, as mentioned earlier, it is imperative that the maturity requirements and variance procedures apply to as much of the 1988 crop as possible.

The committee's recommendation, other information, and all written comments timely received in response to this interim final with request for comments will be considered prior to any finalization of this interim final rule. Commenters are encouraged to submit their views in support of or in opposition to this interim final rule. Any pertinent data to support views and comments should also be submitted.

List of Subjects in 7 CFR Part 917

Marketing agreements and orders, Pears, Plums, Peaches, California.

For the reasons set forth in the preamble, 7 CFR Part 917 is amended as follows:

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 917 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 917.460 is revised to read as follows:

§ 917.460 Plum Regulation 19.

(a)(1) No handler shall ship any lot of packages or containers of any plums unless such plums grade at least U.S. No. 1, except that the plums shall be "well-matured," rather than "mature" but not overripe or shriveled. Internal discoloration not considered serious damage and healed growth cracks emanating from the stem end which do not cause serious damage shall be permitted. In addition to the above, any lot of Tragedy or Kelsey plums shall be permitted an additional 10 percent tolerance for defects not considered serious damage.

(2) During the 1988 and subsequent seasons, the Federal or the Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the surface color, flesh color or "spring" requirements established for the variety or not less than 90 percent of any lot shall meet the ground color standard established for the variety except that for the Ebony variety, an additional lot tolerance of 17 percent shall be permitted for fruit not meeting the "spring" requirement. For varities not listed, the Federal or the Federal-State Inspection Service will use such tests as it deems proper.

(3) A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

(i) A grower or handler may initiate a request for a variance from a maturity guide (e.g., color chip) by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. The fieldman shall call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site.

(ii) The committee fieldman and the officer-in-charge accompany the requester to the site.

(iii) If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may attend public meetings or participate in telephone meetings and may provide additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations and recommendations of the fieldman and inspection official, and any other information provided by the requester. Decisions of the maturity subcommittee shall be made within two days from the time the request for variance is received. A majority of the subcommittee must vote in favor of the variance for it to be implemented. The subcommittee shall prepare a written report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and to the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal in accordance with paragraph (v) below.

(iv) If neither the fieldman nor the inspection official believe a variance is warranted, the variance shall not be granted. The requester may file an appeal from this determination as specified in paragraph (v) below.

(v) To file an appeal, the requester shall notify the Plum Commodity Committee manager who will immediately refer the appeal to the Appeal Committee. The Appeal Committee shall consist of the Chairman of the Peach Commodity Committee, the Chairman of the Nectarine Administrative Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Plum Commodity Committee manager is notified of the appeal. A majority vote of the Appeal Committee is needed to overturn the determination of the maturity subcommittee. The Appeal Committee may hold telephone meetings. The Appeal Committee shall prepare a written report of its determination and the reasons therefor. A representative of the Appeal Committee shall, in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

TABLE I

Column A, variety	Column B, maturity guides
Ace	⅛ of surface mottled red color characteristic of the variety, or ¾ red or light amber flesh color.
Amazon	½ of surface red with "spring."
Ambra	Full surface dark red color with "spring."
Andy's Pride	Some of surface mottled red with remainder good yellow color. *G color.*
Angee	That portion of the surface not distinct red color shall be light yellow color. *I color.*
Angeleno	Full surface dark purple or ¾ dark purple with remainder light greenish yellow. *B color.*
Armelita	Full surface dark red color with "spring."
Ashag	90 percent of surface dark red with "spring."
August Rosa	⅔ of surface red or full yellow color. *I color.*
Autumn Rosa	½ of surface red color or full light yellow color. *F color.*
Beauty	85 percent of surface yellowish green or trace of red. *A color.*
Bee-Gee	¾ of surface red color with "spring."
Bella-Rosa	¾ of surface red color, remainder yellow color. *C color.*
Berry Red	Full surface red color.
Blackamber	Full surface red color with "spring."
Black Beaut	Full surface distinct red color with "spring," or supervisor discretion.
Black Giant	¾ of surface red color with remainder yellow color. *H color.*
Black Jewel	Full surface dark red color with "spring."
Black Knight	Smooth shoulders. ¾ of surface dark red color or full distinct red.
Burgandy	Full dark red surface color or full distinct red flesh color.
Burmosa	½ of surface red color or full yellowish green color. *A color.*
Carolyn Harris	½ of surface mottled red characteristic of the variety or ¾ red or light amber flesh color.
Casselman	Not less than 95 percent of the surface shall be distinct red color or full yellow color. *I color.*
Catalina	Full surface red color with "spring."

TABLE I—Continued

Column A, variety	Column B, maturity guides
Durado	½ of surface red (any degree), with remainder yellowish green. Smooth shoulders. *A color.* Note: This plum must be considered on individual field basis.
Early Beaut	¾ of surface distinct red color or full light greenish yellow color. *F color.*
Early Ann	"Spring." ¾ of surface dark purplish blue with Hawaiian remainder yellow color.
Early Simka	Dark red color, remainder full light yellow color. *F color.*
Ebony	Full surface dark red with "spring." Additional lot tolerance of 17 percent for fruit not meeting the spring requirement.
El Dorado	"Spring." Full dark red surface color or part red with remainder yellow color, except stem cavity. *D color.*
Eldorosa	½ of surface red color or full light greenish yellow color. *D color.*
Elephant Heart	½ of surface mottled red color characteristic of the variety, or ¾ red or light amber flesh color.
Emily	½ of surface red color or full light greenish yellow color. *B color.*
Empress	Full surface dark purplish blue or ¾ dark purplish blue, remainder light greenish yellow color. *B color.*
Frank Ann	Full surface yellow color. *D color.*
Freedom	¾ of surface dark red with remainder full light greenish yellow color. *C color.*
Fresno Black	90 percent of surface dark red with "spring."
Fresno Rosa	That portion of the surface not distinct red color shall be full yellow color. *I color.*
Friar	Full surface red color with "spring."
Frontier	½ of surface mottled red color characteristic of the variety, or ⅔ red or light amber flesh color.
Gar-Rosa	½ of surface red color or full light greenish yellow color. *C color.*
Gavora	¾ of surface red color or light greenish yellow color. *B color.*
Grand Rosa	¾ of surface red color or full light greenish yellow color. *C color.*
Hiland Rosa	½ of surface red color or yellowish green color. *B color.*
Honey Gold	85 percent of surface distinct red color or full light yellow color, light green streaking permitted. *F color.*
Improved Late Santa Rosa.	85 percent of surface distinct red color or full light yellow color, light green streaking permitted. *F color.*
July Red	¾ of surface red color.
July Santa Rosa	¾ of surface red color or full light greenish yellow color. *C color.*
June Beaut	Full surface red with "spring."
Kelsey	Shoulders and surface smooth with "spring."

TABLE I—Continued

Column A, variety	Column B, maturity guides
King David	¾ of surface red color with remainder light greenish yellow color. *D color.*
King Richard	Full surface red color or light greenish yellow. *D color.*
King's Black	¾ of surface red with remainder light yellow color. *F color.*
King's Red	Full surface red color or full light yellow color. *H color.*
Laroda	Full surface dark red or dark red color at blossom end and remainder of surface full light yellow color, with a surface tolerance of 5 percent for fruit not meeting the yellow surface requirement. *F color.*
Late Duarte	½ of surface mottled red color characteristic of the variety, or ⅔ red or light amber flesh color.
Late Santa Rosa	85 percent of surface distinct red color or full light yellow color, light green streaking permitted. *F color.*
Linda Rosa	That portion of the surface not distinct red color shall be full yellow color. *I color.*
Mariposa	½ of surface mottled red color characteristic of the variety, or ¾ red or light amber flesh color.
May Rosa	⅔ of surface red color or full light greenish yellow. *C color.*
Midsummer	Full surface dark red.
Milwaukee	¾ of surface red color with "spring."
Nubiana	"Spring." Full surface dark purplish blue or ¾ surface dark purplish blue with remainder light amber color characteristic of the variety.
Padre	¼ of surface red color or full light greenish yellow color. *B color.*
Premier	½ of surface red color with remainder light greenish yellow color. *B color.*
Prima Rosa	¾ of surface distinct red color or full light greenish yellow color. *F color.*
President	¾ of surface reddish purple color with remainder light yellowish green color. *A color,* or full light greenish yellow color. *B color.*
Fresh Prune/ Plums.	That portion of the surface not red color shall be changing in color from dark green to light green. In addition, for all varieties of prune/plums shipped fresh, the soluble solids shall average 19 percent: *Provided,* That for French Prunes the soluble solids shall average 18 percent: *Provided Further,* That Moyer Prunes shall average 16 percent soluble solids.
Queen Ann	"Spring." Full surface dark purple color or some purple color with remainder of surface light greenish yellow color. *B color.*
Queen Rosa	"Spring." ½ of surface red color or yellowish green color. *B color.*

TABLE I—Continued

Column A, variety	Column B, maturity guides
Red Beaut	¾ of surface distinct red color or full light greenish yellow color. *F color.*
Red Glow	½ of surface red, remainder full light greenish yellow color. *F color.*
Red Heart	½ of surface mottled red color characteristic of the variety, or ¾ red or light amber flesh color.
Red Rosa	85 percent of surface distinct red color or full light yellow color. Light green streaking permitted. *F color.*
Redroy	¾ of surface red color or 10 percent of surface red color with remainder light yellow color. *F color.*
Rich Red	¾ of surface distinct red color or full light greenish yellow color. *F color.*
Rosa Ann	¾ of surface distinct red color or full light yellow color. *F color.*
Rosa Grande	¾ of surface red color or greenish yellow color. *B color.*
Rose Ann	¾ of surface distinct red color or full light yellow color. *F color.*
Rosemary	¾ of surface red, remainder full light greenish yellow color. *F color.*
Royal Beaut	¾ of surface red color or full light greenish yellow. *D color.*
Royal Diamond	Full surface red color with "spring."
Royal Garnet	Full surface red color or full light greenish yellow color. *G color.*
Royal Red	Full surface distinct red color or ½ of surface red color, remainder light yellow color. *C color.*
Royal Zee	⅔ of surface red color or full light greenish yellow color. *F color.*
Roysum	¾ of surface distinct red color or full light yellow color with green streaking. *F color.*
Santa Rosa	⅔ of surface red color or full light greenish yellow color. *C color.*
Shayna	Full surface red color or full light yellow color. *F color.*
Shiro	Full surface greenish yellow color or trace of red color. *B color.*
Simka, New Yorker.	Full surface dark red color or dark color with remainder of surface full light yellow color. *F color.*
Spring Beaut	¾ of surface distinct red or full light greenish yellow color. *F color.*
Standard	⅔ of surface purple color or full surface light greenish yellow color. *B color.*
Swall Rosa	That portion of the surface not distinct red color shall be full yellow color. *I color.*
Tragedy	30 percent of surface purple color or full light greenish yellow color. *B color.*
Valentine	½ of surface mottled red color characteristic of the variety, or ¾ of the surface red or light amber flesh color.

TABLE I—Continued

Column A, variety	Column B, maturity guides
Wickson	Shoulders and surface smooth with "spring."

Note.—Consult with the Federal or Federal-State Inspection Service Supervisor for the maturity guides applicable to the varieties not listed above.

(b) No handler shall ship any package or other container of any variety of plums listed in Column A of the following Table II unless such plums are of a size that an eight-pound sample, representative of the sizes of the plums in the package or container, contains not more than the number of plums listed for the variety in Column B of said table.

TABLE II

Column A, Variety	Column B, plums per sample
Andys Pride	69
Angeleno	67
Angee	67
Autumn Rosa	72
Blackamber	56
Black Beaut	69
Black Diamond	59
Black Knight	58
Carolyn Harris	61
Casselman	63
Catalina	56
d'Agen Sugar Prune	139
Durado	74
Early Hawaiian Ann	60
Ebony	66
El Dorado	68
Empress	57
Freedom	56
French Prune	139
Friar	56
Frontier	61
Gar-Rosa	71
Grand Rosa	54
July Red	64
July Santa Rosa	69
Kelsey	47
King David	50
King Richard	54
King's Black	58
Laroda	58
Late Santa Rosa (including improved Late Santa Rosa and Swall Rosa)	64
Linda Rosa	63
Mariposa	61
Midsummer	63
Moyer Prune	139
Nubiana	56
President	57
Prima Black	69
Queen Ann	50
Queen Rosa	53
Red Beaut	74
Red Rosa	64
Redroy	58
Rich Red	74
Rosa Ann	69
Rosemary	50
Rose Ann	60
Royal Red	74
Roysum	74
Santa Rosa	69
Sharron' Plum	63

TABLE II—Continued

Column A, Variety	Column B, plums per sample
Simka, Arrosa, New Yorker	50
Spring Beaut	74
Standard	83
Wickson	51

(c) No handler shall ship any package or container of any variety of plums not specifically named in paragraph (b) of this section, unless such plums are of a size that an eight-pound sample representative of the sizes of the plums in the package or container contains not more than 139 plums.

(d) *Definitions.* As used herein, "U.S. No. 1," "mature," and "serious damage" means the same as defined in the United States Standards for Grades of Fresh Plums and Prunes (7 CFR 51.1520 through 51.1538). "Well-matured" means a condition distinctly more advanced than "mature."

Dated: May 24, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 88-12039 Filed 5-26-88; 8:45 am]

BILLING CODE 3410-02-M

7 CFR Part 916

[Docket No. AMS-FV-88-056IR]

Nectarines Grown in California; Size Requirements and Maturity Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule changes the size regulations established for California nectarines. The increase in variety-specific size requirements for numerous nectarine varieties and the increase in minimum size requirements for non-listed varieties are designed to make nectarines more marketable and to give retailers and consumers a better product. This rule also will change the coverage of the size requirements by adding six varieties of nectarines and by removing four varieties from the variety-specific size list. In addition, this rule specifies the maturity requirements and maturity variance procedures. This action is designed to facilitate nectarine maturity determinations and promote marketing of the crop. Interested persons are invited to comment on this rule change.

DATES: This interim final rule becomes effective May 27, 1988. Comments which are received by July 11, 1988, will be considered prior to issuance of the final rule.

ADDRESS: Interested persons are invited to submit written comments concerning this interim final rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085-S, Washington, DC 20090-6456. Three copies of the written material shall be submitted, and they will be made available for public inspection in the office of the Docket Clerk during regular business hours. The comments should reference the date and page number of this issue of the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Jerry N. Brown, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456; telephone 202-475-5464

SUPPLEMENTARY INFORMATION: This interim final rule is issued under Marketing Order No. 916 (7 CFR Part 916), regulating the handling of nectarines grown in California. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C 601-674), hereinafter referred to as the Act.

This interim final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 650 handlers of plums, peaches, and nectarines subject to regulation under marketing orders (7 CFR Parts 916 and 917), and there are approximately 2,030 producers of these commodities in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those

having gross annual revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of such fruit may be classified as small entities.

Shipments of California nectarines are regulated by grade, maturity, and size under Nectarine Regulation 14 (7 CFR 916.356, as amended and published in the **Federal Register** on April 29, 1987, 52 FR 15487, and as corrected on May 8, 1987, 52 FR 17504). A proposed rule concerning the size and maturity regulations was published in the **Federal Register** on April 18, 1988, (53 FR 12690). A correction was published in the **Federal Register** on May 12, 1988, (53 FR 16931). Numerous comments were received. Proposed changes to § 916.356 were recommended by the Nectarine Administrative Committee and the Department.

This interim final rule is based upon the committee's recommendation, information submitted by the committee, comments received both supporting and opposing the action, and other available information.

Inspected shipments of California nectarines for the 1987 season totalled 16,863,000 packages and they were primarily sold in the fresh market. In 1987, the production value of California nectarines was about $65,545,000. Although this interim final rule would impose requirements on the handling of nectarines, exemptions from the inspection and certification requirements would continue. These exemptions include provisions for the shipment of minimum quantities of the fruit.

Comments have been received from interested persons concerning the proposed increase in minimum size requirements. Many of the comments were made by an attorney representing two entities who do business as handlers in the nectarine industry and from individuals that have an interest in or who work for one of the two entities. Comments were also received from the committee and a few other interested individuals concerning this matter.

Generally, the material problems with the size proposal as asserted by its opponents are that: (1) No studies have been conducted to determine if small-size nectarines lack taste; (2) the bulletins used by the committee to document market conditions and for regulatory recommendations are tainted by the influence of "mega-packinghouses"; (3) the minimum size requirement often conflicts with the "well-matured" requirement because the fruit will often meet the "well-matured" requirement yet become overripe because it must remain on-tree in order to increase in size and meet the minimum size requirements; (4) the proposal would drastically reduce volume of fruit shipped because in addition to the container-based dimension test (i.e., maximum number fruit per container) being increased there would also be a proposed increase in the weight-based test (i.e., maximum number of fruit in a 16-pound sample) which would further reduce the volume of fruit shipped; and (5) it is too late for growers to utilize or modify their cultural practices (i.e., pruning and thinning) in order to meet the more restrictive size requirements contained in the proposal.

Generally, those in favor of the size proposal contend that the size proposal is warranted because: (1) Studies have been conducted to determine if small-size nectarines lack taste and while one study found there is "no clear relationship between fruit size and flavor provided that all fruits are picked mature," such studies do support the contention that size is an important factor in visual quality; (2) the bulletins used by the committee to document market conditions and for regulatory recommendations accurately report the needs of the market for better quality fruit; (3) large fruit is necessary because the "consumer believes bigger is better and feels that large size produce represents better quality;" (4) a general consensus exists within the nectarine industry that larger size fruit is necessary for the industry to compete in the highly competitive fresh fruit market; and (5) regardless of the contention that it is too late for growers to utilize or modify their cultural practices in order to meet the more restrictive size requirements contained in the proposal, such small size fruit should be removed from the market as it would be very difficult to move and would in turn adversely affect the pricing structure of the market.

One commenter provided the Department with numerous studies that he had obtained from the University of California at Davis. One of the studies found that "there is no clear relationship between fruit size and flavor provided that all fruits are picked mature." Nevertheless, the study stated that consumers "see good quality as good appearance, firmness, good flavor, and nutritive value." Furthermore, the study stated that although "consumers buy on the basis of appearance and feel, their satisfication and subsequent purchases depend upon good eating quality."

The Department finds that the minimum size requirements set forth in this rule are needed to assure that fresh nectarines have the various characteristics demanded by consumers. Different size requirements for different varieties recognize varietal characteristics and market preferences.

In assessing market demand, the committee utilizes market reports and other data. Committee personnel survey markets receiving California nectarines and determine the overall quality and sizes of the fruit offered and buyer reactions. The changes in size requirements respond to market needs.

Another comment on increasing the minimum size requirements is contained in a *Final Report of California Summer Fruits Retailer Research* by Ervin D. Thuerk. Mr. Thuerk is a marketing consultant with the Thuerk Pro-Con Company in Westlake Village, California. Mr. Thuerk directed a project designed to ascertain individual retailers' attitudes and their wants and needs for fruit quality and maturity. Meetings were held with 25 companies in approximately 20 cities, representing nearly 17,000 retail supermarkets. These supermarkets equal 38.7 percent of the total industry units operated. Information was obtained on: (1) Product needs in the fresh produce industry; (2) retail marketing trends and how they are changing; (3) consumer attitudes and their changing wants and needs; (4) the development of future programs for the marketing of California summer fruits; and (5) attitudes toward industry standards and marketing programs. The findings indicate that early season fruit which is small in size does not provide satisfaction to the consumer, does not encourage repeat purchases, and nor does it benefit the market.

Some commenters have contended that the proposal would drastically reduce the volume of fruit shipped because, in addition to the container-based dimension test (i.e., maximum number of fruit per container) being increased, there would also be an increase in the weight-based test (i.e., maximum number of fruit in a 16-pound sample) which would further reduce the volume of fruit shipped. The Department disputes the contention that the proposal would drastically reduce the volume of fruit shipped because the industry has recognized the fact that in past seasons small size nectarines have been a detriment to the trade and as such the industry has directed its efforts toward production and marketing of better quality and larger size fruit. The Department finds that this action is

needed to provide fresh markets with larger sizes of fruit preferred by these markets.

Finally, some commenters contended that it is too late for growers to modify their cultural practices (i.e., pruning and thinning) in order to meet the more restrictive size requirements contained in the proposal. However, at the time the committee made its recommendation most growers had begun to undertake ordinary cultural practices on their orchards to attain desirable fruit size. Any committee recommendation reflects the sentiments of the industry and the feasibility and practicality of the contemplated action.

The changes are necessary to remove from the market those sizes of fruit which are not being well-received by consumers. These actions are intended to foster repeat purchases and maintain consumer satisfaction. Early season purchases of small-sized nectarines have a negative effect on total nectarine sales because consumers do not make repeat purchases after being dissatisfied with their original purchases. Increased size requirements are needed to make nectarines more marketable and are essential for the consumer satisfaction needed to maintain current markets and to build new markets. No shortage is expected as a result of the size changes, rather, healthier market conditions for California nectarines are anticipated.

After considering all of the comments received, this action adopts the following size requirements to recognize the interest of California nectarine growers and handlers in maintaining the quality of the nectarines they market. To implement the committee's size recommendations, paragraph (a) of § 916.356 will be revised to increase the variety-specific size requirements for 75 varieties of nectarines and to change the size requirements for four varieties by removing them from the variety-specific size requirements and by subjecting them to the minimum size requirements established for non-listed varieties.

This action will decrease the number of nectarines allowed in a 16-pound representative sample. For example, the minimum size requirement for Early Diamond nectarines would be increased from the smaller size "108" to the larger size "96." Also, two new size designations will be added to § 916.356(a), and one size designation will be removed from the minimum size requirements prescribed in that paragraph. Specifically, size "84" (not more than 84 nectarines in a No. 22D standard lug box) will be replaced by two new size designations, size "88" and size "80."

Also, under this action, size "108" nectarines when packed in a loose-filled container will be subject only to a 16-pound sample test instead of both the 16-pound test and the tray pack test as required previously. Size "108" nectarines will only be subject to the tray pack requirement specifying that such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of standard pack, not more than 108 nectarines in the lug box. This recognizes that the Aurelio Grand, Maybelle, Mayfire, and Royal Delight variety nectarines subject to the "108" size requirements normally develop well enough to meet the tray pack requirements, but sometimes do not produce enough soluble solids to meet the 16-pound weight test.

This action will also change the requirements for non-listed varieties of nectarines. Currently, the requirements for non-listed varieties of nectarines specify a minimum size "108" to be shipped during January 1 through May 31 of each fiscal period, size "96" to be shipped during June 1 through June 30 of each fiscal period, and size "84" to be shipped during July 1 through December 31 of each fiscal period. This action will increase the requirements for nectarines to size "96" during January 1 through May 31 of each fiscal period, size "88" during June 1 through June 30 of each fiscal period, and size "80" during July 1 through December 31 of each fiscal period.

In addition, the maximum number of nectarines allowed in a representative 16-pound sample of "108" size nectarines will be reduced from 95 to 92. For example, the minimum size requirement for Royal Delight nectarines will continue to be a size "108"; however, the maximum number of Royal Delight nectarines allowed in a representative 16-pound will be 92 and they will be subject to the tray pack test (not more than 108 nectarines in a No. 22D standard lug box) when packed in loose-filled containers.

In addition, this action will establish variety-specific size requirements for nectarine varieties not produced in commercially significant quantities and remove varieties no longer produced in significant quantities from variety-specific size requirements. Variety-specific size regulations for nectarines are implemented when the nectarine variety is produced in commercially significant quantities, i.e., shipments in excess of 10,000 packages during a season. When varieties are no longer produced in significant quantities (less than 5,000 packages during the previous season), they are removed from the variety—specific size requirements, but are subject to, minimum size requirements established for non-listed varieties. The quantities used in making these determinations are the same as those used in prior seasons. These requirements are specified in paragraph (a) of § 916.356. Specifically, the Kism Grand, September Red, Sun Diamon, and 181–119 varieties of nectarines will be added to the variety-specific requirements in paragraph (a)(5) of § 916.356; May Diamond will be added to the variety-specific requirements in paragraph (a)(4) of § 916.356; and Mayfire will be added to the variety-specific requirements in paragraph (a)(2) of § 916.356. The Armking, Gee Red, Richards Grand, and Star Grand varieties of nectarines will be removed from the variety-specific size requirements. Shipments of the new varieties that will be added to the variety-specific size regulations exceeded 10,000 packages during the 1987 season. Shipments of the varieties that will be removed from the variety-specific size regulations fell below 5,000 packages during the 1987 season.

Further, the April 18 proposal included revisions in paragraph (a) of § 916.356 to clarify the nectarine maturity requirements and simplify the maturity determination system currently used by the nectarine industry. Among other things, the proposed revision of paragraph (a) specified that no handler can ship nectarines unless they are at least "well-matured," as defined in paragraph (b) and specified the role of Federal or Federal-State inspectors in making "well-matured" determinations.

It was proposed that the first sentence of paragraph (a)(1) be revised to read: "Any lot of package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade, except that the nectarines shall be 'well-matured,' rather than 'mature,' but not over-ripe or shriveled." This change was intended to clarify the fact that all nectarines marketed under this program must be "well-matured," rather than "mature" as defined in the U.S. grade standards for nectarines. Since May 16, 1980 (45 FR 32309; May 16, 1980) nectarines have been required to be "well-matured" rather than "mature," and this requirement has been implemented by the Federal-State Inspection Service since that time.

In addition to specifying that nectarines must be "well-matured," the proposed change defined "well-matured" to mean a condition distinctly more advanced that "mature."

According to the U.S. grade standards, a nectarine is considered mature when it has reached the stage of growth which will insure a proper completion of the ripening process. This is a minimum standard of maturity which was in effect before the more recent advances in handling and distribution techniques and does not preclude inspecting to a higher degree of maturity. In 1979 the committee reported that "the maturity of nectarines at destination was rather severely criticized." Comments discussed later support the contention of proponents that the "well-matured" requirement has resulted in more consumer acceptance and expansion of markets for California nectarines.

To ascertain compliance with the "well-matured" standard with regard to each variety of nectarines, various tests are used. Since 1980, the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be use for each variety of nectarines and which test level (e.g., particular color chip) is appropriate for each variety. When the Federal-State Inspection Service has sufficient experience with a variety to determine that a particular test or tests or a particular test level should normally be appropriate for the entire production area for every year, it has advised the committee of the determination. The committee has then ratified that determination, publishing it in its annual bulletin. After such a determination for a particular variety has been published, variances during the season or permanent changes between seasons have been made by the committee or its maturity subcommittee. The committee and its staff have provided advice to the Federal-State Inspection Service in making its maturity determinations, and likewise the Federal-State Inspection Service and the committee staff have advised the committee and its maturity subcommittee in making variances and changes.

To lessen the burdens on committee members, it was proposed that the responsibility for variances during the season and changes between the seasons be given to the Federal or Federal-State Inspection Service. This change would have simplified the procedures by assigning all maturity determinations and the application of those determinations to one group. In making this proposal, it was intended that the Federal or the Federal-State Inspection Service, while considering variances and changes, would seek the advice of the committee and its staff in order to draw upon their wealth of expertise. It was also intended that any changes and any variances would be applicable to all growers and handlers of the particular variety. Finally, it was intended that any changes and variances would be made at the supervisory level of the Federal or the Federal-State Inspection Service, rather than by the particular packinghouse inspector. This was intended to ensure that these decisions are made by those who have the greatest background and expertise and who are in a position to be knowledgeable concerning current conditions throughout the entire production area.

Further, a table was proposed to be added to paragraph (a) of § 916.356 to specify color chips which the Federal or the Federal-State Inspection Service intended to use the specified varieties of nectarines.

For these varieties, it was proposed to continue the requirement that not less than 90 percent of the fruit surface shall meet the color guide established for the variety, and not less than 90 percent of any lot shall meet the color guide established for the variety.

The varieties listed in the table were those described above where the inspection service has sufficient experience to determine a generally appropriate test or tests and test levels. It was proposed that the Federal or Federal-State Inspection Service would have the authority to make variances from the guides in the table during the season for any variety to reflect changes in crop and weather conditions that would make the guide an inappropriate measure of "well-matured." For varieties not listed in the table, the Federal or Federal-State Inspection Service would use such tests as it deems appropriate.

There are no changes of color chips in the table from the list in the 1987 Nectarine Bulletin. However, an additional aggregate surface tolerance of 10 percent for the Tom Grand and 61–61 varieties of nectarines will be added to paragraph (a)(1)(i) of § 916.356. This is intended to help make maturity determinations for these varieties of nectarines more accurate. This exception is the same as is currently in effect for the Fairlane variety of nectarines. No comments were received with respect to the proposed changes. Therefore, they are adopted as proposed.

Numerous comments were received regarding other aspects of the proposed maturity requirements and variance procedures. Some commenters disagreed with or suggested modifications to the proposed requirements and procedures. Some commenters requested that the current "well-matured" requirements continue in effect. Other commenters thought that the maturity requirements should be returned to the level which existed in 1980 or to the mature requirements specified in U.S. No. 1 grade standard. Some thought that the variance procedures were lacking because an appeal process was not provided to review the setting of standards in the first place or for reviewing variance decisions. Two commenters suggested that the proposed definition of "well-matured" be clarified and made more specific as it related to the condition of fruit to make decisions on variances more objective.

In many instances, the favorable comments and other information sufficiently refuted the unfavorable comments, particularly regarding the desirability of continuing the "well-matured" requirement. Contrary to some commenters' contentions, at least one study has been conducted which indicates that the implementation of the "well-matured" requirement has resulted in greater consumer acceptance of the fruit than existed prior to 1980. Further, the shipments of "well-matured" fruit, as opposed to "mature" fruit have helped the industry's market expansion efforts. In fact, the requirement has been generally well received by the industry, retailers, and the consuming public.

In fact, one commenter submitted a *Final Report of California Summer Fruits Retailer Research* by Ervin D. Thuerk. The report was previously described in this document. With respect to maturity, the findings indicate that early season fruit which is picked immature does not provide satisfaction to the consumer and does not encourage repeat purchases, and does not benefit the market. Fruit has to look good to get the consumer to buy it, but it must also taste good to foster additional sales. There is definitely a lag effect on sales from poor eating quality on the varieties which follow. When this occurs, prices are depressed because the pipelines are filled with poor fruit, according to the executives interviewed.

In addition, a marketing extension pomologist from the University of California at Davis indicated that in the late 1970's the post harvest performance of a number of commercial nectarine cultivars had been evaluated. In these tests, researchers found that low maturity fruit tended to be more susceptible to bruising (especially vibration bruising), and also more susceptible to flesh browning following bruising. He further indicated that size is

generally correlated with maturity in fruits. Typically in any population of fruits, the smallest size fruits will be lower in sugars, and often less physiologically mature, than larger fruits. He went on to say that this is especially true in a climate like California, where the bloom period is normally prolonged and thus size may indicate the length of the growing season for the individual fruits.

The Thuerk report described earlier also addresses the comments that the "well-matured" requirement does not reflect the different needs of buyers in markets far from the production area compared to buyers in nearby markets.

In addition, a comment from the Executive Vice President of the Canadian Fruit Wholesalers Association indicated that some of its members feel that the current "well-matured" standard has played an important role in keeping high quality consumer acceptable fruit grown in the United States available in Canadian markets. The members of the association polled felt that a change from the "well-matured" to the mature standard would be regressive and would hurt sales. Along the same lines, a buyer in Chelsea, Massachusetts, indicated that it is extremely important for California packers to maintain the high quality, taste, appearance, and shelf life that their customers have come to expect. To continue its trend of buying more and more fruit, the buyer indicated that the "well-matured" standard should be maintained.

In response to the commenter who asserted that the tests currently in effect are more restrictive than when the "well-matured" requirement was implemented in 1980, there has been an increase in the number of color chips used. However, the initial chips were not considered adequate to cover the variations in color among the numerous varieties. As a result, gradations in color have been added to more accurately reflect the characteristics of the many varieties of nectarines. Therefore, the number of color chips *per se* does not support the contention that the color chips are more restrictive now than there were in 1980 and 1981.

One commenter stated that the price received for "well-matured" fruit has not adequately compensated for the increase in harvesting costs that have been incurred. However, the commenter did not document this claim. Further, the "well-matured" requirement has in general contributed to the economic health of the nectarine industry. More than 123,554,000 packages of California nectarines have been inspected and shipped since the "well-matured" requirement became effective in 1980. Also, when the growers under this program participated in 1986-87 in a referendum to determine industry support for the nectarine marketing order program, a majority of those voting favored continuance of the program. It is doubtful that growers would favor continuing a program that resulted in considerable lost profits.

Some commenters expressed the view that the maturity levels have been drastically raised to control volume as opposed to causing better consumer quality fruit to reach the market. One of these commenters indicated that this is evidenced by the decrease in packages shipped per acre from 1980 to 1987 even though increasing acreage was coming into production with a substantially higher number of trees planted per acre. However, this commenter's evaluation is inconclusive because he did not consider other factors in addition to the "well-matured" requirement that could affect the amount of nectarines shipped to the fresh market. Other factors could lead to a reduced number of cartons shipped per acre, such as age of the trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements.

One commenter requested an exemption for "leaf spots" and recommended a 10 percent exemption from the "well-matured" requirement be established as long as the fruit otherwise meets the U.S. No. 1 standard. These recommendations are being referred to the committee for evaluation.

In view of the foregoing, this action adopts, the proposed maturity requirements described above to recognize the interest of California nectarine growers and handlers in maintaining the quality and maturity of the nectarines they market. As stated previously, in 1979, the committee reported that nectarines picked and packed at the minimum standard of maturity, "mature," were rather severely criticized at destination. The evidence indicates that the "well-matured" requirement in effect since that time has resulted in more consumer acceptance and the expansion of markets for California nectarines.

We do, however, believe that a more specific definition of "well-matured" could be helpful. Therefore, comments are invited on developing a definition with more specificity.

In addition to the comments received on the size and maturity requirements, the Department received comments on the variance procedures described in the proposed rule. The proposal stated that: "The Federal or the Federal-State Inspection Service has the authority to make variances for any variety from any guide or tests, including those in Table I, during the season to reflect changes in crop or weather conditions that would make the existent guide an inappropriate measure of "well-matured."

The purpose of this change was to relieve the maturity subcommittee of the burden of making variances during the season because committee members are dispersed over a wide geographic area and have daily responsibilities with regard to their own businesses.

However, comments from the committee and officials from the Federal-State Inspection Service indicated that the committee and its maturity subcommittee should continue to play a direct role in making final determinations on making changes and granting variances in the maturity guides used in determining whether the fruit meets the "well-matured" standard. The commenters indicated that these very important decisions should not rest solely in the hands of one group, but they should be fair and timely because of the perishability of the commodity.

Comments received from the California Department of Food and Agriculture (CDFA) indicated that full responsibility to allow or disallow variances from color chip requirements should not be placed on inspection service. The comment indicated that the CDFA and Federal-State Inspection Service has provided and will continue to provide expert advice on the condition or maturity of the fruit.

The committee suggested that the first contact should be with the Federal-State Inspection supervisor so the supervisor would first be able to review the problem to determine if the problem is with maturity or with interpretation of an individual inspector. The committee pointed out that in the past, the supervising inspector has been able to resolve many issues by working with the grower or shipper and the packing house inspector. If the situation could not be resolved to the satisfaction of the inspection service and the requester, then the requester would ask for a maturity variance.

In view of this, the Department has decided to specify in the regulations procedures for handling variances during the current and subsequent seasons which are similar to those currently used. In addition, in order to respond to comments that there is no recourse to adverse decisions of the maturity subcommittee, this interim final rule establishes a procedure for appealing those decisions. These

procedures are specified in paragraph (a)(1) of § 916.356.

Under these procedures, a grower or handler may make a request for a variance from the maturity guide by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. This fieldman would call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site. If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may attend public meetings or participate in telephone meetings and may provide additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations, and recommendations of the fieldman and inspection official, and any other information provided by the requester. Decisions of the maturity subcommittee shall be made within two days from the time the request for variance is received.

Because of the perishability of the fruit, it is imperative that decisions on variances be made promptly. Because of the large geographical area involved and the need for timely decisions, the subcommittee may hold telephone meetings. A majority of the subcommittee must vote in favor of a variance. The subcommittee shall prepare a written report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and to the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal as described later.

If after on-site review of the request neither the field man nor the inspection official believe a variance is warranted, the variance will not be granted and the matter will not be referred to the maturity subcommittee. The requester however may file an appeal from this determination in accordance with the procedures described below.

To file an appeal, the requester shall notify the Nectarine Administrative Committee manager who will immediately refer the appeal to the Appeal Committee established by this rule. It is important that the members of the Appeal Committee are different from those serving on the maturity subcommittee which makes the initial determination. It is also important that members of the Appeal Committee are knowledgeable about crop and maturity conditions in the industry. Therefore, the Appeal Committee shall consist of the Chairman of the Peach Commodity Committee, the Chairman of the Plum Commodity Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Nectarine Administrative Committee manager is notified of the appeal, recognizing that a final decision must be made promptly. A majority vote of the Appeal Committee is needed to grant a variance. The Appeal Committee may hold telephone meetings in order to facilitate the decisionmaking process. The Appeal Committee shall prepare a written report of its determination and the reasons therefor.

A representative of the Appeal Committee shall, in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

Another change from the proposal is that any decision to grant a variance for a particular nectarine variety will not automatically apply to all growers and handlers of that variety throughout California. The committee and other commenters have pointed out that the granting of variances on an across-the-board basis throughout the state may not be appropriate. Because of the differences in weather and growing conditions that occur throughout the growing area a variety grown in the San Joaquin Valley may be "well-mature" at a lesser degree of color than an orchard of the same variety in the upper San Joaquin Valley. This condition is sometimes significant and can even occur in neighboring orchards.

The inspection and industry officials designated to make these variance decisions have the necessary background and expertise in fruit maturity and knowledge about growing conditions in the production area.

It is the Department's view that the change to add several new varieties of nectarines now produced in commercially significant quantities to the variety-specific (named-variety) size requirements and to delete four varieties no longer produced in commercially significant quantities from those requirements will not be detrimental to small entities. These changes are expected to improve the quality of nectarines in the fresh market which will be beneficial in maintaining current markets and developing new ones. The change to clarify and revise the maturity requirements for nectarines is intended to foster and facilitate a greater understanding of these requirements within the nectarine industry and, as such, will not result in additional costs. The changes to the well matured guides for the Tom Grand and 61–61 varieties of nectarines will relax requirements.

Based on available information, the Administrator of the AMS has determined that the issuance of this interim final rule will not have a significant impact on a substantial number of small entities.

After consideration of all relevant information presented, including the committee's recommendations, the comments received in favor and opposition, and other information, it is found that this regulation, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that it is impracticable, unnecessary, and contrary to the public interest to give notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) Shipments of 1988 crop nectarines have begun and this action should cover as much of the 1988 crop as possible; (2) the maturity requirements set forth below are substantially the same as currently implemented and should be made effective as soon as possible; and (3) this interim final rule relaxes maturity requirements for two varieties of nectarines.

The actions set forth below are being issued on an interim final basis with opportunity for written comments rather than as a final rule so interested persons will be able to provide input on the maturity modifications and still allow the maturity procedures to be used for as much of the 1988 shipping season as

possible. An opportunity needs to be provided for interested persons to file comments, but, as mentioned earlier, it is imperative that the size and maturity requirements and variance procedures apply to as much of the 1988 crop as possible.

The committee's recommendation, other information, and all written comments timely received in response to this interim final with request for comments will be considered prior to any finalization of this interim final rule. Commenters are encouraged to submit their views in support of or in opposition to this interim final rule. Any pertinent data to support views and comments should also be submitted.

List of Subjects in 7 CFR Part 916

Marketing agreement and order, Nectarines, California.

For the reasons set forth in the preamble, 7 CFR Part 916 is amended as follows:

PART 916—NECTARINES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 916 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 916.356 is revised to read as follows:

§ 916.356 Nectarine Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade except that the nectarines shall be "well-matured," rather than "mature," but not overripe or shriveled: *Provided,* That nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ⅜ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ½ inch in diameter: *Provided further,* That an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen.

(i) During the 1988 and subsequent seasons, the Federal or the Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety, except that for the Fairlane, Tom Grand, and 61–61 varieties of nectarines, not less than an aggregate area of 80 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or the Federal-State Inspection Service will use such tests as it deems proper. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured."

The maturity determination variance procedure is set forth as follows:

TABLE I

Column A variety	Column B maturity guide
Ama Lyn	G
Ambrosia	G
Apache	G
Apkarian	G
Armking	B
Aurelio Grand	F
Autumn Delight	M
Autumn Grand	L
Bob Grand	L
Clinton-Strawberry	H
Desert Dawn	G
Early May	G
Early May Grand	H
Early Star	G
Early Sungrand	H
Fairlane	M
Fantasia	L
Firebrite	H
Flamekist	L
Flaming Red	K
Flavortop	J
Flavortop I	K
Gee Red	H
Gold King	H
Granderli	J
Grand Stan	C
Hi-Red	J
Independence	H
July Red	H
June Glo	H
June Grand	G
Kent Grand	L
Larry's Grand	M
Late Le Grand	L
Late Tina Red	I
Le Grand	H
Maybelle	F
Mayfair	C
May Glo	H
May Grand	H
Mayred	B
Mike Grand	H
Moon Grand	M
Niagara Grand	H
P-R Red	L
Red Diamond	M
Red Delight	I
Red Free	L
Red Grand	H
Red Jim	L
Red June	G
Regal Grand	L
Richards Grand	L
Rio Red	L
Royal Delight	F
Royal Giant	I
Ruby Grand	J
Scarlet Red	K
September Grand	L
September Red	L
Sherri Red	J
Son Red	L
Sparkling June	M
Sparkling Red	L
Spring Diamond	M
Spring Grand	G
Spring Red	H
Stan's Grand	C
Star Brite	J
Star Grand	H
Summer Beaut	H
Summer Diamond	M
Summer Grand	L
Summer Red	L
Sunfre	F
Sun Grand	G
Tasty Free	L
Tom Grand	L
Zee Gold	G
61–61	J
#91	C

NOTE. Consult with the Federal or Federal-State Inspection Service Supervisor for the maturity guides applicable to the varieties not listed above.

(ii) A grower or handler may initiate a request for variance from a maturity guide (e.g., color chip) by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. This fieldman will call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site.

(iii) The committee fieldman and the officer-in-charge accompany the requester to the site.

(iv) If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may attend public meetings or participate in telephone meetings and may provide additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations and recommendations of the fieldman and inspection official, and any other information provided by the requester. Decisions of the maturity

subcommittee shall be made within two days from the time the request for variance is received. A majority of the subcommittee must vote in favor of the variance for it to be implemented. The subcommittee shall prepare a written report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal in accordance with paragraph (a)(1)(vi) of this section.

(v) If neither the fieldman nor the inspection official believe a variance is warranted, the variance shall not be granted. The requester may file an appeal from this determination as specified in paragraph (a)(1)(vi) of this section.

(vi) To file an appeal, the requester shall notify the Nectarine Administrative Committee manager who will immediately refer the appeal to the Appeal Committee. The Appeal Committee shall consist of the Chairman of the Peach Commodity Committee, the Chairman of the Plum Commodity Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Nectarine Administrative Committee manager is notified of the appeal. A majority vote of the Appeal Committee is needed to grant a variance. The Appeal Committee may hold telephone meetings. The Appeal Committee shall prepare a written report of its determination and the reasons therefor. A representative of the Appeal Committee shall, in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

(2) Any package or container of Aurelio Grand, Maybelle, Mayfire, or Royal Delight variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 108 nectarines in the lug box; and

(ii) Such nectarines, when packed other than as specified in paragraph (a)(2)(i) of this section, are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 92 nectarines.

(3) Any package or container of Early Diamond, Mayfair, or May Glo variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 96 nectarines in the lug box; and

(ii) Such nectarines, when packed in any container, are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 87 nectarines.

(4) Any package or container of Ama Lyn, Apache, Early May, Early May Grand, Mike Grand, Early Star, Grand Stan, June Glo, June Grand, May Grand, Pacific Star, Red Delight, Red June, Spring Grand, Star Brite, Sunfre, or May Diamond variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 88 nectarines in the lug box; and

(ii) Such nectarines, when packed in any container, except for the Apache variety of nectarines when packed in tray packs, are of a size that a 16-pound sample, represenative of the nectarines in the package or container, contains not more than 78 nectarines.

(5) Any package or container of Autumn Delight, Autumn Grand, Bob Grand, Clinton-Strawberry, Early Sungrand, Fairlane, Fantasia, Firebrite, Flamekist, Flaming Red, Flavortop, Flavortop I, Gold King, Grand Diamond, Granderli, Hi-Red, Independence, July Red, Kent Grang, Kism Grand, Late Le Grand, Le Grand, Moon Grand, Niagara Grand, P–R Red, Red Diamond, Red Free, Red Grand, Regal Grand, Royal Giant, Ruby Grand, September Grand, September Red, Tasty Free, Tom Grand, Larry's Grand, Scarlet Red, Son Red, Spring Diamond, Spring Red, Late Tina Red, Red Jim, Summer Beaut, Sparkling Red, Star Bright, Summer Diamond, Summer Grand, Summer Red, Sun Diamond, Sun Grand, Sherri Red, Super Star, Rio Red, 61–61, or 181–119, variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 80 nectarines in the lug box; and

(ii) Such nectarines, when packed in any container are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 67 nectarines.

(6) During January 1 through May 31, of each fiscal period, no handler shall handle any package or container of any variety of nectarines not specifically named in paragraphs (a)(2), (3), (4), or (5) of this section unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 96 nectarines in the lug box; and

(ii) Such nectarines, when packed in any container are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 87 nectarines.

(7) During June 1 through June 30, of each fiscal period, no handler shall handle any package or container of any variety of nectarines not specifically named in paragraphs (a)(2), (3), (4), or (5) of this section unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 88 nectarines in the lug box; and

(ii) Such nectarines, when packed in any container are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 78 nectarines.

(8) During July 1 through December 31, of each fiscal period, no handler shall handle any package or container of any variety of nectarines not specifically named in paragraphs (a)(2), (3), (4), or (5) of this section unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 80 nectarines in the lug box; and

(ii) Such nectarines, when packed in any container are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 67 nectarines.

(b) *Definitions.* As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Nectarines [7 CFR 51.3145 to 51.3160]; "No. 22D standard lug box" means the same as defined in section 1380.19(17) of

the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

Dated: May 24, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 88-12038 Filed 5-26-88; 8:45 am]

BILLING CODE 3410-02-M

7 CFR Part 917

[Docket No. AMS-FV-88-055IR]

Fresh Pears, Plums, and Peaches Grown in California; Size Requirements and Maturity Regulations for Peaches

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule changes the size regulations established for California peaches. The coverage of the variety-specific size requirements will be changed by removing two varieties, no longer produced in significant quantities, from the variety-specific size list. Also size requirements will be modified for varieties of peaches not subject to variety-specific size requirements which are shipped November 1 through July 2. This is intended to bring these requirements into conformity with those in effect for shipments during the July 3 through October 31 period. In addition, this rule specifies maturity requirements and maturity variance procedures. This action is designed to facilitate peach maturity determinations and promote marketing of the crop.

DATE: The interim final rule becomes effective May 27, 1988. Comments which are received by July 11, 1988 will be considered prior to issuance of the final rule.

ADDRESS: Interested persons are invited to submit written comments concerning this interim final rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085-S, Washington, DC 20090-6456. Three copies of the written material shall be submitted, and they will be made available for public inspection in the office of the Docket Clerk during regular business hours. The comments should reference the date and page number of this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Jerry N. Brown, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456; telephone 202-475-5464.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under Marketing Order No. 917 (7 CFR Part 917), regulating the handling of fresh pears, plums, and peaches grown in California. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This interim final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposal on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 650 handlers of plums, peaches, and nectarines subject to regulation under marketing orders (7 CFR Parts 916 and 917), and there are approximately 2,030 producers of these commodities in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having gross annual revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of such fruit may be classified as small entities.

Shipments of California peaches are regulated by grade, maturity, and size under Peach Regulation 14 (7 CFR 917.459, as amended and published in the Federal Register on April 29, 1987, 52 FR 15488). A proposed rule concerning the size and maturity regulations was published in the Federal Register on April 18, 1988, (53 FR 12694). Comments were received concerning the proposed maturity requirements. Proposed changes to § 917.459 were recommended by the Peach Commodity Committee and the Department.

This interim final rule is based upon the committee's recommendation, information submitted by the committee, comments received both supporting and opposing the action, and other available information.

Inspected shipments of California peaches for the 1987 season totalled 13,854,000 packages and they were primarily sold in the fresh market. In 1987, the production value of California freestone peaches (fresh and processed) and clingstone peaches was about $68,252,000 and $95,612,000, respectively. Although this interim final rule would continue to impose requirements on the handling of peaches, exemptions from the inspection and certification requirements would continue. These exemptions include provisions for the shipment of minimum quantities of the fruit.

The proposal included changes in the minimum size requirements for peaches. No comments were received concerning such changes.

Accordingly, this action adopts the proposed size requirements described below to recognize the interest of California peach growers and handlers in maintaining the quality of peaches they market.

To implement the peach committee's size recommendations, paragraph (a)(5) of § 917.459 will be revised to remove two varieties no longer produced in significant quantities from variety-specific size requirements. Variety-specific size regulations for peaches are implemented when the peach variety is produced in commercially significant quantities; i.e., shipments in excess of 10,000 packages during a season. When varieties are no longer produced in significant quantities (less than 5,000 packages during the previous season), they are removed from the variety-specific size requirements, but are subject to minimum size requirements established for non-listed varieties. The quantities used in making these determinations are the same as those used in prior seasons. These requirements are specified in paragraphs (a), (b), and (c) of § 917.459. Specifically, the Summerset and Windsor varieties of peaches will be removed from the variety-specific size requirements in that paragraph. Shipments of the varieties that will be removed from the variety-specific size requirements fell below 5,000 packages during the 1987 season.

Paragraphs (b) and (c) of § 917.459 require all varieties of peaches not subject to the variety-specific size requirements to be subject to minimum size requirements. The total shipments

of these peaches are significant enough to warrant coverage, even though shipments of the individual varieties of them do not exceed 10,000 packages. Paragraph (b) covers shipments of these varieties during the period November 1 through July 2, and paragraph (c) covers shipments during the period July 3 through October 31.

For shipments during the July 3 through October 31 period, paragraph (c) currently specifies minimum size requirements for peaches packed in No. 22D standard lug boxes, requirements for these peaches packed in No. 12B standard fruit (peach) boxes, and 16-pound representative sample count per pound requirements for peaches packed in other containers. Paragraph (b) specifies No. 22D standard lug box requirements and 16-pound representative sample count per pound requirements, but does not specify size requirements for fruit packed in No. 12B standard fruit (peach) boxes. To foster consistency of regulation throughout the year, size requirements will be added to paragraph (b) for peaches packed in No. 12B standard fruit (peach) boxes for shipment during the period November 1 through July 2. The peaches so packed will have to be of a size that will pack, in accordance with the requirements of standard pack, not more than 65 peaches in the box. These are the same requirements as specified in paragraph (c) for shipments during the July 3 through October 31 period. With the change, such peaches packed in No. 12B standard fruit (peach) boxes will no longer be subject to the 16-pound representative sample count per pound requirements, just the pack requirements.

Further, the proposal included revisions in paragraph (a) of § 917.459 to clarify the peach maturity requirements and simplify the maturity determination system currently used by the peach industry. Among other things, the revision of paragraph (a) specified that no handler could ship peaches unless they are at least "well-matured," as defined in paragraph (d) and specified the role of Federal or Federal-State inspectors in making "well-matured" determinations.

It was proposed that the first sentence of paragraph (a)(1) be revised to read: "Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade, except that the peaches shall be 'well-matured,' rather than 'mature,' but not over-ripe or shriveled." This change was intended to clarify the fact that all peaches marketed under this program must be "well-matured," rather than "mature" as defined in the U.S. grade standards for peaches. Since May 16, 1980 (45 FR 32310; May 16, 1980) peaches have been required to be "well-matured" rather than "mature," and this requirement has been implemented by the Federal-State Inspection Service since that time.

In addition to specifying that peaches must be "well-matured," the proposed change defined "well-matured" as a condition distinctly more advanced than "mature." According to the U.S. grade standards, a peach is considered mature when it has reached the stage of growth which will insure a proper completion of the ripening process. This is a minimum standard of maturity which was in effect before the more recent advances in handling and distribution techniques and does not preclude inspecting to a higher degree of maturity. In 1979 the committee reported that higher maturity standards were necessary to satisfy trade demand, particularly in eastern markets. Comments discussed later support the contention of proponents that the "well-matured" requirement has resulted in more consumer acceptance and expansion of markets for California peaches.

To ascertain compliance with the "well-matured" standard with regard to each variety of peaches, various tests are used. Since 1980, the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of peaches and which test level (e.g., particular color chip) is appropriate for each variety. When the Federal-State Inspection Service has sufficient experience with a variety to determine that a particular test or tests and a particular test level should normally be appropriate for the entire production area for every year, it has advised the committee of that determination. The committee has then ratified that determination, publishing it in its annual bulletin. After such a determination for a particular variety has been published, variances during the season or permanent changes between seasons have been made by the committee or its maturity subcommittee. The committee and its staff have provided advice to the Federal-State Inspection Service in making its maturity determinations, and likewise the Federal-State Inspection Service and the committee staff have advised the committee and its maturity subcommittee in making variances and changes.

To lessen the burdens on committee members, it was proposed that the responsibility for variances during the season and changes between the seasons be given to the Federal or Federal-State Inspection Service. This change would have simplified the procedures by assigning all maturity determinations and the application of those determinations to one group. In making this proposal, it was intended that the Federal or Federal-State Inspection Service, while considering variances and changes, would seek the advice of the committee and its staff in order to draw upon their wealth of expertise. It was also intended that any changes and any variances would be applicable to all growers and handlers of the particular variety. Finally, it was intended that any changes and variances would be made at the supervisory level of the Federal or the Federal-State Inspection Service, rather than by the particular packinghouse inspector. This was intended to ensure that these decisions are made by those who have the greatest background and expertise and who are in a position to be knowledgeable concerning current conditions throughout the entire production area.

Further, a table as proposed to be added to paragraph (a) of § 917.459 to specify color chip guides which the Federal or the Federal-State Inspection Service intends to use beginning with the 1988 season for the specified varieties of peaches.

For these varieties, an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety, and not less than 90 percent of any lot shall meet the color guide established for the variety.

The varieties listed in the table were those described above where the inspection service has sufficient experience to determine a generally appropriate test or tests and test levels. It was proposed that the Federal or Federal-State Inspection Service would have the authority to make variances from the guides in the table during the season for any variety to reflect changes in crop and weather conditions that would make the guide an inappropriate measure of "well-matured." For varieties not listed in the table, the Federal or Federal-State Inspection Service would use such tests as it deems appropriate.

There is one change in the table from the list in the 1987 Peach Bulletin. The color guide for the Prima Fire peach variety would be changed from the "I" color guide to the "H" color guide. This is intended to help make the maturity determination for this peach variety more accurate. This change is the same

as was in effect for such peach variety at the end of last season. No comments were received with respect to the proposed change. Therefore, the change is adopted as proposed.

Comments were received regarding other aspects of the proposed maturity requirements and variance procedures. One commenter opposed the proposal and in his comments, while not specific to any particular peach variety, he requested that his comments on similar proposals concerning California nectarines and plums be held applicable to California peaches. Some commenters disagreed with or suggested modifications to the proposed requirements and procedures. Some commenters requested that the current "well-matured" requirements continue in effect. One commenter thought that the maturity requirements should be returned to the level which existed in 1980 or to the mature requirements specified in U.S. No. 1 grade standards. One commenter thought that the variance procedures were lacking because an appeal process was not provided to review the setting of standards in the first place or for reviewing variance decisions. Two commenters suggested tha the proposed definition of "well-matured" be clarified and made more specific as it related to the condition of fruit to make decisions on variances more objective.

In many instances, the favorable comments and other information sufficiently refuted the unfavorable comments, particularly regarding the desirability of continuing the "well-matured" requirement. Contrary to one commenter's contentions, at least one study has been conducted which indicates that the implementation of the "well-matured" requirement has resulted in greater consumer acceptance of the fruit than existed prior to 1980. Further, the shipments of "well-matured" fruit, as opposed to "mature" fruit have helped the industry's market expansion efforts. In fact, the requirement has been generally well received by the industry, retailers, and the consuming public.

In fact, one commenter submitted a *Final Report of California Summer Fruits Retailer Research* by Ervin D. Thuerk. Mr. Thuerk is a marketing consultant with the Thuerk Pro-Con Company in Westlake Village, California. Mr. Thuerk directed a project to, among other things, pursue individual retailers' attitudes and their wants and needs for fruit quality and maturity. Meetings were held with twenty-five companies in approximately twenty cities, representing nearly 17,000 retail supermarkets, which equals a 38.7 percent share of the total industry units operated. Information was obtained on: (1) Product needs in the fresh produce industry; (2) retail marketing trends and how they are changing; (3) consumer attitudes and their changing wants and needs; (4) the development of future programs for the marketing of California summer fruits; and (5) attitudes toward industry standards and marketing programs. The findings indicate that early season fruit which is picked immature does not provide satisfaction to the consumer and does not encourage repeat purchases, and does not benefit the market. Fruit has to look good to get the consumer to buy it, but it must also taste good to foster additional sales. There is definitely a lag effect on sales from poor eating quality on the varieties which follow. When this occurs prices are depressed because the pipelines are filled with poor fruit, according to the executives interviewed.

In addition, a marketing extension pomologist from the University of California at Davis indicated that in the late 1970's the post harvest performance of a number of commercial peach cultivars had been evaluated. In these tests, researchers found that low maturity fruit tended to be more susceptible to bruising (especially vibration bruising), and also more susceptible to flesh browning following bruising. He further indicated that size is generally correlated with maturity in fruits. Typically in any population of fruits, the smallest size fruits will be lower in sugars, and often less physiologically mature, than larger fruits. He went on to say that this is especially true in a climate lake California, where the bloom period is normally prolonged and thus size may indicate the length of the growing season for the individual fruits.

The Thuerk report described earlier also addresses the comments that the "well-matured" requirement does not reflect the different needs of buyers in markets far from the production area compared to buyers in nearby markets.

In addition, a comment from the Executive Vice President of the Canadian Fruit Wholesalers Association indicated that some of its members feel that the current "well-matured" standard has played an important role in keeping high quality consumer acceptable fruit grown in the United States available in Canadian markets. The members of the association polled felt that a change from the "well-matured" to the mature standard would be regressive and would hurt sales. Along the same lines, a buyer in Chelsea, Massachusetts, indicated that it is extremely important for California packers to maintain the high quality, taste, appearance, and shelf life that their customers have come to expect. To continue its trend of buying more and more fruit, the buyer indicated that "well-matured" standard should be maintained.

In response to the commenter who asserted that the tests currently in effect are more restrictive than when the "well-matured" requirement was implemented in 1980, there has been an increase in the number of color chips used. However, the initial chips were not considered adequate to cover the variations in color among the numerous varieties. As a result, gradations in color have been added to more accurately reflect the characteristics of the many varieties of peaches. Therefore, the number of color chips *per se* does not support the contention that the color chips are more restrictive now than there were in 1980 and 1981.

One commenter stated that the price received for "well-matured" fruit has not adequately compensated for the increase in harvesting costs that have been incurred. However, the commenter did not document this claim. Further, the "well-matured" requirement has in general contributed to the economic health of the peach industry. More than 106,295,000 packages of California peaches have been inspected and shipped since the "well-matured" requirement became effective in 1980. Also, when the growers under this program participated in 1986–87 in a referendum to determine industry support for the peach marketing order program, a majority of those voting favored continuance of the program. It is doubtful that growers would favor continuing a program that resulted in considerable lost profits.

One commenter expressed the view that the maturity levels have been drastically raised to control volume as opposed to causing better consumer quality fruit to reach the market. One commenter indicated that this is evidenced by the decrease in packages shipped per acre from 1980 to 1987 even though increasing acreage was coming into production with a substantially higher number of trees planted per acre. However, this commenter's evaluation is inconclusive because he did not consider other factors in addition to the "well-matured" requirement that could affect the amount of peaches shipped to the fresh market. Other factors could lead to a reduced number of cartons shipped per acre, such as age of the trees, weather, cultural practices, and

failure to meet other types of handling requirements such as minimum size requirements.

One commenter requested an exemption for "leaf spots" and recommended a 10 percent exemption from the "well-matured" requirement be established as long as the fruit otherwise meets the U.S. No. 1 standard. These recommendations are being referred to the committee for evaluation.

In view of the foregoing, this action adopts, the proposed maturity requirements described above to recognize the interest in California peach growers and handlers in maintaining the quality and maturity of the peaches they market. As stated previously, in 1979, the committee reported that peaches picked and packed at the minimum standard of maturity "mature," were rather severely criticized at destination. The evidence indicates that the "well-matured" requirement in effect since that time has resulted in more consumer acceptance and the expansion of markets for California peaches.

We do, however, believe that a more specific definition of "well-matured" could be helpful. Therefore, comments are invited on developing a definition with more specificity.

In addition to the comments received on the size and maturity requirements, the Department received comments on the variance procedures described in the proposed rule. The proposal stated that: "The Federal or the Federal-State Inspection Service has the authority to make variances for any variety from any guide or tests, including those in Table I, during the season to reflect changes in crop or weather conditions that would make the existent guide an inappropriate measure of "well-matured."

The purpose of this change was to relieve the maturity subcommittee of the burden of making variances during the season because committee members are dispersed over a wide geographic area and have daily responsibilities with regard to their own businesses.

However, comments from the committee and officials from the Federal-State Inspection Service indicated that the committee and its maturity subcommittee should continue to play a direct role in making final determinations on making changes and granting variances in the maturity guides used in determining whether the fruit meets the "well-matured" standard. The commenters indicated that these very important decisions should not rest solely in the hands of one group, but they should be fair and timely because of the perishability of the commodity.

Comments received from the California Department of Food and Agriculture (CDFA) indicated that full responsibility to allow or disallow variances from color chip requirements should not be placed on the inspection service. The comment indicated that the CDFA and Federal-State Inspection Service has provided and will continue to provide expert advice on the condition or maturity of the fruit.

The committee suggested that the first contact should be with the Federal-State Inspection supervisor so the supervisor would first be able to review the problem to determine if the problem is with maturity or with interpretation of an individual inspector. The committee pointed out that in the past, the supervising inspector has been able to resolve many issues by working with the grower or shipper and the packing house inspector. If the situation could not be resolved to the satisfaction of the inspection service and the requester, then the requester would ask for a maturity variance.

In view of this, the Department has decided to specify in the regulations procedures for handling variances during the current and subsequent season which are similar to those currently used. In addition, in order to respond to comments that there is no recourse to adverse decisions of the maturity subcommittee, this interim final rule establishes a procedure for appealing those decisions. These procedures are specified in paragraph (a)(1) of § 917.459.

Under these procedures, a grower or handler may make a request for a variance from the maturity guide by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. This fieldman would call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site. If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may attend public meetings or participate in telephone meetings and may provide additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations, and recommendations of the fieldman and inspection official, and any other information provided by the requester. Decisions of the maturity subcommittee shall be made within two days from the time the request for variance is received.

Because of the perishability of the fruit, it is imperative that decisions on variances be made promptly. Because of the large geographical area involved and the need for timely decisions, the subcommittee may hold telephone meetings. A majority of the subcommttee must vote in favor of variance. The subcommittee shall prepare a writteen report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and to the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal as described later.

If after on-site review of the request neither the fieldman nor the inspection official believe a variance is warranted, the variance will not be granted and the matter will not be referred to the maturity subcommittee. The requester however may file an appeal from this determination in accordance with the procedure described below.

To file an appeal, the requester shall notify the Peach Commodity Committee manager who will immediately refer the appeal to the Appeal Committee established by this rule. It is important that the members of the Appeal Committee are different from those serving on the maturity subcommittee which makes the initial determination. It is also important that members of the Appeal Committee are knowledgeable about crop and maturity conditions in the industry. Therefore, the Appeal Committee shall consist of the Chairman of the Plum Commodity Committee, the Chairman of the Nectarine Administrative Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Peach Commodity Committee manager is notified of the appeal, recognizing that a final decision must be made promptly. A majority vote

of the Appeal Committee is needed to grant a variance. The Appeal Committee may hold telephone meetings in order to facilitate the decisionmaking process. The Appeal Committee shall prepare a written report of its determination and the reasons thererfor.

A representative of the Appeal Committee shall, in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

Another change from the proposal is that any decision to grant a variance for a particular peach variety will not automatically apply to all growers and handlers of that variety throughout California. The committee and other commenters have pointed out that the granting of variances on an across-the-board basis throughout the state may not be appropriate. Becaue of the differences in weather and growing conditions that occur throughout the growing area a variety grown in the San Joaquin Valley may be "well-mature" at a lesser degree of color than an orchard of the same variety in the upper San Joaquin Valley. This condition is sometimes significant and can even occur in neighboring orchards.

The inspection and industry officials designated to make these variance decisions have the necessary background and expertise in fruit maturity and knowledge about growing conditions in the production area.

It is the Department's view that the change to delete two varieties no longer produced in commercially significant quantities from variety-specific size requirements and to change size requirements for peaches shipped in No. 12B standard fruit (peach) boxes during the period November 1 through July 2 will not be detrimental to small entities. The change to clarify and revise the maturity requirements for peaches is intended to foster and facilitate a greater understanding of these requirements within the peach industry and, as such, would not result in additional costs. The change to the "well-matured" guide for the Prima Fire variety of peaches will make maturity determination more accurate.

Based on the above, the Administrator of AMS has determined that the issuance of this interim final rule will not have a signficant economic impact on a substantial number of small entities.

After consideration of all relevant information presented, including the committee's recommendations, the comments received in favor and opposition, and other information, it is found that this regulation, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that it is impracticable, unnecessary, and contrary to the public interest to give notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) Shipments of 1988 crop peaches have begun and this action should cover as much of the 1988 crop as possible; and (2) the maturity requirements set forth below are substantially the same as currently implemented; and (3) this interim final rule relaxes size requirements for two varieties of peaches.

The actions set forth below are being issued on an interim final basis with opportunity for written comments rather than as a final rule so interested persons will be able to provide input on the maturity modifications and still allow the maturity procedures to be used for as much of the 1988 shipping season as possible. An opportunity needs to be provided for interested persons to file comments, but, as mentioned earlier, it is imperative that the size, maturity requirements and variance procedures apply to as much of the 1988 crop as possible.

The committee's recommendation, other information, and all written comments timely received in response to this interim final with request for comments will be considered prior to any finalization of this interim final rule. Commenters are encouraged to submit their views in support of or in opposition to this interim final rule. Any pertinent data to support views and comments should also be submitted.

List of Subjects in 7 CFR Part 917

Marketing agreements and orders, Pears, Plums, Peaches, California.

For the reasons set forth in the preamble, 7 CFR Part 917 is amended as follows:

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 917 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 917.459 is revised to read as follows:

§ 917.459 Peach Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade, except that the peaches shall be "well-matured," rather than "mature," but not overripe or shriveled.

(i) During the 1988 and subsequent seasons, the Federal or the Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or the Federal-State Inspection Service will use such tests as if deems proper. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

(ii) A grower or handler may initiate a request for variance from a maturity guide (e.g., color chip) by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. This fieldman will call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site.

(iii) The committee fieldman and the officer-in-charge accompany the requester to the site.

(iv) If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may attend public meetings or participate in telephone meetings and may provide additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations and recommendations of the fieldman and inspection official, and any other information provided by the requester. Decisions of the maturity subcommittee shall be made within two

days from the time the request for variance is received. A majority of the subcommittee must vote in favor of the variance for it to be implemented. The subcommittee shall prepare a written report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal in accordance with paragraph (a)(1)(vi) of this section.

(v) If neither the fieldman nor the inspection official believe a variance is warranted, the variance shall not be granted. The requester may file an appeal from this determination as specified in paragraph (a)(1)(vi) of this section.

(vi) To file an appeal, the requester shall notify the Peach Commodity Committee manager who will immediately refer the appeal to the Appeal Committee. The Appeal Committee shall consist of the Chairman of the Plum Commodity Committee, the Chairman of the Nectarine Administrative Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Peach Commodity Committee manager is notified of the appeal. A majority vote of the Appeal Committee is needed to grant a variance. The Appeal Committee may hold telephone meetings. The Appeal Committee shall prepare a written report of its determination and the reasons therefor. A representative of the Appeal Committee shall, in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

(2) Any package or container of Desertgold variety peaches unless:

(i) Such peaches when packed in molded forms (tray pack) in a No. 22D standard lug box are of a size that will pack, in accordance with the requirements of standard pack, not more than 96 peaches in the box; or

(ii) Such peaches in any container when packed other than as specified in paragraph (a)(2)(i) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 96 peaches.

(3) Any package or container of any type of Morning Sun or Springold variety peaches unless:

(i) Such peaches when packed in molded forms (tray pack) in a No. 22D standard lug box are of a size that will pack, in accordance with the requirements of standard pack, not more than 84 peaches in the box; or

(ii) Such peaches when packed in a No. 12B standard fruit (peach) box are of a size that will pack, in accordance with the requirements of standard pack, not more than 65 peaches in the box; or

(iii) Such peaches in any container when packed other than as specified in paragraph (a)(3) (i) and (ii) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 79 peaches.

(4) Any package or container of Babcock, Coronet, Early Coronet, Firecrest, First Lady, Flavorcrest, Flavor Red, Golden Crest, Golden Lady, Honey Red, June Crest, June Lady, Kern Sun, May Crest, May Lady, Merrill Gem, Merrill Gemfree, Ray Crest, Redhaven, Redtop, Regina, Royal May, Springcrest, Spring Lady, Willie Red, or 50–178 variety of peaches unless:

(i) Such peaches when packed in molded forms (tray pack) in a No. 22D standard lug box are of a size that will pack, in accordance with the requirements of standard pack, not more than 80 peaches in the box; or

(ii) Such peaches when packed in a No. 12B standard fruit (peach) box are of a size that will pack, in accordance with the requirements of standard pack, not more than 65 peaches in the box; or

(iii) Such peaches in any container when packed other than as specified in paragraph (a)(4) (i) and (ii) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 73 peaches.

(5) Any package or container of Angelus, August Sun, Autumn Crest, Autumn Gem, Autumn Lady, Belmont, Berenda Sun, Blum's Beauty, Cassie, Cal Red, Carnival, Early O'Henry, Elberta, Elegant Lady, Fairmont, Fairtime, Fay Elberta, Fayette, Fire Red, Flamecrest, Fortyniner, Franciscan, July Lady, July Sun, Kings Lady, Lacey, Mary Ann, O'Henry, Pacifica, Parade, Preuss Suncrest, Red Cal, Redglobe, Red Lady, Ryan's Sun, Scarlet Lady, Sparkle, Sprague Last Chance, Suncrest, Sun Lady, or Toreador variety of peaches unless:

(i) Such peaches when packed in molded forms (tray pack) in a No. 22D standard lug box are of a size that will pack, in accordance with the requirements of standard pack, not more than 72 peaches in the box; or

(ii) Such peaches when packed in a No. 12B standard fruit (peach) box are of a size that will pack, in accordance with the requirements of standard pack, not more than 65 peaches in the box; or

(iii) Such peaches in any container when packed other than as specified in paragraphs (a)(5) (i) and (ii) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 64 peaches.

TABLE I

Column A variety	Column B maturity guide
Angelus	I
Armgold	D
August Sun	I
Autumn Crest	I
Autumn Gem	I
Autumn Lady	H
Babcock Type (Ask Supervising Insp.)	
Bella Rosa	G
Belmont (Fairmont)	I
Berenda Sun	I
Blum's Beauty	G
Bonjour	F
Cardinal	G
Cal Red	I
Carnival	I
Cassie	H
Coronet	E
Delp	C
Desertgold	B
Early Coronet	D
Early Elberta	C
Early Fairtime	I
Early O'Henry	I
Early Royal May	G
Early Top	G
Elberta	B
Elegant Lady	M
Fairtime	G
Fay Elberta	C
Fayette	I
Fiesta	I
Fire Red	I
First Lady	D
Firecrest	I
Flamecrest	I
Flavorcrest	G
Flavor Red	G
Fortyniner	F
Franciscan	G
Golden Lady	F
Halloween	I
Honey Red	G
JJK-1	G
Jody Gaye	F
Judy Elberta	C
July Lady	G
June Crest	G
June Lady	G
Kearney	I
Kern Sun	H
Kim Elberta	C
King's Lady	I
Lacey	I
Mardigras	G

TABLE I—Continued

Column A variety	Column B maturity guide
May Crest	G
May Lady	G
Merrill Gem	G
Merrill Gemfree	G
Morning Sun	D
O'Henry	I
Pacifica	G
Parade	I
Pat's Pride	D
Preuss Suncrest	F
Prima Fire	H
Ray Crest	G
Red Cal	I
Redglobe	C
Redhaven	G
Red Lady	G
Redtop	G
Regina	G
Rio Oso Gem	I
Royal April	D
Royal Gold	D
Royal May	G
Ryan's Sun	I
Scarlet Lady	F
Sparkle	I
Springcrest	G
Spring Lady	H
Springold	D
Summerset	I
Suncrest	G
Sun Lady	I
Toreador	I
Treasure	F
Willie Red	G
Windsor	I

Note: Consult with the Federal or Federal-State Inspection Service Supervisor for the maturity guide applicable to the varieties not listed above.

(b) During the period November 1 through July 2 of each fiscal period, no handler shall handle any package or container of any variety of peaches not specifically named in paragraphs (a) (2), (3), (4), or (5) of this section unless:

(1) Such peaches when packed in molded forms (tray pack) in a No. 22D standard lug box are of a size that will pack, in accordance with requirements of standard pack, not more than 96 peaches in the box; or

(2) Such peaches when packed in a No. 12B standard fruit (peach) box are of a size that will pack, in accordance with the requirements of standard pack, no more than 65 peaches in the box; or

(3) Such peaches in any container when packed other than as specified in paragraphs (b) (1) or (2) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 96 peaches.

(c) During July 3 through October 31 of each fiscal period, no handler shall handle any package or container of any variety of peaches not specifically named in paragraphs (a) (2), (3), (4), or (5) of this section unless:

(1) Such peaches when packed in molded forms (tray pack) in a No. 22D standard lug box are of a size that will pack, in accordance with requirements of standard pack, not more than 80 peaches in the box; or

(2) Such peaches when packed in a No. 12B standard fruit (peach) box are of a size that will pack, in accordance with the requirements of standard pack, not more than 65 peaches in the box; or

(3) Such peaches in any container when packed other than as specified in paragraphs (c) (1) or (2) of this section are of a size that a 16-pound sample, representative of the peaches in the package or container, contains not more than 73 peaches.

(d) As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Peaches (7 CFR 51.1210 through 51.1223); and "No. 22D standard lug box" and "No. 12B standard fruit (peach) box" mean the same as defined in section 1380.19(18) of the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

Dated: May 24, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 4, 11, 25, 30, 31, 32, 34, 35, 40, 50, 60, 61, 70, 71, 73, 74, 75, 95, and 110

Retention Periods for Records

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to establish a definite retention period for each record that an NRC application or licensee for a materials or facility license is required to maintain. This action is necessary to comply with the Office of Management and Budget requirement that a specific retention period be identified for each record. The final rule also establishes a uniform standard acceptable to the NRC for the condition of a record throughout each specified retention period. This action is expected to reduce the overall recordkeeping burden for NRC applicants and licensees by use of uniform and specific retention periods for each recordkeeping requirement.

EFFECTIVE DATE: July 26, 1988.

FOR FURTHER INFORMATION CONTACT: Brenda J. Shelton, Acting Chief, Records and Reports Management Branch, Division of Information Support Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-8132.

SUPPLEMENTARY INFORMATION:

Background

The Nuclear Regulatory Commission's (NRC) regulations require that applicants and licensees retain a variety of records for various periods of time. Licensees must also retain certain plans and procedures for routine operation and emergency situations and file reports of certain occurrences and events. The NRC reviewed its recordkeeping requirements to determine how long the required records should be retained. This rule reflects the results of that review and of the public comments received on the proposed rule. The NRC did not include 10 CFR Part 20 in its review. The record retention requirements contained in Part 20 were examined and modified as part of the proposed revision to Part 20 that was published for public comment in the **Federal Register** on December 20, 1985, (50 FR 51992) and republished on January 9, 1986 (51 FR 1092). Codification of these amendments and amendments in certain published proposed rules combined with this final rule will establish uniform retention periods for all NRC recordkeeping requirements. NRC also intends to conform record retention requirements in future rules to the four uniform periods contained in this rule.

Previously, NRC regulations sometimes specified that a record be retained for a specific period of time. These periods varied widely from 1 or 2 years, to the 40-year life of a reactor license, or to the completion of decommissioning for some licenses. In other instances, the regulation specified that a record be kept until the Commission authorized its disposition, and in others, that it be retained indefinitely. Some parts of NRC regulations specified the condition of a record acceptable to the NRC throughout its required retention period; others did not.

This rule amends regulations in 19 parts of Title 10 to require that certain records in these parts be retained for specific periods. The rule also provides for all parts to Title 10, Chapter I, the

condition of a record acceptable to the NRC throughout its retention.

This rule also establishes four specific retention periods to be used throughout 10 CFR Chapter I. With the exception of one 6 month retention period at 10 CFR 70.58(h), uniform retention periods of 3 years, 5 years, 10 years, or the life of the component, activity, area, or facility are being codified to simplify the system for retaining NRC records. These particular four periods, although not ideal for every record retention requirement, seem to be the best choices for NRC record needs. Uniform periods were recommended to the NRC by the Nuclear Information and Record Management Association (NIRMA) based on the nuclear industry's input to NIRMA. Three of the uniform periods coincide with the retention periods for quality assurance (QA) records in Parts 50 and 71; the fourth coincides with the retention periods for records such as those covered by technical specifications.

The NRC recognizes that technical specifications for each nuclear power plant include record retention requirements that may, in some cases, differ from those set out in this rule. The requirements in this rule take precedence over and supersede any conflicting requirements presently in the technical specifications. Therefore, the Office of Nuclear Reactor Regulation (NRR) intends to issue a generic letter that would provide guidance to licensees for revising their technical specifications to conform with this rule and would include model technical specifications to follow for achieving this conformance.

During the course of reviewing 10 CFR 50.36, "Technical Specifications," the staff found that this section does not clearly reflect the difference in recordkeeping and reporting requirements for reactors licensed under different sections of the regulations. Specifically, commercial and industrial facilities are licensed under § 50.21(b) or § 50.22 and have detailed notification and reporting requirements delineated in § 50.72 and § 50.73, respectively. Therefore, specific cross references to § 50.72 and § 50.73 have been added to § 50.36 where appropriate. Facilities licensed under §50.21(a) for medical therapy uses and facilities licensed under § 50.21(c) for research and development activities do not have separate sections dealing with notification and reporting. The reporting requirements on the automatic safety system and for these types of reactors are contained within § 50.36. Accordingly, language is being added to § 50.36(c)(1)(ii)(A) to make it conform with § 50.72(b)(2)(iii) and § 50.73(a)(2)(v).

An effort has been made to use consistent terminology with regard to paperwork throughout this multi-part rule. For example, the term "retain" conveys the idea of keeping secure or intact and the term "maintain" continuing to preseve and update, in this case, a record. Consistent terminology and specific recordkeeping requirements and retention periods should assist an NRC applicant or a licensee in complying with these requirements.

The changes resulting from this rule should result in an overall reduction in the recordkeeping burden imposed on the NRC applicant or licensee. The major reduction in burden results from establishing 126 specific retention periods, primarily three years or the life of a license, for records that up to now were retained indefinitely. This major reduction, plus four other reductions of retention periods by two years, offsets the increase in retention periods for 54 records; 42 cases by one year, 10 cases by two years, 1 case by two and one half years, and 1 case by three years. Based on staff's understanding of current industry practices, the increases in retention periods would either not impose any additional burden or could be readily accommodated within current equipment configurations and, therefore, would represent no appreciable increase in burden. A paragraph describing the form and condition of a record acceptable to the NRC for review is being codified in ten parts. This requirement is comparable to similar provisions currently included in other parts of the NRC regulations.

Specifying clearly in NRC regulations what records to retain, how long to retain them, and the condition of a record required for NRC inspection is mutually beneficial to the applicant or licensee and to the NRC. The Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) added impetus to the NRC's interest in the regulatory burden imposed on an applicant or a licensee by the preparation and retention of records. Furthermore, OMB's regulations implementing the Paperwork Reduction Act require that record retention requirements imposed by Federal regulations contain specific retention periods. The NRC complies with the Act's requirement for Office of Management and Budget (OMB) review of the information collection requirements in each rulemaking. In addition, two documents on paperwork are being prepared for publication in the NUREG-series: One document will be based on Regulatory Guide 10.1, which is a compilation of reporting requirements for persons subject to NRC regulations, and the other document will summarize the record retention periods for the recordkeeping requirements contained in NRC regulations. These companion documents should be useful to an NRC applicant or a licensee.

On October 28, 1987, the NRC published the proposed rule in the **Federal Register** (52 FR 41442). The comment period ended on December 28, 1987.

Summary of Public Comments

Comments were received from sixteen respondents comprised of eight power reactor licensees, three industry groups, two law firms, one university, one fuel fabrication plant operator, and one private citizen. Copies of the comment letters are available for public inspection and copying for a fee at the NRC Public Document Room at 1717 H Street, NW., Washington, DC. Fifteen of the sixteen commenters generally agreed with the proposed amendments and one commenter disagreed.

Individual who disagreed did not identify any specific records but stated that "reduction of many record retentions to three years would invite cheating, criminal activity, and the ignoring of rules set up to protect the public." The Commission does not agree with this comment. The Commission has an extensive compliance monitoring and inspection program. While examination of licensee record is an important part of the program, it is not the only means by which NRC determines whether licensees are operating safely. Moreover for those requirements covered by the three year minimum period, the Commission believes that records covering the previous three year period will be sufficient to assist the agency in judging compliance or noncompliance, to act on possible noncompliance, and to examine facts as necessary following any incident. In the situation alluded to by the commenter, large irradiators and large medical licensees possessing significant quantities or radioactive material are inspected annually, hence the three year minimum period is adequate.

The remaining fifteen commenters agreed with the proposed changes with the following general comments:

1. *Comment.* Three commenters recommended that the Commission specify in the "statement of Considerations" that a Technical Specification amendment made to conform to this rule is not required and that "pen and ink" changes are

acceptable. Two commenters suggested that fees should not be required for these changes.

Response. The Commission agrees that a Technical Specification amendment to conform to the adminstrative requirements of this rule is not required and that "pen and ink" changes will suffice. However, should licensees desire to amend their Technical Specifications to conform to the administrative requirement of this rule, the licensees would not be required to submit fees under 10 CFR Part 170.

2. *Comment.* One commenter suggested that the general statement appearing in the Supplementary Information which states that requirements in this rule take precedence over and supersede any conflicting requirements in the Technical Specifications should be addressed in 10 CFR 50.36 and, as appropriate, referenced in other 10 CFR Parts.

Response. The Commission believes that the information provided in the "Supplementary Information" is adequate. 10 CFR 50.71(d)(2) currently addresses the precedence issue for 10 CFR Part 50 licensees and applicants. Reference to § 50.71(d)(2) in other 10 CFR Parts is not necessary.

3. *Comment.* Three commenters recommended that the maintenance of records in electronic media such as computerized records and optical disks be addressed.

Response. The Commission does not object to the use of electronic media for the storage of records as long as legible, accurate, and complete records can be produced in hardcopy throughout the duration of the required retention period. Records such as letters, drawings, specifications, etc. must include all pertinent features such as stamps, initials, and signatures. Adequate safeguards against tampering with and loss of records must also be maintained. The rule has been changed to address the use of electronic media.

4. *Comment.* One commenter recommended that the records to be retained under 10 CFR Part 20 be addressed in this rule.

Response. The Commission believes that the pending amendment to 10 CFR Part 20 is the most efficient and economical means for addressing the records contained in that part. The amendment to 10 CFR Part 20 will meet all of the record retention requirements established by this rule. This approach will ensure that the recordkeeping requirements are consistent with changes to the technical and administrative aspects to Part 20 that may result from the public comments and additional staff review of the requirements included in that part.

5. *Comment.* One commenter recommended that the increased record retention periods remain as they are currently specified in 10 CFR Chapter I and another specifically questioned the increased retention period for 53 records.

Response. The Commission has modified many retention periods to streamline and standardize its record retention requirements and to reduce the burden imposed by those requirements. There are instances in which an individual record retention period has been increased. However, we believe that, in general, the rule will result in an ultimate benefit to the majority of the applicants and licensees as well as to the NRC.

6. *Comment.* One commenter stated that the proposed rule changes the current requirements of § 74.31 from a performance-oriented rule to one containing specific recordkeeping requirements. The commenter believes that the proposed changes complicate the licensee's ability to devise its own recordkeeping system, compatible with its own operations, in accordance with a performance oriented rule, and that the proposed changes are unnecessary and should be eliminated.

Response. The Commission has reevaluated the proposed changes in light of this comment and has determined that the specific enumeration of records is not necessary. The current performance-oriented rule adequately provides for retention of records to demonstrate compliance with the Commission's requirements. The proposed change to § 74.31 has been deleted from the final rule.

7. *Comment.* Two commenters stated that the records retention period for the Safety Analysis Report is not obvious and needs to be addressed.

Response. Section 50.71(e) requires licensees to periodically update their FSAR's. Implicit in this requirement is the retention of the updated FSAR by licensees for the duration of their licenses. The Commission believes that the retention period of an updated FSAR is inherent in its existing regulations. Nevertheless, 10 CFR 50.71(e)(6) has been added to the rule to specify that the updated Final Safety Analysis Report (FSAR) is to be retained by the licensees until the NRC terminates their licenses.

8. *Comment.* One Commenter stated that the rule does not make it clear that the retention periods specified are minimum requirements.

Response. The commission does not object to licensees/applicants retaining records beyond the retention period required by NRC regulations. The intent of retention periods for recordkeeping requirements is to establish the minimum retention necessary for compliance with NRC regulations. Should licensees or applicants elect to retain records beyond the retention period required by the NRC, they have that option. Licensees should be aware, however, that NRC's recordkeeping requirements apply only to NRC requirements for the information. Other Federal, State, or local agencies may have requirements that may apply now or in the future.

9. *Comment.* One commenter stated that the recordkeeping requirement pursuant to § 50.54(p)(2) has not been addressed and suggested that the retention be changed to three years.

Response. The omission of the recordkeeping requirement contained at § 50.54(p)(2) was an oversight and has been included in the final rule with a three year retention period.

10. *Comment.* One commenter suggested that the minimum retention period be changed to "three years or until the next inspection, whichever is longer," stating that three years is an insufficient retention period because some records would be destroyed before the next inspection.

Response. While some inspection frequencies are longer than three years, the Commission believes that records covering the previous three year period are sufficient to permit the NRC to judge compliance or noncompliance, to act on possible noncompliance, and to examine necessary facts following an incident. Licensees possessing materials which could pose a significant risk to public health and safety, such as irradiators or large medical facilities, are inspected annually. The three year period, while not ideal for all situations, is a reasonable period which generally satisfies NRC's record needs and conforms to OMB guidelines by providing for the availability of records while not imposing any undue burden on the licensees.

11. *Comment.* One commenter stated that increases in retention periods from two to three years are unnecessary. The commenter believes that present inspection cycles make two years an adequate retention period and suggested that the current two year retention periods for records contained in §§ 70.22(k), 71.9(a), and 110.53(b) be retained.

Response. As explained in the proposed rule, the three year period was selected as one of four periods to provide a uniform system for retention

of all NRC required records. While it is not ideal for all situations, it is a reasonable period which generally satisfies NRC's record needs and conforms to OMB guidelines while not imposing any undue burden on licensees. The Commission believes that any added burden on licensees by an increase, such as from two to three years, is slight and is balanced by the benefit of a uniform system for overall records retention.

12. *Comment.* One commenter stated that the requirements in § 71.135(a) to keep QA records for three years beyond the date the licensee last engages in the activity for which the QA procedures were developed and to keep superseded portions of written procedures for three years are unnecessary and should be deleted. The commenter believes that it is sufficient to retain the QA records only for the life of the package to which they apply.

Response. The Commission disagrees with this comment. Quality assurance records, such as design, fabrication, or predetermination tests, must be retained beyond the end of the service life of the package so that they will be available for examination by the Commission in any analysis following an accident, incident, or other problem involving public health and safety.

13. *Comment.* One commenter stated that the requirement in § 70.24(a)(3) to retain the superseded portion of emergency procedures is unnecessary and should be deleted.

Response. The Commission disagrees with the comment. It is essential that, following any incident in which the use of emergency procedures may be involved, NRC be able to examine all of the facts that existed at the time of the incident, including the emergency procedures that were in effect at that time. Because it is possible, if not probable, that emergency procedures may be revised following an emergency incident based on the licensee's experience in using the procedures, it is necessary that superseded portions be retained for the minimum period, three years.

14. *Comment.* One commenter stated that the requirement in § 70.42(d) to keep copies of licenses, certificates, and other documents used to verify that a recipient of licensed material is authorized to receive it is not necessary and should be deleted.

Response. The Commission disagrees with the comment and believes that NRC needs to be able to examine these records to ensure that licensees are complying with the requirement that they verify the authorization of the persons receiving licensed radioactive material.

15. *Comment.* One commenter stated that the backfit rule, § 50.109, should apply because the recordkeeping rule adds new record retention requirements to various sections of 10 CFR Part 50.

Response. The Commission disagrees with the comment. Section 50.36 is the only section within Part 50 that has been revised to clarify recordkeeping requirements. However, all records specified in this section are currently required by other provisions contained in 10 CFR Chapter I. As stated on page 41443 of the "Federal Register Notice" for the proposed rule published October 28, 1987, the backfit rule, 10 CFR 50.109, does not apply to the records retention rule.

16. *Comment.* One commenter stated that the specific uniform record retention periods being proposed do not conform to the retention periods for the Nuclear Liability Insurance Records identified in ANI/MAELU Information Bulletion 80–1A which requires the records to be maintained for the life of the nuclear liability insurance policy plus ten years.

Response. The record retention requirements set forth in the 10 CFR Chapter I establish the minimum retention periods necessary for NRC to ensure compliance with the safety and health aspects of the nuclear environment and for the NRC to accomplish its mission to protect the public health and safety. Retention of records beyond the minimum period is at the option of the licensee. Licensees should be aware, however, that NRC's recordkeeping requirements apply only to NRC requirements for the information. Other Federal, State, or local agencies may have requirements that may apply now or in the future.

17. *Comment.* One commenter stated that the lack of clear definitions for terms such as "legible" and "authenticated" has the potential to create substantial confusion as to what records are acceptable.

Response. The following definitions of "legible" and "authenticated" apply to records retained under the NRC's regulatory authority. The term "legible" denotes that the records can be read and deciphered within a reasonable amount of time. "Authenticated" denotes that the data has been verified for completeness and accuracy by an authorized individual and that it is a true representation of the original data. This also addresses one commenter's concern about what constitutes a record capable of producing a clear copy.

18. *Comment.* One commenter stated that the requirement in 10 CFR Part 73, Appendix B, Criteria I.C., that a physical test be performed within thirty days of a physical examination was deleted in August 1987 and should not be reintroduced.

Response. The requirement to conduct a medical examination within the preceding 30 days of the physical fitness qualification was revised after publication of the proposed rule. On January 7, 1988 (53 FR 403) Criteria I.C. was revised to state that subsequent to the medical examination, physical fitness shall be demonstrated. This revision is reflected in the final rule.

19. *Comment.* One commenter stated that the requirement in § 73.70(d) to list the "reason for entry," into a vital area was deleted and should not be reintroduced.

Response. The Commission agrees with the comment. The requirement has been deleted from the final rule.

20. *Comment.* One commenter noted that § 50.49(d) contains revised wording that apparently makes this section redundant with existing § 50.49(j).

Response. The Commission disagrees that the recordkeeping requirement contained in § 50.49(d) is redundant to that contained in § 50.49(j). Section 50.49(d) requires the retention of the list of electrical equipment important to safety and information specified in paragraphs (d)(1), (2), and (3) only. Section 50.49(j) requires the retention of records to support the qualification of equipment, but reiterates that there are qualification records contained in § 50.49(d) that must be retained for the same period.

21. *Comment.* One commenter recommended that the Commission update Regulatory Guide 10.1 to clarify and simplify recordkeeping requirements. The commenter also recommended that all recordkeeping requirements be consolidated into a single location within the regulations.

Response. Regulatory Guide 10.1 is a partial listing of regulatory reporting requirements. As indicated in the Supplementary Information, NRC will publish a separate compilation of NRC regulatory reporting and recordkeeping requirements in the NUREG series. The Commission believes the publication of these compilations will preclude the need to group all recordkeeping requirements in a single location within the regulations.

22. *Comment.* One commenter questioned why the retention period for safeguards contingency plans varies depending upon whether the special nuclear material is in transit or at a fixed location and cited § 73.26(e)(3) and

§ 73.40(b) as examples of this discrepancy.

Response. The record retention periods for §§ 73.26(e)(3) and 73.40(b) differ because the individual requirements are different. Section 73.26 covers licenses to transport special nuclear material (SNM) where possession of the material occurs at discrete times and terminates when the last shipment is completed through acknowledged receipt by the receiver. On the other hand, § 73.40(b) covers licenses to hold SNM at fixed sites where possession of material is more continuous and it is more difficult to confirm that possession has ended and the license can be terminated.

Environmental Impact: Categorical Exclusion

The NRC has determined that this regulation is the type of action described in categorical exclusions 10 CFR 51.22(c)(1) and (3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final regulation.

Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This final rule has been submitted to the Office of Management and Budget for review and approval. Requirements in nineteen parts included in this rule were assigned approval numbers by the Office of Management and Budget as follows:

Part 4—3150–0053; Part 11—3150–0062; Part 25—3150–0046; Part 30—3150–0017; Part 31—3150–0016; Part 32—3150–0001; Part 34—3150–0007; Part 35—3150–0010; Part 40—3150–0020; Part 50—3150–0011; Part 60—3150–0127; Part 61—3150–0135; Part 70—3150–0009; Part 71—3150–0008; Part 73—3150–0002; Part 74—3150–0123; Part 75—3150–0055; Part 95—3150–0047; Part 110—3150–0036.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), and NRC Size Standards (50 FR 50241; December 9, 1985), the Commission hereby certifies that this rule does not have a significant economic impact upon a substantial number of small entities. The rule amends parts of the NRC regulations by specifying a period to retain each required record. The rule affects most facility and materials licensees by reducing the regulatory burden of retaining records for an unnecessarily long or indefinite period. Therefore, it is not expected to have a significant economic impact on any licensee. Comments on the expected economic impact of this rule on small entities were solicited; however, none were received.

Backfit Analysis

The Commission has determined that the backfit rule, 10 CFR 50.109, does not apply to the rule. The rule is purely administrative in nature, and therefore does not result in the "modification of or addition to systems, structures, components, or design of a facility * * * or the procedures or organization required to design, construct, or operate a facility * * *". See 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Parts 4, 11, 25, 30, 31, 32, 34, 35, 40, 50, 60, 61, 70, 71, 73, 74, 75, 95, and 110

Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Parts 4, 11, 25, 30, 31, 32, 34, 35, 40, 50, 60, 61, 70, 71, 73, 74, 75, 95, and 110.

PART 4—NONDISCRIMINATION IN FEDERALLY ASSISTED COMMISSION PROGRAMS

1. The authority citation for Part 4 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

2. A new § 4.6 is added to read as follows:

§ 4.6 Maintenance of records.

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

3. Section 4.32 is revised to read as follows:

§ 4.32 Compliance reports.

(a) Each recipient shall keep records and submit to the responsible NRC official, timely, complete, and accurate compliance reports at the times and in the form and containing the information that the responsible NRC official may determine to be necessary to enable the official to ascertain whether the recipient has complied or is complying with this subpart.

(b) In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, the other recipient shall also submit necessary compliance reports to the primary recipient to enable the primary recipient to carry out its obligations under this subpart.

(c) The primary recipient shall retain each record of information needed to complete a compliance report pursuant to paragraph (a) of this section for three years or as long as the primary recipient retains the status of primary recipient as defined in § 4.4, whichever is shorter.

4. In § 4.125, the introductory text of paragraph (d) is revised to read as follows:

§ 4.125 Preemployment inquiries.

* * * * *

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant must be collected on separate forms. The recipient shall retain each form as a record for three years from the date the applicant's employment ends, or, if not hired, from the date of application. Each form must be accorded confidentiality as a medical record, except that:

* * * * *

5. In § 4.127, the introductory text of paragraph (d) is revised to read as follows:

§ 4.127 Existing facilities.

* * * * *

(d) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop a transition plan setting forth the steps necessary to complete the changes. The plan is to be developed with the assistance of interested persons, including handicapped persons, or organizations representing handicapped persons, and the plan is to meet with the approval of the NRC. The recipient shall retain a copy of the transition plan as a record until any structural change to a facility is complete. A copy of the transition plan

is to be made available for public inspection. At a minimum, the plan is to:
* * * * *

PART 11—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO OR CONTROL OVER SPECIAL NUCLEAR MATERIAL

6. The authority citation for Part 11 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 11.9 [Amended]

7. Section 11.9 is amended by changing "two years" to "three years" in the last sentence.

8. A new § 11.10 is added under the center heading "General Provisions" to read as follows:

§ 11.10 Maintenance of records.

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawing, specification, must include all pertinent information such as stamps, initials, and signatures etc. The licensee shall maintain adequate safeguards against tampering with and loss of records.

9. In § 11.13, paragraph (b) is revised to read as follows:

§ 11.13 Special requirements for transportation.
* * * * *

(b) Each licensee who, 365 days after Commission approval of the amended security plan submitted in accordance with § 11.11(a), transports or delivers to a carrier for transport special nuclear material subject to the physical protection requirement of §§ 73.20, 73.25, 73.26, or 73.27 of this chapter shall confirm and record prior to shipment the name and special nuclear material access authorization number of all individuals identified in paragraph (a) of this section assigned to the shipment. The licensee shall retain this record for three years after the last shipment is made. However, the licensee need not confirm and record the special nuclear material access authorization number in the case of any individual for whom an application has been submitted and is pending before the NRC in accordance with paragraph (a) of this section.

PART 25—ACCESS AUTHORIZATION FOR LICENSEE PERSONNEL

10. The authority citation for Part 25 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 25.11 [Amended]

11. Section 25.11 is amended by changing "two years" to "three years" in the last sentence.

12. In § 25.13, the existing test is designated paragraph (a) and a new paragraph (b) is added and the section heading revised to read as follows:

§ 25.13 Maintenance of records.
* * * * *

(b) Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

§ 25.23 [Amended]

13. In § 25.23, the introductory text is amended by changing "one year" to "three years" in the fifth sentence.

§ 25.35 [Amended]

14. In § 25.35, the last sentence of the existing text is amended by changing "two years" to "three years."

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

15. The authority citation for Part 30 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

16. In § 30.34, paragraph (g) is revised to read as follows:

§ 30.34 Terms and conditions of licenses.
* * * * *

(g) Each licensee preparing technetium-99m radiopharmaceuticals from molybdenum-99/technetium-99m generators shall test the generator eluates for molybdenum-99 breakthrough in accordance with § 35.14(b)(4) (i) through (iv) of this chapter. The licensee shall record the results of each test and retain each record for three years after the record is made.
* * * * *

17. In § 30.51, paragraph (c) is removed, paragraph (d) is redesignated (c), and paragraphs (a), (b), and (c)(1) are revised to read as follows:

§ 30.51 Records.

(a) Each person who receives byproduct material pursuant to a license issued pursuant to the regulations in this part and Parts 31 through 35 of this chapter shall keep records showing the receipt, transfer, and disposal of the byproduct material as follows:

(1) The licensee shall retain each record of receipt of byproduct material as long as the material is possessed and for three years following transfer or disposal of the material.

(2) The licensee who transferred the material shall retain each record of transfer for three years after each transfer unless a specific requirement in another part of the regulations in this chapter dictates otherwise.

(3) The licensee who disposed of the material shall retain each record of disposal of byproduct material until the Commission terminates each license that authorizes disposal of the material.

(b) The licensee shall retain each record that is required by the regulations in this part and Parts 31 through 35 of this chapter or by license condition for the period specified by the appropriate regulation or license condition. If a retention period is not otherwise specified by regulation or license condition, the record must be retained until the Commission terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

(c)(1) Records which must be maintained pursuant to this part and Parts 31 through 35 of this chapter may be the original or a reproduced copy or microform if such reproduced copy or microform is duly authenticated by authorized personnel and the microform is capable of producing a clear and legible copy after storage for the period specified by Commission regulations. The record may also be stored in electronic media with the capability for

producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

* * * * *

PART 31—GENERAL DOMESTIC LICENSES FOR BYPRODUCT MATERIAL

18. The authority citation for Part 31 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

19. In § 31.5, paragraph (c)(4) is revised to read as follows:

§ 31.5 Certain measuring, gauging, or controlling devices.[2]

* * * * *

(c) * * *

(4) Shall maintain records showing compliance with the requirements of paragraphs (c)(2) and (c)(3) of this section. The records must show the results of tests. The records also must show the dates of performance of, and the names of persons performing, testing, installing, servicing, and removing from the installation radioactive material and its shielding or containment. The licensee shall retain these records as follows:

(i) Each record of a test for leakage or radioactive material required by paragraph (c)(2) of this section must be retained for three years after the next required leak test is performed or until the sealed source is transferred or disposed of.

(ii) Each record of a test of the on-off mechanism and indicator required by paragraph (c)(2) of this section must be retained for three years after the next required test of the on-off mechanism and indicator is performed or until the sealed source is transferred or disposed of.

(iii) Each record that is required by paragraph (c)(3) of this section must be retained for three years from the date of the recorded event or until the device is transferred or disposed of.

* * * * *

20. A new § 31.12 is added to read as follows:

§ 31.12 Maintenance of records.

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as letters, stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

PART 32—SPECIFIC DOMESTIC LICENSES TO MANUFACTURE OR TRANSFER CERTAIN ITEMS CONTAINING BYPRODUCT MATERIAL

21. The authority citation for Part 32 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

22. A new § 32.3 is added to read as follows:

§ 32.3 Maintenance of records.

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy of a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

PART 34—LICENSES FOR RADIOGRAPHY AND RADIATION SAFETY REQUIREMENTS FOR RADIOGRAPHIC OPERATIONS

23. The authority citation for Part 34 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

24. A new § 34.4 is added to read as follows:

§ 34.4 Maintenance of records.

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy of a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

§ 34.24 [Amended]

25. Section 34.24 is amended by changing "two years" to "three years" in the next to last sentence.

26. In § 34.25, paragraph (c) is revised to read as follows:

§ 34.25 Leak testing, repair, tagging, opening, modification, and replacement of sealed sources.

* * * * *

(c) The leak test must be capable of detecting the presence of 0.005 microcurie of removable contamination on the sealed source. An acceptable leak test for sealed sources in the possession of a radiography licensee would be to test at the nearest accessible point to the sealed-source storage position, or other appropriate measuring point, by a procedure to be approved pursuant to § 34.11(f). Each record of leak test results must be kept in units of microcuries [or disintegrations per minute (dpm)] and retained for inspection by the Commission for three years after it is made.

* * * * *

§ 34.26 [Amended]

27. Section 34.26 is amended by changing "two years" to "three years" in the last sentence.

28. In § 34.27, the introductory paragraph is revised to read as follows:

§ 34.27 Utilization logs.

Each licensee shall maintain current logs, which shall be kept available for three years from the date of the recorded event, for inspection by the Commission, at the address specified in

[2] Persons possessing byproduct material in devices under the general license in § 31.5 before January 15, 1975, may continue to possess, use, or transfer that material in accordance with the requirements of § 31.5 in effect on January 14, 1975.

the license, showing for each sealed source the following information:

* * * * *

29. In § 34.28, paragraph (b) is revised to read as follows:

§ 34.28 Inspection and maintenance of radiographic exposure devices, storage containers, and source changers.

* * * * *

(b) The licensee shall conduct a program for inspection and maintenance of radiographic exposure devices, storage containers, and source changers at intervals not to exceed three months or prior to the first use thereafter to ensure proper functioning of components important to safety. The licensee shall retain records of these inspections and maintenance for three years.

30. In § 34.29, paragraph (c) is revised to read as follows:

§ 34.29 Permanent radiographic installations.

* * * * *

(c) The alarm system must be tested at intervals not to exceed three months or prior to the first use thereafter of the source in the installation. The licensee shall retain records of these tests for three years.

31. In § 34.32, the introductory paragraph is revised to read as follows:

§ 34.32 Operating and emergency procedures.

The licensee shall retain a copy of current operating and emergency procedures as a record until the Commission terminates the license that authorizes the activity for which the procedures were developed and, if superseded, retain the superseded material for three years after each change. These procedures must include instructions in at least the following:

* * * * *

32. In § 34.33, paragraphs (b) and (e) are revised to read as follows:

§ 34.33 Personnel monitoring.

* * * * *

(b) Pocket dosimeters must be read and exposures recorded daily. The licensee shall retain each record of these exposures for three years after the record is made.

* * * * *

(e) Reports received from the film badge or TLD processor must be retained for inspection until the Commission terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

PART 35—MEDICAL USE OF BYPRODUCT MATERIAL

33. The authority citation for Part 35 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

34. A new § 35.5 is added to read as follows:

§ 35.5 Maintenance of records.

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

§ 35.27 [Amended]

35. Section 35.27 paragraph (c) is amended by changing "two years" to "three years."

§ 35.29 [Amended]

36. Section 35.29, paragraph (b) is amended by changing "two years" to "three years."

§ 35.50 [Amended]

37. Section 35.50, paragraph (e) introductory text is amended by changing "two years" to "three years."

§ 35.51 [Amended]

38. Section 35.51, paragraph (d) introductory text is amended by changing "two years" to "three years."

§ 35.53 [Amended]

39. Section 35.53, paragraph (c) introductory text is amended by changing "two years" to "three years."

§ 35.59 [Amended]

40. Section 35.59, paragraph (i) is amended by changing "two years" to "three years."

§ 35.70 [Amended]

41. Section 35.70, paragraph (h) is amended by changing "two years" to "three years."

§ 35.80 [Amended]

42. Section 35.80, paragraph (f) is amended by changing "two years" to "three years."

§ 35.92 [Amended]

43. Section 35.92, paragraph (b) is amended by changing "two years" to "three years."

§ 35.204 [Amended]

44. Section 35.204, paragraph (c) is amended by changing "two years" to "three years."

§ 35.310 [Amended]

45. Section 35.310, paragraph (b) is amended by changing "two years" to "three years."

§ 35.315 [Amended]

46. Section 35.315, paragraph (a)(4) is amended by changing "two years" to "three years."

§ 35.404 [Amended]

47. Section 35.404, paragraph (b) is amended by changing "two years" to "three years."

§ 35.406 [Amended]

48. Section 35.406, paragraph (d) is amended by changing "two years" to "three years."

§ 35.410 [Amended]

49. Section 35.410, paragraph (b) is amended by changing "two years" to "three years."

§ 35.415 [Amended]

50. Section 35.415, paragraph (a)(4) is amended by changing "two years" to "three years."

§ 35.610 [Amended]

51. Section 35.610, paragraph (c) is amended by changing "two years" to "three years."

§ 35.615 [Amended]

52. Section 35.615, paragraph (d)(4) is amended by changing "two years" to "three years."

§ 35.634 [Amended]

53. Section 35.634, paragraph (c) is amended by changing "two years" to "three years."

54. Section 35.634, paragraph (f) is amended by changing "two years" to "three years."

§ 35.636 [Amended]

55. Section 35.636, paragraph (c) is amended by changing "two years" to "three years."

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

56. The authority citation for Part 40 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

57. In § 40.26, paragraph (c)(2) is revised to read as follows:

§ 40.26 General license for possession and storage of byproduct material as defined in this part.

* * * * *

(c) * * *

(2) The documentation of daily inspections of tailings or waste retention systems and the immediate notification of the appropriate NRC regional office as indicated in Appendix D to 10 CFR Part 20 of this chapter, or the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, of any failure in a tailings or waste retention system that results in a release of tailings or waste into unrestricted areas, or of any unusual conditions (conditions not contemplated in the design of the retention system) that if not corrected could lead to failure of the system and result in a release of tailings or waste into unrestricted areas; and any additional requirements the Commission may by order deem necessary. The licensee shall retain this documentation of each daily inspection as a record for three years after each inspection is documented.

* * * * *

58. In § 40.35, paragraph (e)(3) is revised to read as follows:

§ 40.35 Conditions of specific licenses issued pursuant to § 40.34.

* * * * *

(e) * * *

(3) Keep records showing the name, address, and a point of contact for each general license to whom he or she transfers depleted uranium in industrial products or devices for use pursuant to the general license provided in § 40.25 or equivalent regulations of an Agreement State. The records must be retained for three years from the date of transfer and must show the date of each transfer, the quantity of depleted uranium in each product or device transferred, and compliance with the report requirements of this section.

59. In § 40.61, paragraph (c) is removed, paragraph (d) is redesignated (c), and paragraphs (a), (b), and (c)(1) are revised to read as follows:

Records, Reports, and Inspections

§ 40.61 Records.

(a) Each person who receives source or byproduct material pursuant to a license issued pursuant to the regulations in this part shall keep records showing the receipt, transfer, and disposal of this source or byproduct material as follows:

(1) The licensee shall retain each record of receipt of source or byproduct material as long as the material is possessed and for three years following transfer or disposition of the source or byproduct material.

(2) The licensee who transferred the material shall retain each record of transfer or source or byproduct material until the Commission terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

(3) The licensee shall retain each record of disposal of source or byproduct material until the Commission terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

(4) If source or byproduct material is combined or mixed with other licensed material and subsequently treated in a manner that makes direct correlation of a receipt record with a transfer, export, or disposition record impossible, the licensee may use evaluative techniques (such as first-in-first-out), to make the records that are required by this Part account for 100 percent of the material received.

(b) The licensee shall retain each record that is required by the regulations in this part or by license condition for the period specified by the appropriate regulation or license condition. If a retention period is not otherwise specified by regulation or license condition, each record must be maintained until the Commission terminates the license that authorizes the activity that is subject to the recordkeeping requirement.

(c)(1) Records which must be maintained pursuant to this part may be the original or reproduced copy or microform if the reproduced copy or microform is duly authenticated by authorized personnel and the microform is capable of producing a clear and legible copy after storage for the period specified by Commission regulations. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

* * * * *

60. In Appendix A to Part 40, I. Technical Criteria, the second paragraph of Criterion 8 and Criterion 8A are revised to read as follows:

Appendix A [Amended]

I. Technical Criteria

* * * * *

Criterion 8 * * *

Checks must be made and logged hourly of all parameters (e.g., differential pressures and scrubber water flow rates) that determine the efficiency of yellowcake stack emission control equipment operation. The licensee shall retain each log as a record for three years after the last entry in the log is made. It must be determined whether or not conditions are within a range prescribed to ensure that the equipment is operating consistently near peak efficiency; corrective action must be taken when performance is outside of prescribed ranges. Effluent control devices must be operative at all times during drying and packaging operations and whenever air is exhausting from the yellowcake stack. Drying and packaging operations must terminate when controls are inoperative. When checks indicate the equipment is not operating within the range prescribed for peak efficiency, actions must be taken to restore parameters to the prescribed range. When this cannot be done without shutdown and repairs, drying and packaging operations must cease as soon as practicable. Operations may not be restarted after cessation due to off-normal performance until needed corrective actions have been identified and implemented. All these cessations, corrective actions, and restarts must be reported to the appropriate NRC regional office as indicated in Criterion 8A, in writing, within ten days of the subsequent restart. * * *

* * * * *

Criterion 8A—Daily inspections of tailings or waste retention systems must be conducted by a qualified engineer or scientist and documented. The licensee shall retain the documentation for each daily inspection as a record for three years after the documentation is made. The appropriate NRC regional office as indicated in Appendix D to 10 CFR Part 20 of this chapter, or the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, must be immediately notified of any failure in a tailings or waste retention system that results in a release of tailings or waste into unrestricted areas, or of any unusual conditions (conditions not contemplated in the design of the retention system) that is not corrected could indicate the potential or lead to failure of the system and result in a

release of tailings or waste into unrestricted areas.

* * * * *

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

61. The authority citation for Part 50 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

62. In § 50.36, the introductory text of paragraph (c) and paragraphs (c) (1), and (c)(2), and (c)(7) are revised to read as follows:

§ 50.36 Technical specifications.

* * * * *

(c) Technical specifications will include items in the following categories:

(1) *Safety limits, limiting safety system settings, and limiting control settings.* (i)(A) Safety limits for nuclear reactors are limits upon important process variables that are found to be necessary to reasonably protect the integrity of certain of the physical barriers that guard against the uncontrolled release of radioactivity. If any safety limit is exceeded, the reactor must be shut down. The licensee shall notify the Commission, review the matter, and record the results of the review, including the cause of the condition and the basis for corrective action taken to preclude recurrence. Operation must not be resumed until authorized by the Commission. The licensee shall retain the record of the results of each review until the Commission terminates the license for the reactor, except for nuclear power reactors licensed under § 50.21(b) or § 50.22 of this part. For these reactors, the licensee shall notify the Commission as required by § 50.72 and submit a Licensee Event Report to the Commission as required by § 50.73. Licensees in these cases shall retain the records of the review for a period of three years following issuance of a Licensee Event Report.

(B) Safety limits for fuel reprocessing plants are those bounds within which the process variables must be maintained for adequate control of the operation and that must not be exceeded in order to protect the integrity of the physical system that is designed to guard against the uncontrolled release or radioactivity. If any safety limit for a fuel reprocessing plant is exceeded, corrective action must be taken as stated in the technical specification or the affected part of the process, or the entire process if required, must be shut down, unless this action would further reduce the margin of safety. The licensee shall notify the Commission, review the matter, and record the results of the review, including the cause of the condition and the basis for corrective action taken to preclude recurrence. If a portion of the process or the entire process has been shutdown, operation must not be resumed until authorized by the Commission. The licensee shall retain the record of the results of each review until the Commission terminates the license for the plant.

(ii)(A) Limiting safety system settings for nuclear reactors are settings for automatic protective devices related to those variables having significant safety functions. Where a limiting safety system setting is specified for a variable on which a safety limit has been placed, the setting must be so chosen that automatic protective action will correct the abnormal situation before a safety limit is exceeded. If, during operation, it is determined that the automatic safety system does not function as required, the licensee shall take appropriate action, which may include shutting down the reactor. The licensee shall notify the Commission, review the matter, and record the results of the review, including the cause of the condition and the basis for corrective action taken to preclude recurrence. The licensee shall retain the record of the results of each review until the Commission terminates the license for the reactor except for nuclear power reactors licensed under § 50.21(b) or § 50.22 of this part. For these reactors, the licensee shall notify the Commission as required by § 50.72 and submit a Licensee Event Report to the Commission as required by § 50.73. Licensees in these cases shall retain the records of the review for a period of three years following issuance of a Licensee Event Report.

(B) Limiting control settings for fuel reprocessing plants are settings for automatic alarm or protective devices related to those variables having significant safety functions. Where a limiting control setting is specified for a variable on which a safety limit has been placed, the setting must be so chosen that protective action, either automatic or manual, will correct the abnormal situation before a safety limit is exceeded. If, during operation, the automatic alarm or protective devices do not function as required, the licensee shall take appropriate action to maintain the variables within the limiting control-setting values and to repair promptly the automatic devices or to shut down the affected part of the process and, if required, to shut down the entire process for repair of automatic devices. The licensee shall notify the Commission, review the matter, and record the results of the review, including the cause of the condition and the basis for corrective action taken to preclude recurrence. The licensee shall retain the record of the results of each review until the Commission terminates the license for the plant.

(2) *Limiting conditions for operation.* Limiting conditions for operation are the lowest functional capability or performance levels of equipment required for safe operation of the facility. When a limiting condition for operation of a nuclear reactor is not met, the licensee shall shut down the reactor or follow any remedial action permitted by the technical specifications until the condition can be met. When a limiting condition for operation of any process step in the system of a fuel reprocessing plant is not met, the licensee shall shut down that part of the operation or follow any remedial action permitted by the technical specifications until the condition can be met. In the case of a nuclear reactor not licensed under § 50.21(b) or § 50.22 of this part or fuel reprocessing plant, the licensee shall notify the Commission, review the matter, and record the results of the review, including the cause of the condition and the basis for corrective action taken to preclude recurrence. The licensee shall retain the record of the results of each review until the Commission terminates the license for the nuclear reactor or the fuel reprocessing plant. In the case of nuclear power reactors licensed under § 50.21(b) or § 50.22, the licensee shall notify the Commission if required by § 50.72 and shall submit a Licensee Event Report to the Commission as required by § 50.73. In this case, licensees shall retain records associated with preparation of a Licensee Event Report for a period of three years following issuance of the report. For events which do not require a Licensee Event Report, the licensee shall retain each record as required by the technical specifications.

* * * * *

(7) *Written Reports.* Licensees for nuclear power reactors licensed under §50.21(b) and § 50.22 of this part shall submit written reports to the Commission in accordance with § 50.73 of this part for events described in paragraphs (c)(1) and (c)(2) of this section. For all licensees, the

Commission may require Special Reports as appropriate.

* * * * *

63. In § 50.36a, paragraph (a)(1) is revised to read as follows:

§ 50.36a Technical specifications on effluents from nuclear power reactors.

(a) * * *

(1) That operating procedures developed pursuant to § 50.34a(c) for the control of effluents be established and followed and that equipment installed in the radioactive waste system, pursuant to § 50.34(a), be maintained and used. The licensee shall retain the operating procedures in effect as a record until the Commission terminates the reactor license and shall retain each superseded revision of the procedures for three years from the date it was superseded.

* * * * *

64. In § 50.48, paragraph (a) is revised to read as follows:

§ 50.48 Fire protection.

(a) Each operating nuclear power plant must have a fire protection plan that satisfies Criterion 3 of Appendix A of this part. This fire protection plan must describe the overall fire protection program for the facility, identify the various positions within the licensee's organization that are responsible for the program, state the authorities that are delegated to each of these positions to implement those responsibilities, and outline the plans for fire protection, fire detection and suppression capability, and limitation of fire damage. The plan must also describe specific features necessary to implement the program described above, such as administrative controls and personnel requirements for fire prevention and manual fire suppression activities, automatic and manually operated fire detection and suppression systems, and the means to limit fire damage to structures, systems, or components important to safety so that the capability to safely shut down the plant is ensured.[3] The licensee shall retain the fire protection plan and each change to the plan as a record until the Commission terminates the reactor license and shall retain each superseded revision of the procedures for three years from the date it was superseded.

* * * * *

65. In § 50.49, the introductory text of paragraph (d) is revised to read as follows:

§ 50.49 Environmental qualification of electric equipment important to safety for nuclear power plants.

* * * * *

(d) The applicant or licensee shall prepare a list of electric equipment important to safety covered by this section. In addition, the applicant or licensee shall include the information in paragraphs (d)(1), (2), and (3) of this section for this electric equipment important to safety in a qualification file. The applicant or licensee shall keep the list and information in the file current and retain the file in auditable form for the entire period during which the covered item is installed in the nuclear power plant or is stored for future use to permit verification that each item of electric equipment is important to safety meets the requirements of paragraph (j) of this section.

* * * * *

66. In § 50.54, the introductory text of paragraph (p)(2) and paragraph (q) are revised to read as follows:

§ 50.54 Conditions of licenses.

* * * * *

(p) * * *

(2) The licensee may make changes to the plans referenced in paragraph (p)(1) without prior Commission approval if the changes do not decrease the safeguards effectiveness of the plan. The licensee shall maintain records of changes to the plans made without prior Commission approval for a period of three years from the date of the change, and shall submit, as specified in § 50.4, a report containing a description of each change within two months after the change is made. Prior to the safeguards contingency plan being put into effect, the licensee shall have:

* * * * *

(q) A licensee authorized to possess and operate a nuclear power reactor shall follow and maintain in effect emergency plans which meet the standards in § 50.47(b) and the requirements in Appendix E of this part. A licensee authorized to possess and/or operate a research reactor or a fuel facility shall follow and maintain in effect emergency plans which meet the requirements in Appendix E to this part. The licensee shall retain the emergency plan and each change that decreases the effectiveness of the plan as a record until the Commission terminates the license for the nuclear power reactor. The nuclear power reactor licensee may make changes to these plans without Commission approval only if the changes do not decrease the effectiveness of the plans and the plans, as changed, continue to meet the standards of § 50.47(b) and the requirements of Appendix E to this part. The research reactor and/or the fuel facility licensee may make changes to these plans without Commission approval only if these changes do not decrease the effectiveness of the plans and the plans, as changed, continue to meet the requirements of Appendix E to this part. This nuclear power reactor, research reactor, or fuel facility licensee shall retain a record of each change to the emergency plan made without prior Commission approval for a period of three years from the date of the change. Proposed changes that decrease the effectiveness of the approved emergency plans may not be implemented without application to and approval by the Commission. The licensee shall submit, as specified in § 50.4, a report of each proposed change for approval. If a change is made without approval, the licensee shall submit, as specified in § 50.4, a report of each change within 30 days after the change is made.

* * * * *

67. In § 50.71, paragraph (c) and (d)(1) are revised, and a new (e)(6) is added to read as follows:

§ 50.71 Maintenance of records, making of reports.

* * * * *

(c) Records that are required by the regulations in this part, by license condition, or by technical specifications, must be retained for the period specified by the appropriate regulation, license condition, or technical specification. If a retention period is not otherwise specified, these records must be retained until the Commission terminates the facility license.

(d)(1) Records which must be maintained pursuant to this part may be the original or a reproduced copy or microform if such reproduced copy or microform is duly authenticated by authorized personnel and the microform is capable of producing a clear and legible copy after storage for the period specified by Commission regulations. The record may also be stored in electronic media with the capability of producing legible, accurate, and

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[3] Basic fire protection guidance for nuclear power plants is contained in two NRC documents:

- Branch Technical Position Auxiliary Power Conversion System Branch BTP APCSB 9.5-1, "Guidelines for Fire Protection for Nuclear Power Plants," for new plants docketed after July 1, 1976, dated May 1976.
- Appendix A to BTP APCSB 9.5-1, "Guidelines for Fire Protection for Nuclear Power Plants Docketed Prior to July 1, 1976," for plants that were operating or under various stages of design or construction before July 1, 1976, dated August 23, 1976.

Also see Note 4

complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

* * * * *

(e) * * *

(6) The updated FSAR shall be retained by the licensee until the Commission terminates their license.

68. In Appendix R to Part 50, Section III, Specific Requirements, paragraph I.3.d. is revised to read as follows:

Appendix R—Fire Protection Program For Nuclear Power Facilities Operating Prior to January 1, 1979

* * * * *

III. * * *

I. * * *

3. * * *

(d) At 3-year intervals, a randomly selected unannounced drill must be critiqued by qualified individuals independent of the licensee's staff. A copy of the written report from these individuals must be available for NRC review and shall be retained as a record as specified in § III.I.4 of this appendix.

* * * * *

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

69. The authority citation for Part 60 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

70. Section 60.4 is revised to read as follows:

§ 60.4 Communications and records.

(a) Except where otherwise specified, all communications and reports concerning the regulations in this part and applications filed under them should be addressed to the Director of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Communications reports, and applications may be delivered in person at the Commission's offices at 1717 H Street NW., Washington DC, or 11555 Rockville Pike, Rockville, Maryland.

(b) Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

71. In § 60.71, the section heading and paragraph (b) are revised to read as follows:

§ 60.71 Records and reports.

* * * * *

(b) Records of the receipt, handling, and disposition of radioactive waste at a geologic repository operations area shall contain sufficient information to provide a complete history of the movement of the waste from the shipper through all phases of storage and disposal. DOE shall retain these records in a manner that ensures their useability for future generations in accordance with § 60.51(a)(2).

72. In § 60.72, paragraph (a) is revised to read as follows:

§ 60.72 Construction records.

(a) DOE shall maintain records of construction of the geologic repository operations area in a manner that ensures their useability for future generations in accordance with § 60.51(a)(2).

* * * * *

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

73. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

74. In § 61.80 of Subpart G paragraphs (c), (e) and (f) are revised to read as follows:

Subpart G—Records, Reports, Tests, and Inspections

§ 61.80 Maintenance of records, reports, and transfers.

* * * * *

(c) Records which must be maintained pursuant to this part may be the original or a reproduced copy or a microform if this reproduced copy or microform is capable of producing copy that is clear and legible at the end of the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

* * * * *

(e) Notwithstanding paragraphs (a) through (d) of this section, the licensee shall record the location and the quantity of radioactive wastes contained in the disposal site and transfer these records upon license termination to the chief executive of the nearest municipality, the chief executive of the county in which the facility is located, the county zoning board or land development and planning agency, the State governor and other State, local, and Federal governmental agencies as designated by the Commission at the time of license termination.

(f) Following receipt and acceptance of a shipment of radioactive waste, the licensee shall record the date of disposal of the waste, the location in the disposal site, the condition of the waste packages as received, any discrepancies between materials listed on the manifest and those received, and any evidence of leaking or damaged packages or radiation or contamination levels in excess of limits specified in Department of Transportation and Commission regulations. The licensee shall briefly describe any repackaging operations of any of the waste packages included in the shipment, plus any other information required by the Commission as a license condition. The licensee shall retain these records until the Commission transfers or terminates the license that authorizes the activities described in this section.

* * * * *

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

75. The authority citation for Part 70 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

76. In § 70.22, paragraph (g), (h), (i), (j), and (k) are revised to read as follows:

§ 70.22 Contents of applications.

* * * * *

(g)(1) Each application for a license that would authorize the transport or delivery to a carrier for transport of special nuclear material in an amount specified in § 73.1(b)(2) of this chapter must include (i) a description of the plan for physical protection of special nuclear material in transit in accordance with §§ 73.20, 73.25, 73.26, 73.27, and

73.67(a), (e), and (g) for 10 kg or more of special nuclear material of low strategic significance, and § 73.70(g) of this chapter including, as appropriate, a plan for the selection, qualification, and training of armed escorts, or the specification and design of a specially designed truck or trailer, and (ii) a licensee safeguards contingency plan or response procedures, as appropriate, for dealing with threats, thefts, and radiological sabotage relating to the special nuclear material in transit.

(2) Each application for such a license involving formula quantities of strategic special nuclear material must include the first four categories of information contained in the applicant's safeguards contingency plan. (The first four categories of information, as set forth in Appendix C to Part 73 of this chapter, are Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix. The fifth category of information, Procedures, does not have to be submitted for approval.)

(3) The licensee shall retain this discription of the plan for physical protection of special nuclear material in transit and the safeguards contingency plan or safeguards response procedures and each change to the plan or procedures as a record for a period of three years following the date on which the licensee last possessed the appropriate type and quantity of special nuclear material requiring this record under each license.

(h)(1) Each application for a license to possess or use at any site or contiguous sites subject to control by the licensee uranium-235 (contained in uranium enriched to 20 percent or more in the uranium-235 isotope), uranium-233, or plutonium alone or in any combination in a quantity of 5,000 grams or more computed by the formula, grams = (grams contained U–235) + 2.5 (grams U–233 + grams plutonium), other than a license for possession or use of this material in the operation of a nuclear reactor licensed pursuant to Part 50 of this chapter, must include a physical security plan, consisting of two parts. Part I must address vital equipment, vital areas, and isolation zones, and must demonstrate how the applicant plans to meet the requirements of §§ 73.20, 73.40, 73.45, 73.46, 73.50, 73.60, 73.70, and 73.71 of this chapter in the conduct of the activity to be licensed, including the identification and description of jobs as required by § 11.11(a) of this chapter. Part II must list tests, inspections, and other means to demonstrate compliance with such requirements.

(2) The licensee shall retain a copy of this physical security plan and each change to the plan as a record for a period of three years following the date on which the licensee last possessed the appropriate type and quantity of special nuclear material requiring this record under each license.

(i) Each application for a license to possess and use special nuclear material for processing and fuel fabrication, scrap recovery, or conversion of uranium hexafluoride must contain, in addition to the other information required by this section, plans for coping with emergencies.[3] The licensee shall retain a copy of these plans for coping with emergencies as records until the Commission terminates each license obtained by this application or any application for renewal of a license, and each change to the plan for three years after the date of change.

(j)(1) Each application for a license to possess or use at any site or contiguous sites subject to control by the licensee uranium-235 (contained in uranium enriched to 20 percent or more in the uranium-235 isotope), uranium-233, or plutonium alone or in any combination in a quantity of 5,000 grams or more computed by the formula, grams = (grams contained U–235) + 2.5 (grams U–233 + grams plutonium) other than a license for possession or use of this material in the operation of a nuclear reactor licensed pursuant to Part 50 of this chapter, must include a licensee safeguards contingency plan for dealing with threats, thefts, and radiological sabotage, as defined in Part 73 of this chapter, relating to nuclear facilities licensed under Part 50 of this chapter or to the possession of special nuclear material licensed under this part.

(2) Each application for such a license must include the first four categories of information contained in the applicant's safeguards contingency plan. (The first four categories of information, as set forth in Appendix C to Part 73 of this chapter, are Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix.) The fifth category of information, Procedures, does not have to be submitted for approval.

(3) The licensee shall retain a copy of this safeguards contingency plan as a record until the Commission terminates each license obtained by this application or any application for renewal of a license and retain each change to the plan as a record for three years after the date of the change.

(k) Each application for a license to possess or use at any site or contiguous sites subject to control by the licensee special nuclear material of moderate strategic significance or 10 kg or more of special nuclear material of low strategic significance as defined under § 73.2 (x) and (y) of this chapter, other than a license for possession or use of this material in the operation of a nuclear power reactor licensed pursuant to Part 50 of this chapter, must include a physical security plan that demonstrates how the applicant plans to meet the requirements of § 73.67(d), (e), (f), and (g), as appropriate, of this chapter. The licensee shall retain a copy of this physical security plan as a record for the period during which the licensee possesses the appropriate type and quantity of special nuclear material requiring this record under each license and each change to the plan for three years after the change.

* * * * *

77. In § 70.24, paragraph (a)(3) is revised to read as follows:

§ 70.24 Criticality accident requirements.

(a) * * *

(3) The licensee shall maintain emergency procedures for each area in which this licensed special nuclear material is handled, used, or stored to ensure that all personnel withdraw to an area of safety upon the sounding of the alarm. These procedures must include the conduct of drills to familiarize personnel with the evacuation plan, and designation of responsible individuals for determining the cause of the alarm, and placement of radiation survey instruments in accessible locations for use in such an emergency. The licensee shall retain a copy of current procedures for each area as a record for as long as licensed special nuclear material is handled, used, or stored in the area. The licensee shall retain any superseded portion of the procedures for three years after the portion is superseded.

* * * * *

78. In § 70.32, the introductory text of paragraph (c)(2) and paragraphs (d), (e), and (g) are revised to read as follows:

§ 70.32 Conditions of licenses.

* * * * *

(c) * * *

(2) The licensee shall maintain records of changes to the material control and accounting program made without prior Commission approval, for three years after they are superseded, and shall furnish to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, with a copy to the appropriate NRC Regional Office shown in Appendix A to

[3] Emergency plans shall contain the elements that are listed in Section IV, "Content of Emergency Plans," of Appendix E to Part 50 of this chapter.

Part 73 of this chapter, a report containing a description of each change within:

* * * * *

(d) The licensee shall make no change which would decrease the effectiveness of the plan for physical protection of special nuclear material in transit prepared pursuant to § 70.22(g) or § 73.20(c) of this chapter without the prior approval of the Commission. A licensee desiring to make such changes shall submit an application for a change in the technical specifications incorporated in his or her license, if any, or for an amendment to the license pursuant to § 50.90 or §70.34 of this chapter, as appropriate. The licensee may make changes to the plan for physical protection of special nuclear material without prior Commission approval if these changes do not decrease the effectiveness of the plan. The licensee shall retain a copy of the plan as a record for the period during which the licensee possesses a formula quantity of special nuclear material requiring this record under each license and each change to the plan for three years from the effective date of the change. A report containing a description of each change must be furnished the Director of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, with a copy to the appropriate NRC Regional Office shown in Appendix A to Part 73 of this chapter within two months after the change.

(e) The licensee shall make no change which would decrease the effectiveness of a security plan prepared pursuant to §§ 70.22(h), 70.22(k), or 73.20(c) without the prior approval of the Commission. A licensee desiring to make such a change shall submit an application for an amendment to its license pursuant to § 70.34. The licensee shall maintain records of changes to the plan made without prior Commission approval, for three years from the effective date of the change, and shall furnish to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, with a copy to the appropriate NRC Regional Office shown in Appendix A to Part 73 of this chapter, a report containing a description of each change within two months after the change is made.

* * * * *

(g) The licensee shall prepare and maintain safeguards contingency plan procedures in accordance with Appendix C to Part 73 of this chapter for effecting the actions and decisions contained in the Responsibility Matrix of its safeguard contingency plan. The licensee shall retain a copy of the safeguards contingency plan procedures as a record for the period during which the licensee possesses the appropriate type and quantity of special nuclear material requiring this record under each license for which the procedures were developed and each change to the plan for three years from the effective date of the change. The licensee shall make no change that would decrease the safeguards effectiveness of the first four categories of information (Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix) contained in any licensee safeguards contingency plan prepared pursuant to §§ 70.22(g), 70.22(j), 73.30(g), or 73.40 of this chapter without the prior approval of the Commission. A licensee desiring to make such a change shall submit an application for an amendment to its license pursuant to § 70.34. The licensee may make changes to the licensee safeguards contingency plan without prior Commission approval if the changes do not decrease the safeguards effectiveness of the plan. The licensee shall maintain each change to the plan made without prior approval as a record during the period for which possession of a formula quantity of special nuclear material is authorized under a license and retain the superseded material for three years from the effective date of the change and shall furnish a report containing a description of each change within 60 days after the change is made to the Regional Administrator of the appropriate NRC Regional Office specified in Appendix A to Part 73 of this chapter, with a copy to the Director of Nuclear Material Safety and Safeguards.

* * * * *

79. In § 70.42, paragraphs (d)(1), (2), (3), (4), and (5) are revised to read as follows:

§ 70.42 Transfer of special nuclear material.

* * * * *

(d) * * *

(1) The transferor may have in his or her possession, and read, a current copy of the transferee's specific license or registration certificate. The transferor shall retain a copy of each license or certificate for three years from the date that is was obtained.

(2) The transferor may have in its possession a written certification by the transferee that the transferee is authorized by license or registration certificate to receive the type, form, and quantity of special nuclear material to be transferred, specifying the license or registration certificate number, issuing agency, and expiration date. The transferor shall retain the written certification as a record for three years from the date of receipt of the certification;

(3) For emergency shipments the transferor may accept oral certification by the transferee that he or she is authorized by license or registration certification to receive the type, form, and quantity of special nuclear material to be transferred, specifying the license or registration certificate number, issuing agency, and expiration date, provided that the oral certification is confirmed in writing within ten days. The transferor shall retain the written confirmation of the oral certification for three years from the date of receipt of the confirmation;

(4) The transferor may obtain other sources of information compiled by a reporting service from official records of the Commission or the licensing agency of an Agreement State as to the identity of licensees and the scope and expiration dates of licenses and registrations. The transferor shall retain the compilation of information as a record for three years from the date that it was obtained; or

(5) When none of the methods of verification described in paragraphs (d)(1) to (4) of this section are readily available or when a transferor desires to verify that information received by one of these methods is correct or up-to-date, the transferor may obtain and record confirmation from the Commission or the licensing agency of an Agreement State that the transferee is licensed to receive the special nuclear material. The transferor shall retain the record of confirmation for three years from the date the record is made.

80. In §70.51, the paragraphs (b)(2), (3), (5), and (6), (c), the introductory text of (e)(1), (f)(2)(v), and (i)(1) are revised to read as follows:

§ 70.51 Material balance, inventory, and records requirements.

* * * * *

(b) * * *

(2) Each record that is required by the regulations in this part or by license condition must be maintained and retained for the period specified by the appropriate regulation or license condition. If a retention period is not otherwise specified by regulation or license condition, the licensee shall retain the record until the Commission terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

(3) Each record of receipt, acquisition, or physical inventory of special nuclear material that must be maintained pursuant to paragraph (b)(1) of this section must be retained as long as the licensee retains possession of the material and for three years following transfer of such material.

* * * * *

(5) Each record of transfer of special nuclear material to other persons must be retained by the licensee who transferred the material until the Commission terminates the license authorizing the licensee's possession of the material. Each record required by paragraph (e)(1)(v) of this section must be retained for three years after it is made.

(6) Each record of disposal of special nuclear material must be retained until the Commission terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

(c) Each licensee who is authorized to possess at any one time special nuclear material in a quantity exceeding one effective kilogram of special nuclear material shall establish, maintain, and follow written material control and accounting procedures that are sufficient to enable the licensee to account for the special nuclear material in the licensee's possession under license. The licensee shall retain these procedures until the Commission terminates the license that authorizes possession of the material and retain any superseded portion of the procedures for three years after the portion is superseded.

* * * * *

(e) * * *

(1) Maintain procedures that include items listed in paragraphs (e)(1)(i), (ii), (iii), (iv), (v), (vi), and (vii) of this section and retain each record required in these paragraphs for three years after the record is made.

* * * * *

(f) * * *

(2) * * *

(v) Documentation in compliance with the requirements of paragraphs (f)(2)(i), (ii), (iii), and (iv) of this section. Each record documenting compliance with these requirements must be retained for three years after it is made.

* * * * *

(i)(1) Records which must be maintained pursuant to this part may be the original or a reproduced copy or microform if such reproduced copy or microform is duly authenticated by authorized personnel and the microform is capable of producing a clear and legible copy after storage for the period specified by Commission regulations. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

* * * * *

81. In § 70.57, the introductory text of paragraph (b) and paragraphs (b)(2), (3), (4), (6), (7), the introductory text of (8), (11), and (12) are revised to read as follows:

§ 70.57 Measurement control program for special nuclear materials control and accounting.

* * * * *

(b) In accordance with § 70.58(f), each licensee who is authorized to possess at any one time and location strategic special nuclear material, or special nuclear material of moderate strategic significance, in a quantity exceeding one effective kilogram and to use such special nuclear material for activities other than those involved in the operation of a nuclear reactor licensed pursuant to Part 50 of this chapter, those involved in a waste disposal operation, or as sealed sources, shall establish and maintain a measurement control program for special nuclear materials control and accounting measurements. Each program function must be identified and assigned in the licensee organization in accordance with § 70.58(b)(2), and functional organizational relationships must be set forth in writing in accordance with § 70.58(b)(3). The program must be described in a manual which contains the procedures, instructions, and forms prepared to meet the requirements of this paragraph, including procedures for the preparation, review, approval, and prompt dissemination of any program modifications or changes. The licensee shall retain the current program as a record until the Commission terminates the license authorizing possession of the nuclear materials. The licensee's program shall include the following:

* * * * *

(2) Provisions must be made for management reviews to determine the adequacy of the program and to assess the applicability of current procedures and for planned audits to verify conformance with all aspects of the program. These reviews and audits must be performed at intervals not to exceed 12 months. Audits and reviews must be performed by trained individuals independent of direct responsibility for the receipt, custody, utilization, measurement, measurement quality, and shipment of special nuclear material. The results of reviews and audits must be recorded and reported to licensee management. The licensee shall retain each record of a review or an audit for three years after the record is made.

(3) The licensee shall ensure that any person who contracts to perform materials control and accounting measurement services conforms with applicable requirements of paragraphs (b)(4) through (8) and (10) through (12) of this section. Conformance must include reporting by the contractor of sufficient error data to allow the licensee to calculate bias corrections and measurement limits of error. All statistical studies must be reported or references in the measurement report submitted to the licensee, who shall have access to the contractor's supporting control data. The licensee shall perform reviews to determine the adequacy of the contractor's program and audits to verify conformance with all aspects of the program. Reviews and audits must be performed at intervals not to exceed 12 months. The results of reviews and audits must be documented and reported to licensee management. The licensee shall retain the record of the results of the licensee review and audit of the contractor's program for three years after the record is made.

(4) In order to ensure that potential sources of sampling error are identified and that samples are representative, process and engineering tests must be performed using well characterized materials to establish or to verify the applicability of existing procedures for sampling special nuclear materials and for maintaining sample integrity during transport and storage. The licensee shall record the results of the above process and engineering tests and shall maintain those results as a record for as long as that sampling systems is in use and for three years following the last such use. The program must ensure that such procedures are maintained and followed, and that sampling is included in the procedures for estimating biases, limits for systematic errors, and random error variances.

* * * * *

(6) To ensure the adequacy of each measurement system with respect to process flows, sampling and measurement points, and nominal material compositions, engineering analyses and evaluations must be made of the design, installation, preoperational tests, calibration, and the operation of each system. These

analyses and evaluations must be repeated whenever a significant change is made in any component of a system. The licensee shall record the results of these analyses and evaluations and retain these records for three years after the life of the process or equipment.

(7) Procedures and performance criteria must be established for the training, qualifying, and periodic requalifying of all personnel who perform sampling and measurements for materials control and accounting purposes. The licensee shall retain as a record the results of personnel qualification or requalification for three years after the record is made.

(8) The program must generate current data on the performance of measuring processes, including, as appropriate, values for bias corrections and their uncertainties, random error variances, limits for systematic errors, and other parameters needed to establish the uncertainty of measurements pertaining to materials control and accounting. The program data must reflect the current process and measurement condition existing at the time the control measurements are made. The licensee shall record this data and retain this record for three years after the record is made. Measurements which are not controlled by the program may not be used for materials control or for accounting purposes. The program must include:

* * * * *

(11)(i) The licensee shall establish and maintain a statistical control system, including control charts and formal statistical procedures, designed to monitor the quality of each type of program measurement. The licensee shall retain a copy of the current statistical control system as a record until the Commission terminates each license that authorizes possession of the material that the system affects and shall retain copies of such system documents for previous inventory periods as a record for three years after they are replaced.

(ii) Control chart limits must be established to be equivalent to levels of significance of 0.05 and 0.001. Whenever control data exceed the 0.05 control limits, the licensee shall investigate the condition and take corrective action in a timely manner. The licensee shall record the results of these investigations and actions and retain each record for three years after the record is made. Whenever the control data exceed the 0.001 control limits, the measurement system that generated the data must not be used for material control and accounting purposes until the deficiency has been corrected and the system has been brought into control at the 0.05 control level.

(12) The licensee shall provide a records system in which all data, information, reports, and documents generated by the measurement control program must be retained for three years. Records must include a summary of the error data utilized in the limit of error calculations performed for each material balance period. The records system must be organized for efficient retrieval of program information. Each reported result must be readily relatable to the original measurement data and to all relevant measurement control information, including pertinent calibration data. Records must be available for NRC inspection.

* * * * *

82. In § 70.58, paragraphs (b)(3), (e), (f), (h), and (j) and the introductory text of paragraphs (i) and (k) are revised to read as follows:

§ 70.58 Fundamental nuclear material controls.

* * * * *

(b) * * *

(3) Material control and accounting functional and organizational relationships must be set forth in writing in job descriptions, organizational directives, instructions, procedure manuals, etc. This documentation must include position qualification requirements and definitions of authorities, responsibilities, and duties. Delegations of material control and accounting responsibilities and authority must be in writing. The licensee shall retain this documentation as a record until the Commission terminates each license that authorizes the activity that is subject to retention of the documentation, and if any portion of the documentation is superseded, retain the superseded material for three years after each change.

* * * * *

(e) A system must be established, maintained, and followed for the measurement of all special nuclear material received, produced, or transferred between MBAs, transferred from MBAs to ICAs, on inventory, or shipped, discarded, or otherwise removed from inventory and for the determination of the limit of error associated with each such measured quantity except for plutonium-beryllium sources; samples that have been determined by other means to contain less than 10 grams U–235, U–233, or plutonium each; and reactor-irradiated fuels involved in research, development, and evaluation programs in facilities other than irradiated-fuel reprocessing plants. The system must be described in writing and provide for sufficient measurements to substantiate the quantities of element and isotope measured and the associated limits or error. The licensee shall record the required measurements and associated limits of error and shall retain any record associated with this system for three years after the record is made.

(f) A program must be established, maintained, and followed pursuant to § 70.57(b) for the continuing determination and control of the systematic and random errors of measurement processes at a level commensurate with the requirements of § 70.51(e)(5). The licensee shall retain each completed record required by the program for three years after the record is made.

* * * * *

(h) A system of storage and internal handling controls must be established, maintained, and followed to provide current knowledge of the identity, quantity, and location of all special nuclear material contained within a plant in discrete items and containers. The licensee shall include procedures as specified in § 70.51(e)(1) and retain any record associated with the procedures for six months after the record is made;

(i) Procedures for special nuclear material scrap control must be established, maintained, and followed to limit the accumulation and the uncertainty of measurement of these materials on inventory. The licensee shall retain a copy of the current procedures as a record until the Commission terminates each license that authorizes the activity that is subject to the retention of procedures and, if any portion of the procedures is superseded, retain the superseded portion for three years after each change. Such procedures must include:

* * * * *

(j) Physical inventory procedures must be established, maintained, and followed so that special nuclear material balance and their measurement uncertainties can be determined on the basis of measurements in compliance with the material balance and inventory requirements and criteria specified in § 70.51. The licensee shall retain a copy of the current procedures as a record until the Commission terminates each license that authorizes the activity that is subject to the retention of procedures and, if any portion of the procedures is superseded, retain the superseded portion for three years after each change.

(k) A system of records and reports must be established, maintained, and followed that will provide information sufficient to locate special nuclear material and to close a measured material balance around each material balance area and the total plant, as specified in § 70.51. As required by § 70.51, the licensee shall retain the records associated with this system for three years after the records are made. This system must include:

* * * * *

PART 71—PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

83. The authority citation for Part 71 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

84. In § 71.1, the existing paragraph is designated (a), the section heading is revised, and a new paragraph (b) is added to read as follows:

§ 71.1 Communications and records.

* * * * *

(b) Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

85. Section 71.91 is revised to read as follows:

§ 71.91 Records.

(a) Each licensee shall maintain for a period of three years after shipment a record of each shipment of licensed material not exempt under § 71.10, showing, where applicable:

(1) Identification of the packaging by model number;

(2) Verification that there are no significant defects in the packaging, as shipped;

(3) Volume and identification of coolant;

(4) Type and quantity of licensed material in each package, and the total quantity of each shipment;

(5) For each item of irradiated fissile material:

(i) Identification by model number and/or serial number;

(ii) Irradiation and decay history to the extent appropriate to demonstrate that its nuclear and thermal characteristics comply with license conditions; and

(iii) Any abnormal or unusual condition relevant to radiation safety.

(6) Date of the shipment;

(7) For Fissile Class III and for Type B packages, any special controls exercised;

(8) Name and address of the transferee;

(9) Address to which the shipment was made; and

(10) Results of the determinations required by § 71.87 and by the conditions of the package approval.

(b) The licensee shall make available to the Commission for inspection, upon reasonable notice, all records required by this part. Records are valid only if stamped, initialed, or signed and dated by authorized personnel or otherwise authenticated.

(c) Each licensee shall maintain sufficient written records to furnish evidence of the quality of packaging. The records to be maintained include results of the determinations required by § 71.85; design, fabrication, and assembly records; results of reviews, inspections, tests, and audits; results monitoring work performance and materials analyses; and results of maintenance, modification, and repair activities. Inspection, test, and audit records must identify the inspector or data recorder, the type of observation, the results, the acceptability and the action taken in connection with any deficiencies noted. The records must be retained for three years after the life of the packaging to which they apply.

86. In § 71.97, paragraphs (c)(4), (e), and (f)(2) are revised to read as follows:

§ 71.97 Advance notification of shipment of nuclear waste.

* * * * *

(c) * * *

(4) The licensee shall retain a copy of the notification as a record for three years.

* * * * *

(e) *Revision notice.* A licensee who finds that schedule information previously furnished to a governor or governor's designee in accordance with this section will not be met, shall telephone a responsible individual in the office of the governor of the State or of the governor's designee and inform that individual of the extent of the delay beyond the schedule originally reported. The licensee shall maintain a record of the name of the individual contacted for three years.

(f) * * *

(2) The licensee shall state in the notice that it is a cancellation and shall identify the advance notification which is being cancelled. The licensee shall retain a copy of the notice as a record for three years.

87. In § 71.101, paragraph (b) is revised to read as follows:

Subpart H—Quality Assurance

§ 71.101 Quality assurance requirements.

* * * * *

(b) Each licensee shall establish, maintain, and execute a quality assurance program satisfying each of the applicable criteria of §§ 77.101 through 71.137 of this subpart and satisfying any specific provisions that are applicable to the licensee's activities, including procurement of packaging. The licensee shall apply each of the applicable criteria in a graded approach, i.e., to an extent that is consistent with its importance to safety.

* * * * *

88. In § 71.105, paragraph (a) is revised to read as follows:

§ 71.105 Quality assurance program.

(a) The licensee shall establish, at the earliest practicable time, consistent with the schedule for accomplishing the activities, a quality assurance program that complies with the requirements of §§ 71.101 through 71.137 of this subpart. The licensee shall document the quality assurance program by written procedures or instructions and shall carry out the program in accordance with those procedures throughout the period during which packaging is used. The licensee shall identify the material and components to be covered by the quality assurance program, the major organizations participating in the program, and the designated functions of these organizations.

* * * * *

89. Section 71.135 is revised to read as follows:

§ 71.135 Quality assurance records.

The licensee shall maintain sufficient written records to describe the activities affecting quality. The records must include the instructions, procedures, and drawings required by § 71.111 to prescribe quality assurance activities and must include closely related specifications such as required

qualifications of personnel, procedures, and equipment. The records must include the instructions or procedures which establish a records retention program that is consistent with applicable regulations and designates factors such as duration, location, and assigned responsibility. The licensee shall retain these records for three years beyond the date when the licensee last engages in the activity for which the quality assurance program was developed. If any portion of the written procedures or instructions is superseded, the licensee shall retain the superseded material for three years after it is superseded.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

90. The authority citation for Part 73 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

91. In § 73.24, paragraph (b)(1) is revised to read as follows:

§ 73.24 Prohibitions.

* * * * *

(b) * * *

(1) The licensee shall confirm and log the arrival at the final destination of each individual shipment and retain the log for three years from the date of the last entry in the log. The licensee shall also schedule shipments to ensure that the total quantity for two or more shipments in transit at the same time does not equal or exceed the formula quantity, or

* * * * *

92. In § 73.26, paragraphs (c)(1)(ii) and (2), the introductory text of paragraph (d)(3), and paragraphs (d)(4) and (e)(1) are revised to read as follows:

§ 73.26 Transportation physical protection systems, subsystems, components, and procedures.

* * * * *

(c) * * *

(1) * * *

(ii) The shipment must be protected at all times within the geographical limits of the United States as provided in this section and §§ 73.25 and 73.27. The licensee shall retain each record required by these sections for three years after the close of period for which the licensee possesses the special nuclear material under each license authorizing the licensee to ship this material, and superseded material for three years after each change.

(2) A licensee who exports a formula quantity of strategic special nuclear material shall comply with the requirements of this section and §§ 73.25 and 73.27, as applicable, up to the first point where the shipment is taken off the transport outside the United States. The licensee shall retain each record required by these sections for three years after the close of period for which the licensee possesses the special nuclear material under each license authorizing the licensee to export this material, and superseded material for three years after each change.

(d) * * *

(3) The licensee or the licensee's agent shall establish, maintain, and follow a written management system to provide for the development, revision, implementation, and enforcement of transportation physical protection procedures. The licensee or the agent shall retain as a record the current management system for three years after the close of period for which the licensee possesses the special nuclear material under the license for which the system was developed and, if any portion of the system is superseded, retain the superseded material for three years after each change. The system shall include:

* * * * *

(4) Neither the licensee nor the licensee's agent shall permit an individual to act as an escort or other security organization member unless the individual has been trained, equipped, and qualified to perform each assigned security job duty in accordance with Appendix B, of this part, "General Criteria for Security Personnel." Upon the request of an authorized representative of the Commission, the licensee or the agent shall demonstrate the ability of the physical security personnel to carry out their assigned duties and responsibilities. Armed escorts shall requalify in accordance with Appendix B to this part at least every 12 months. Each requalification must be documented. The licensee or the agent shall retain documentation of the initial qualification for the term of employment and of each requalification as a record for three years from the date of the requalification.

* * * * *

(e) *Contingency and Response Plans and Procedures.* (1) The licensee or the licensee's agent shall establish, maintain, and follow a written safeguards contingency plan for dealing with threats, thefts, and radiological sabotage related to strategic special nuclear material in transit subject to the provisions of this section. This safeguards contingency plan must be in accordance with the criteria in Appendix C of this part, "Licensee Safeguards Contingency Plan." The licensee or the agent shall retain the contingency plan as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the plan is used and superseded material for three years after each change.

* * * * *

93. In § 73.37, paragraphs (b)(2), (b)(5), and the introductory text of paragraph (b)(3) are revised to read as follows:

§ 73.37 Requirements for physical protection of irradiated reactor fuel in transit.

* * * * *

(b) * * *

(2) Include and retain a copy of current procedures for coping with circumstances that threaten deliberate damage to a spent fuel shipment and with other safeguards emergencies as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the procedures were developed and, if any portion of the procedures is superseded, retain the superseded material for three years after each change.

(3) Include instructions for each escort and retain a copy of the current instructions as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license that authorizes the activity that requires the instruction and retain any superseded material for three years after each change. The instructions must direct that, upon detection of the abnormal presence of unauthorized persons, vehicles, or vessels in the vicinity of a spent fuel shipment or upon detection of a deliberately induced situation that has the potential for damaging a spent fuel shipment, the escort will:

* * * * *

(5) Provide for maintenance of a written log by the escorts and communications center personnel for each spent fuel shipment, which will include information describing the shipment and significant events that occur during the shipment, and will be available for review by authorized NRC personnel for a period of at least three years following completion of the shipment.

* * * * *

94. In § 73.40, paragraphs (b), (c)(2), and (d) are revised to read as follows:

§ 73.40 Physical protection: General requirements at fixed sites.

* * * * *

(b) Each licensee subject to the requirements of §§ 73.20, 73.45, 73.46, 73.50, 73.55, or § 73.60 shall prepare a safeguards contingency plan in accordance with the criteria set forth in Appendix C to this part. The licensee shall retain the current plan as a record until the Commission terminates the license for which the plan was developed and, if any portion of the plan is superseded, retain the superseded material for three years after each change. The safeguards contingency plan must include plans for dealing with threats, thefts, and radiological sabotage relating to nuclear facilities licensed under Part 50 or to the possession of special nuclear material licensed under Part 70 of this chapter. Each licensee subject to the requirements of this paragraph shall submit to the Commission for approval the first four categories of information contained in the safeguards contingency plan. (The first four categories of information, as set forth in Appendix C to this part, are Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix. The fifth category of information, Procedures, does not have to be submitted for approval.) [1] The plan becomes effective and must be followed by the licensee 30 days after approval by the Commission.

(c) * * *

(2) Detailed procedures developed according to Appendix C to this part available at the licensee's site. The licensee shall retain a copy of the current procedures as a record until the Commission terminates the license for which the procedures were developed and, if any portion of the procedures is superseded, retain the superseded material for three years after each change, and

* * * * *

(d) The licensee shall provide for the implementation, revision, and maintenance of this safeguards contingency plan. To this end, the licensee shall provide for a review at least every twelve months of the safeguards contingency plan by individuals independent of both security program management and personnel who have direct responsibility for implementation of the security program. The review must include a review and audit of safeguards contingency procedures and practices, an audit of the security system testing and maintenance program, and a test of the safeguards system along with commitments established for response by local law enforcement authorities. The results of the review and audit, along with recommendations for improvements must be documented, reported to the licensee's corporate and plant management, and kept available at the plant for inspection for a period of three years from the date of the review or audit.

95. In § 73.46, paragraphs (b)(3)(i), (b)(4), (d)(3), (d)(10), (d)(13), (h)(1), and (h)(2) are revised to read as follows:

§ 73.46 Fixed site physical protection systems, subsystems, components, and procedures.

* * * * *

(b) * * *

(3) * * *

(i) Written security procedures that document the structure of the security organization and detail the duties of guards, watchmen, and other individuals responsible for security. The licensee shall retain a copy of the current procedures as a record until the Commission terminates the license for which they were developed and, if any portion of the procedures is superseded, retain the superseded material for three years after each change;

* * * * *

(4) The licensee may not permit an individual to act as a guard, watchman, armed response person, or other member of the security organization unless the individual has been trained, equipped, and qualified to perform each assigned security job duty in accordance with Appendix B to this part "General Critieria for Security Personnel." Upon the request of an authorized representative of the Commission, the licensee shall demonstrate the ability of the physical security personnel, whether licensee or contractor employees, to carry out their assigned duties and responsibilities. Each guard, watchman, armed response person, or other member of the security organization, whether a licensee or contractor employee, shall requalify in accordance with Appendix B to this part at least every 12 months. This requalification must be documented. The licensee shall retain the documentation of each requalification as a record for three years after the requalification.

* * * * *

(d) * * *

(3) The licensee shall establish and follow written procedures that will permit access control personnel to identify those vehicles that are authorized and those materials that are not authorized entry to protected, material access, and vital areas. The licensee shall retain a copy of the current procedures as a record until the Commission terminates each license for which the procedures were developed and, if any portion of the procedures is superseded, retain the superseded material for three years after each change.

* * * * *

(10) Before existing from a material access area, containers of contaminated wastes must be drum scanned and tamper sealed by at least two individuals, working and recording their findings as a team, who do not have access to material processing and storage areas. The licensee shall retain the records of these findings for three years after the record is made.

* * * * *

(13) Individuals not permitted by the licensee to enter protected areas without escort must be escorted by a watchman or other individual designated by the licensee while in a protected area and must be badged to indicate that an escort is required. In addition, the individual shall be required to register his or her name, date, time, purpose of visit and employment affiliation, citizenship, and name of the individual to be visited in a log. The licensee shall retain each log as a record for three years after the last entry is made in the log.

* * * * *

(h) * * *

(1) The licensee shall have a safeguard contingency plan for dealing with threats, thefts, and radiological sabotage related to the strategic special nuclear material and nuclear facilities subject to the provisions of this section. Safeguards contingency plans must be in accordance with the criteria in Appendix C to this part, "Licensee Safeguards Contingency Plans." Contingency plans must include, but need not be limited to, the response requirements in paragraphs (h)(2) through (h)(5) of this section. The licensee shall retain a copy of the current safeguards contingency plan as a record until the Commission terminates the license and, if any portion of the plan is superseded, retain the superseded material for three years after each change.

(2) The licensee shall establish and document response arrangements that have been made with local law enforcement authorities. The licensee shall retain documentation of the current arrangements as a record until

[1] Licensees subject to § 73.55 may modify their physical security plans to incorporate contingency plan information specified in Appendix C to this part. A physical security plan that contains all the information required in both § 73.55 and Appendix C to Part 73 satisfies the requirement for a contingency plan.

the Commission terminates each license requiring the arrangements and, if any arrangement is superseded, retain the superseded material for three years after each change.

* * * * *

96. In § 73.50, paragraphs (a)(3) and (4), (c)(5), and (g)(1) and (2) are revised to read as follows:

§ 73.50 Requirements for physical protection of licensed activities.

* * * * *

(a) * * *

(3) The licensee shall establish, maintain, and follow written security procedures that document the structure of the security organization and detail the duties of guards, watchmen, and other individuals responsible for security. The licensee shall retain a copy of the current procedures as a record until the Commission terminates each license for which the procedures were developed and, if any portion of the procedures is superseded, retain the superseded material for three years after each change.

(4) The licensee may not permit an individual to act as a guard, watchman, armed response person, or other member of the security organization unless the individual has been trained, equipped, and qualified to perform each assigned security job duty in accordance with Appendix B, "General Criteria for Security Personnel," to this part. Upon the request of an authorized representative of the Commission, the licensee shall demonstrate the ability of the physical security personnel to carry out their assigned duties and responsibilities. Each guard, watchman, armed response person, and other member of the security organization shall requalify in accordance with Appendix B to this part at least every 12 months. This requalification must be documented. The licensee shall retain the documentation of each requalification as a record for three years after the requalification.

* * * * *

(c) * * *

(5) Individuals not employed by the licensee must be escorted by a watchman, or other individual designated by the licensee, while in a protected area and must be badged to indicate that an escort is required. In addition, the licensee shall require that each individual not employed by the licensee register his or her name, date, time, purpose of visit, employment affiliation, citizenship, name and badge number of the escort, and name of the individual to be visited. The licensee shall retain the register of information for three years after the last entry is made in the register. Except for a driver of a delivery or service vehicle, an individual not employed by the licensee who requires frequent and extended access to a protected area or a vital area need not be escorted if the individual is provided with a picture badge, which the individual must receive upon entrance into the protected area and return each time he or she leaves the protected area, that indicates—

(i) Nonemployee-no escort required,

(ii) Areas to which access is authorized, and

(iii) The period for which access has been authorized.

* * * * *

(g) *Response requirement.* (1) The licensee shall have a safeguards contingency plan for dealing with threats, thefts, and radiological sabotage related to the special nuclear material and nuclear facilities subject to the provisions of this section. Safeguards contingency plans must be in accordance with the criteria in Appendix C to this part, "Licensee Safeguards Contingency Plans." The licensee shall retain a copy of the plan and each change to the plan as a record until the Commission terminates each license for which the plan was developed and retain the superseded materials for three years after each change.

(2) The licensee shall establish and document liaison with law enforcement authorities. The licensee shall retain the documentation of the current liaison as a record until the Commission terminates each license for which the liaison was developed and, if any portion of the liaison documentation is superseded, retain the superseded material for three years after each change.

* * * * *

97. In § 73.55, paragraphs (b)(1) and (3)(i) and (ii) and (4), (d)(6), and (h)(2) are revised to read as follows:

§ 73.55 Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage.

* * * * *

(b) *Physical Security Organization.* (1) The licensee shall establish a security organization, including guards, to protect his facility against radiological sabotage. If a contract guard force is utilized for site security, the licensee's written agreement with the contractor that must be retained by the licensee as a record for the duration of the contract will clearly show that:

(i) The licensee is responsible to the Commission for maintaining safeguards in accordance with Commission regulations and the licensee's security plan,

(ii) The NRC may inspect, copy, and take away copies of all reports and documents required to be kept by Commission regulations, orders, or applicable license conditions whether the reports and documents are kept by the licensee or the contractor,

(iii) The requirement in paragraph (b)(4) of this section that the licensee demonstrate the ability of physical security personnel to perform their assigned duties and responsibilities, includes demonstration of the ability of the contractor's physical security personnel to perform their assigned duties and responsibilities in carrying out the provisions of the Security Plan and these regulations, and

(iv) The contractor will not assign any personnel to the site who have not first been made aware of these responsibilities.

* * * * *

(3) * * *

(i) Written security procedures that document the structure of the security organization and detail the duties of guards, watchmen, and other individuals responsible for security. The licensee shall maintain a copy of the current procedures as a record until the Commission terminates each license for which the procedures were developed and, if any portion of the procedure is superseded, retain the superseded material for three years after each change.

(ii) Provision for written approval of these procedures and any revisions to the procedures by the individual with overall responsibility for the security functions. The licensee shall retain each written approval as a record for three years from the date of the approval.

(4)(i) The licensee may not permit an individual to act as a guard, watchman armed response person, or other member of the security organization unless the individual has been trained, equipped, and qualified to perform each assigned security job duty in accordance with Appendix B, "General Criteria for Security Personnel," to this part. Upon the request of an authorized representative of the Commission, the licensee shall demonstrate the ability of the physical security personnel to carry out their assigned duties and responsibilities. Each guard, watchman, armed response person, and other member of the security organization shall requalify in accordance with Appendix B to this part at least every 12 months. This requalification must be documented. The licensee shall retain

the documentation of each requalification as a record for three years after the requalification.

(ii) Each licensee shall submit a training and qualifications plan outlining the processes by which guards, watchmen, armed response persons, and other members of the security organization will be selected, trained, equipped, tested, and qualified to ensure that these individuals meet the requirements of this paragraph. The licensee shall maintain a current copy of the training and qualifications plan as a record until the Commission terminates each license for which the plan was developed and, if any portion of the plan is superseded, retain the material that is superseded for three years after each change. The training and qualifications plan must include a schedule to show how all security personnel will be qualified two years after the submitted plan is approved. The training and qualifications plan must be followed by the licensee 60 days after the submitted plan is approved by the NRC.

* * * * *

(d) * * *

(6) Individuals not authorized by the licensee to enter protected areas without escort shall be escorted by a watchman or other individual designated by the licensee while in a protected area and shall be badged to indicate that an escort is required. In addition, the licensee shall require that each individual register his or her name, date, time, purpose of visit, employment affiliation, citizenship, and name of the individual to be visited. The licensee shall retain the register of information for three years after the last entry in the register.

* * * * *

(h) * * *

(2) The licensee shall establish and document liaison with local law enforcement authorities. The licensee shall retain documentation of the current liaison as a record until the Commission terminates each license for which the liaison was developed and, if any portion of the liaison documentation is superseded, retain the superseded material for three years after each change.

* * * * *

98. In § 73.67, the paragraphs (c)(1); (d)(11); (e)(3)(iv), (e)(5), and (3)(6)(i), and the introductory text to (e)(4); (f)(4); and (g)(3)(i), (g)(4), and (g)(5)(i) are revised to read as follows:

§ 73.67 Licensee fixed site and in-transit requirements for the physical protection of special nuclear material of moderate and low strategic significance.

* * * * *

(c) * * *

(1) Submit a security plan or an amended security plan describing how the licensee will comply with all the requirements of paragraphs (d), (e), (f), and (g) of this section, as appropriate, including schedules of implementation. The licensee shall retain a copy of the effective security plan as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the original plan was submitted. Copies of superseded material must be retained for three years after each change.

* * * * *

(d) * * *

(11) Establish and maintain written response procedures for dealing with threats of thefts or thefts of these materials. The licensee shall retain a copy of the response procedures as a record for the period during which the licensee possesses the appropriate type and quantity of special nuclear material requiring this record under each license for which the original procedures were developed and, for three years thereafter. Copies of superseded material must be retained for three years after each change.

(e) * * *

(3) * * *

(iv) Establish and maintain written response procedures for dealing with threats of thefts or thefts of this material. The licensee shall retain a copy of the current response procedures as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the original procedures were developed and copies of superseded material must be retained for three years after each change.

* * * * *

(4) Each licensee who arranges the physical protection of strategic special nuclear material in quantities of moderate strategic significance while in transit or who takes delivery of this material free on board (f.o.b.) the point at which it is delivered to a carrier for transport shall comply with the requirements of paragraphs (e)(1), (2), and (3) of this section. The licensee shall retain each record required by paragraphs (e)(1), (2), (3), and (4)(i) and (ii) of this section for three years after close of period licensee possesses special nuclear material under each license that authorizes these licensee activities. Copies of superseded material must be retained for three years after each change. In addition, the licensee shall—

* * * * *

(5) Each licensee who exports special nuclear material of moderate strategic significance shall comply with the requirements specified in paragraphs (c) and (e)(1), (3), and (4) of this section. The licensee shall retain each record required by these sections for three years after the close of period for which the licensee possesses the special nuclear material under each license that authorizes the licensee to export this material. Copies of superseded material must be retained for three years after each change.

(6) * * *

(i) Comply with the requirements specified in paragraphs (c) and (e)(2), (3), and (4) of this section. The licensee shall retain each record required by these sections for three years after the close of period for which the licensee possesses the special nuclear material under each license that authorizes the licensee to import this material. Copies of superseded material must be retained for three years after each change.

* * * * *

(f) * * *

(4) Establish and maintain response procedures for dealing with threats of thefts or thefts of this material. The licensee shall retain a copy of the current response procedures as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the procedures were established. Copies of superseded material must be retained for three years after each change.

(g) * * *

(3) * * *

(i) Establish and maintain response procedures for dealing with threats or thefts of this material. The licensee shall retain a copy of the current response procedures as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the procedures were established. Copies of superseded material must be retained for three years after each change.

* * * * *

(4) Each licensee who exports special nuclear material of low strategic significance shall comply with the appropriate requirements specified in paragraphs (c) and (g) (1) and (3) of this section. The licensee shall retain each record required by these sections for three years after the close of period for which the licensee possesses the special nuclear material under each license that authorizes the licensee to export this material. Copies of superseded material

must be retained for three years after each change.

(5) * * *

(i) Comply with the requirements specified in paragraphs (c) and (g) (2) and (3) of this section and retain each record required by these paragraphs for three years after the close of period for which the licensee possesses the special nuclear material under each license that authorizes the licensee to import this material. Copies of superseded material must be retained for three years after each change.

* * * * *

99. Section 73.70 is revised to read as follows:

§ 73.70 Records.

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records. Each licensee subject to the provisions of §§ 73.20, 73.25, 73.26, 73.27, 73.45, 73.46, 73.55, or 73.60 shall keep the following records:

(a) Names and addresses of all individuals who have been designated as authorized individuals. The licensee shall retain this record of currently designated authorized individuals for the period during which the licensee possesses the appropriate type and quantity of special nuclear material requiring this record under each license that authorizes the activity that is subject to the recordkeeping requirement and, for three years thereafter. Copies of superseded material must be retained for three years after each change.

(b) Names, addresses, and badge numbers of all individuals authorized to have access to vital equipment or special nuclear material, and the vital areas and material access areas to which authorization is granted. The licensee shall retain the record of individuals currently authorized this access for the period during which the licensee possesses the appropriate type and quantity of special nuclear material requiring this record under each license that authorizes the activity that is subject to the recordkeeping requirement and, for three years thereafter. Copies of superseded material must be retained for three years after each change.

(c) A register of visitors, vendors, and other individuals not employed by the licensee pursuant to §§ 73.46(d)(1), 73.55(d)(6), or § 73.60. The licensee shall retain this register as a record for three years after the last entry is made in the register.

(d) A log indicating name, badge number, time of entry, and time of exit of all individuals granted access to a vital area except those individuals entering or exiting the reactor control room. The licensee shall retain this log as a record for three years after the last entry is made in the log.

(e) Documentation of all routine security tours and inspections, and of all tests, inspections, and maintenance performed on physical barriers, intrusion alarms, communications equipment, and other security related equipment used pursuant to the requirements of this part. The licensee shall retain the documentation for these events for three years from the date of documenting each event.

(f) A record at each onsite alarm annunciation location of each alarm, false alarm, alarm check, and tamper indication that identifies the type of alarm, location, alarm circuit, date, and time. In addition, details of response by facility guards and watchmen to each alarm, intrusion, or other security incident shall be recorded. The license shall retain each record for three years after the record is made.

(g) Shipments of special nuclear material subject to the requirements of this part, including names of carriers, major roads to be used, flight numbers in the case of air shipments, dates and expected times of departure and arrival of shipments, vertification of communication equipment on board the transfer vehicle, names of individuals who are to communicate with the transport vehicle, container seal descriptions and identification, and any other information to confirm the means utilized to comply with §§ 73.25, 73.26, and 73.27. This information must be recorded prior to shipment. Information obtained during the course of the shipment such as reports of all communications, change of shipping plan, including monitor changes, trace investigations, and others must also be recorded. The licensee shall retain each record about a shipment required by this paragraph (g) for three years after the record is made.

(h) Procedures for controlling access to protected areas and for controlling access to keys for locks used to protect special nuclear material. The licensee shall retain a copy of the current procedures as a record until the Commission terminates each license for which the procedures were developed and, if any portion of the procedure is superseded, retain the superseded material for three years after each change.

100. In Appendix B to Part 73, Section I.C, E, and F and II.A, B, C, and E, and the introductory text of Section IV are revised to read as follows:

Appendix B—General Criteria for Security Personnel

* * * * *

Criteria

I. * * *

C. Medical examinations and physical fitness qualifications—Guards, armed response personnel, armed escorts and other armed security force members shall be given a medical examination including a determination and written certification by a licensed physician that there are no medical contraindications as disclosed by the medical examination to participation by the individual in physical fitness tests. Subsequent to this medical examination, guards, armed response personnel, armed escorts and other armed security force members shall demonstrate physical fitness for assigned security job duties by performing a practical physical exercise program within a specific time period. The exercise program performance objectives shall be described in the license training and qualifications plan and shall consider job-related functions such as strenuous activity, physical exertion, levels of stress, and exposure to the elements as they pertain to each individual's assigned security job duties for both normal and emergency operations. The physical fitness qualification of each guard, armed response person, armed escort, and other security force member shall be documented and attested to by a licensee security supervisor. The licensee shall retain this documentation as a record for three years from the date of each qualification.

* * * * *

E. Physical requalification—At least every 12 months, central alarm station operators shall be required to meet the physical requirements of B.1.b of this section, and guards, armed response personnel, and armed escorts shall be required to meet the physical requirements of paragraphs B.1.b (1) and (2), and C of this section. The licensee shall document each individual's physical requalification and shall retain this documentation of requalification as a record for three years from the date of each requalification.

F. Documentation—The results of suitability, physical, and mental qualifications data and test results must be documented by the licensee or the licensee's

agent. The licensee or the agent shall retain this documentation as a record for three years from the date of obtaining and recording these results.

* * * * *

II. Training and qualifications.

A. Training requirements—Each individual who requires training to perform assigned security-related job tasks or job duties as identified in the licensee physical security or contingency plans shall, prior to assignment, be trained to perform these tasks and duties in accordance with the licensee or the licensee's agent's documented training and qualifications plan. The licensee or the agent shall maintain documentation of the current plan and retain this documentation of the plan as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the plan was developed and, if any portion of the plan is superseded, retain the material that is superseded for three years after each change.

B. Qualification requirements—Each person who performs security-related job tasks or job duties required to implement the licensee physical security or contingency plan shall, prior to being assigned to these tasks or duties, be qualified in accordance with the licensee's NRC-approved training and qualifications plan. The qualifications of each individual must be documented and attested by a licensee security supervisor. The licensee shall retain this documentation of each individual's qualifications as a record for three years after the employee ends employment in the security-related capacity and for three years after the close of period for which the licensee possesses the special nuclear material under each license, and superseded material for three years after each change.

C. Contract personnel—Contract personnel shall be trained, equipped, and qualified as appropriate to their assigned security-related job tasks or job duties, in accordance with sections II, III, IV, and V of this appendix. The qualifications of each individual must be documented and attested by a licensee security supervisor. The licensee shall retain this documentation of each individual's qualifications as a record for three years after the employee ends employment in the security-related capacity and for three years after the close of period for which the licensee possesses the special nuclear material under each license, and superseded material for three years after each change.

* * * * *

E. Requalification—Security personnel shall be requalified at least every 12 months to perform assigned security-related job tasks and duties for both normal and contingency operations. Requalification shall be in accordance with the NRC-approved licensee training and qualifications plan. The results of requalification must be documented and attested by a licensee security supervisor. The licensee shall retain this documentation of each individual's requalification as a record for three years from the date of each requalification.

* * * * *

IV. Weapons qualification and requalification program.

Qualification firing for the handgun and the rifle must be for daylight firing, and each individual shall perform night firing for familiarization with assigned weapon(s). The results of weapons qualification and requalification must be documented by the licensee or the licensee's agent. Each individual shall be requalified at least every 12 months. The licensee shall retain this documentation of each qualification and requalification as a record for three years from the date of the qualification or requalification, as appropriate.

* * * * *

PART 74—MATERIAL CONTROL AND ACCOUNTING OF SPECIAL NUCLEAR MATERIAL

101. The authority citation for Part 74 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

102. In § 74.31, the existing text of paragraph (d) is redesignated as (d)(1) and paragraph (d)(2) is added to read as follows:

§ 74.31 Nuclear material control and accounting for special nuclear material of low strategic significance.

* * * * *

(d) * * *

(2) Records which must be maintained pursuant to this part may be the original or a reproduced copy or a microform if such reproduced copy or microform is duly authenticated by authorized personnel and the microform is capable of producing a clear and legible copy after storage for the period specified by Commission regulations. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures.

The licensee shall maintain adequate safeguards against tampering with and loss of records.

PART 75—SAFEGUARDS ON NUCLEAR MATERIAL—IMPLEMENTATION OF US/IAEA AGREEMENT

103. The authority citation for Part 75 is revised to read as follows:

Authority: Secs. 53, 63, 103, 104, 122, 161, 68 Stat. 930, 932, 936, 937, 939, 948, as amended (42 U.S.C. 2073, 2093, 2133, 2134, 2152, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); the provisions of this part are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

104. The heading for § 75.6 is revised and a new paragraph (e) is added to read as follows:

§ 75.6 Maintenance of records and delivery of information, reports, and other communications.

* * * * *

(e) Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

105. In § 75.12, paragraphs (b)(1) and (4) are revised to read as follows:

§ 75.12 Communication of information to IAEA.

* * * * *

(b)(1) A licensee may request that information of particular sensitivity, which it customarily holds in confidence, not be transmitted physically to the IAEA. A licensee who makes such a request should, at the time the information is submitted, identify the pertinent document or part thereof and make a full statement of the reasons supporting the request. The licensee shall retain a copy of the request and all documents related to the request as a record until the Commission terminates the license for each installation involved with the request or until the Commission notifies the licensee that the licensee is no longer under the agreement. Superseded material must be retained for three years after each change is made.

* * * * *

(4) If a request is granted, the Commission will determine a location where the information will remain readily available for examination by the IAEA and will so inform the licensee. The licensee shall retain this information as a record until the Commission terminates the license for the installation involved with the request or until the Commission notifies the licensee that the licensee is no longer under the agreement. Superseded

material must be retained for three years after each change is made.

* * * * *

106. In § 75.21, paragraph (a) is revised to read as follows:

§ 75.21 General requirements.

(a) Each licensee who has been given notice by the Commission in writing that its installation has been identified under the Agreement shall establish, maintain, and follow written material accounting and control procedures. The licensee shall retain as a record current material accounting and control procedures until the Commission terminates the license for the installation involved with the request or until the Commission notifies the licensee that the licensee is no longer under the agreement. Superseded material must be retained for three years after each change is made.

* * * * *

PART 95—SECURITY FACILITY APPROVAL AND SAFEGUARDING OF NATIONAL SECURITY INFORMATION AND RESTRICTED DATA

107. The authority citation for Part 95 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

108. Section 95.11 is revised to read as follows:

§ 95.11 Specific exemptions.

The Commission may, upon application of any interested party, grant an exemption from the requirements of Part 95. Exemptions will be granted only if they are authorized by law and will not constitute an undue risk to the common defense and security. The licensee shall retain the documentation related to the request, notification, and processing of an exemption for three years beyond the period covered by the exemption.

109. Section 95.13 is revised to read as follows:

§ 95.13 Maintenance of records.

(a) Each licensee or organization granted security facility approval under this part shall maintain records prescribed within the part. These records are subject to review and inspection by NRC representatives during security surveys.

(b) Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

110. In § 95.25, paragraphs (a)(3), and (h) are revised to read as follows:

§ 95.25 Protection of national security information and restricted data in storage.

(a) * * *

(3) When protective personnel are used, physical checks of security containers must be made as soon as possible after the close of each normal workday and at least once every eight hours thereafter during non-working hours. The licensee shall record the results of these checks and retain each record for three years after it is made.

* * * * *

(h) Unattended security container found opened: In the event that an unattended security container housing classified matter is found unlocked, the custodian or an alternate shall be notified immediately. The container must be secured by protective personnel and the contents inventoried as soon as possible but not later than the next workday. A report reflecting all actions taken must be submitted to the responsible Regional Office (see Appendix A, 10 CFR Part 73 for addresses) with an information copy to the NRC Division of Security. The licensee shall retain records pertaining to these matters for three years after completion of final corrective action.

* * * * *

§ 95.33 [Amended]

111. Section 95.33 is amended by changing "one year" to "three years" in the last sentence.

112. In § 95.37, paragraph (i) is revised to read as follows:

§ 95.37 Classification and preparation of documents.

* * * * *

(i) *Document which custodian believes is improperly classified or lacking appropriate classification markings.* If a person receives a document which, in his or her opinion, is not properly classified, or does not have appropriate classification markings, he or she shall immediately notify the sender and suggest to the originator the classification which he believes to be appropriate. Whenever requested, this challenge of classification marking must be handled in a manner which will ensure the anonymity of the challenger. Pending final determination of proper classification, the document must be safeguarded in accordance with the procedures required for the highest classification in question. Where unauthorized disclosure may have occurred, a report in accordance with § 95.57 of this part is required. These reports must be retained for three years after final corrective action has been taken.

* * * * *

§ 95.41 [Amended]

113. Section 95.41 is amended by changing "two years" to "three years" in the last sentence.

114. Section 95.47 is revised to read as follows:

§ 95.47 Destruction of matter containing national security information and/or restricted data.

Documents containing National Security Information and/or Restricted Data may be destroyed by burning, pulping, or another method that ensures complete destruction of the information which they contain. The method of destruction must preclude recognition or reconstruction of the classified information. Any doubts on methods should be referred to the NRC Division of Security. If the document contains Secret National Security Information and/or Restricted Data a record of the subject or title, document number, if any, originator, its date or origination, its series designation and copy number, and the date of destruction must be signed by the person destroying the document and must be maintained in the office of the custodian at the time of destruction. These destruction records must be retained for three years after destruction.

PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIALS

115. The authority citation for Part 110 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

116. In § 110.53, paragraph (b) is revised to read as follows:

§ 110.53 United States address, records, and inspections.

* * * * *

(b)(1) Each licensee shall maintain records concerning his exports or imports. The licensee shall retain these

records for five years after each export or import except that byproduct material records must be retained for three years after each export or import.

(2) Records which must be maintained pursuant to this part may be the original or a reproduced copy or microform if such reproduced copy or microform is duly authenticated by authorized personnel and the microform is capable of producing a clear and legible copy after storage for the period specified by Commission regulations. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

* * * * *

Dated at Rockville, Maryland, this 13th day of May 1988.

For the Nuclear Regulatory Commission.

Victor Stello, Jr.,

Executive Director for Operations.

[FR Doc. 88-11583 Filed 5-26-88; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 84-CE-03-AD; Amdt. 39-5940]

Airworthiness Directives; Cessna 180, A182, 182, F182, FR182, R182, 185, 188, T188, 190, 195, 205, 206, P206, U206, TP206, TU206, 207, T207, 210 and T210 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final Rule.

SUMMARY: This Amendment revises and reissues Airworthiness Directive (AD) 84-10-01, Amendment 39-4863 (49 FR 21507, May 22, 1984), applicable to certain Cessna single engine airplanes, to allow for the installation of raised filler neck fuel caps as an equivalent means of compliance for those airplanes presently required to be equipped with a fuel system preflight placard. Incidents of engine power loss and accidents due to water contamination of the fuel system have occurred on some models of the above airplanes. The prescribed action identifies airplanes having bladder fuel cells which tend to retain water contamination, provides fuel tank drainage provisions and reduces the possibility that water may enter and be retained in the fuel tanks.

EFFECTIVE DATE: July 5, 1988.

ADDRESSES: Cessna Service Information Letters SE79-45 dated September 10, 1979, SE82-34 dated July 23, 1982, SE84-8 dated March 16, 1984, SE84-9 dated March 23, 1984, and Cessna Single Engine Service Kit SK182-85 dated September 10, 1984, applicable to this AD may be obtained from Cessna Aircraft Company, Customer Service, P.O. Box 1521, Wichita, Kansas 67201. This information may also be examined at the Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 84-CE-03-AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. Paul O. Pendleton, Aerospace Engineer, ACE-140W, Federal Aviation Administration, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone (316) 946-4427.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include a revision to AD 84-10-01, Amendment 39-4863 was published on February 1, 1988, in the **Federal Register** (53 FR 2763). AD 84-10-01, Amendment 39-4863 (49 FR 21507, May 22, 1984), effective May 22, 1984, applicable to certain Cessna single engine airplanes required (among other things) that airplanes containing wrinkles in the fuel bladder tanks (other than fluid trapping diagonal corner wrinkles which were required to be removed or the bladder replaced) that trapped more than three fluid ounces to be placarded for specific fuel system preflight procedures. The proposal resulted from reports of accidents attributed to fuel contamination by water on certain single-engine Cessna airplanes. Investigation has revealed that many fuel cap installations have defective seals which will allow the entrance of water around the fuel cap seal. This amendment introduces reduced diameter fuel filler caps with raised filler necks to prevent precipitation from entering the fuel tanks even when the caps receive minimum maintenance and inspection.

Interested persons have been afforded an opportunity to comment on the proposal. Two comments were received on the proposed amendment. One comment received from a national aircraft users organization was in favor of the proposal as drafted.

A comment from the aircraft manufacturer was in opposition to removal of the preflight procedures placard as it considered these procedures necessary for detection of fuel contamination from an unfiltered source. The FAA has determined that the primary source of fuel contamination on the airplanes affected by the proposal is from precipitation leaking past a deteriorated seal on an improperly maintained flush fuel cap installation. Fuel contamination from an unfiltered source is considered to be very rare in view of the quality control maintained by the fuel suppliers and retailers. Therefore, the FAA disagrees with the manufacturer's comments.

The specific serial numbers of the Cessna 190/195 models were identified after the NPRM was issued. The FAA has determined that clearly identifying the specific serial numbers of these airplanes fully meets the intent of the NPRM and does not impose any additional burden. Accordingly, an AD is being issued in accordance with the NPRM except for the addition of the airplane models and serial numbers.

If the airplane owner elects to install the raised filler neck fuel caps, the projected cost for parts and labor is $200 per airplane. The cost of compliance with the AD is so small that the expense of compliance will not be a significant financial impact on any small entities operating these airplanes.

The regulations set forth in this amendment are promulgated pursuant to authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt State law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulation does not have federalism implications warranting the preparation of the Federalism Assessment.

Therefore, I certify that this action (1) is not a "major rule" under the Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on substantial number of small entities under the criteria of the Regulatory Flexibility Act.

A copy of the final evaluation prepared for this action is contained in the Regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **"ADDRESSES"**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the FAR as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By revising and reissuing AD 84-10-01, Amendment 39-4863 (49 FR 21507, May 22, 1984), as follows:

Cessna: Applies to the following series and serial numbered airplanes certificated in any catagory:

Series	Serial Numbers
180	30000 thru 50911; 18050912 thru 18053000 (1953 thru 1978)
	18053001 thru 18053203 (1979 thru 1981) (optional tanks only)
182	33000 thru 53007; 18253008 thru 18266590 (1956 thru 1978).
R182	R18200001 thru R18200583 (1978).
185	185-0001 thru 18503683 (1961 thru 1978).
	18503684 thru 18504414 (1979 thru 1983) (optional tanks only).
188	188-0446 thru 18803856 (1972 thru 1981) (wing tanks only).
	18800967T thru 18803966T (1972 thru 1983).
T188	T18803307T thru T18803966T (1979 thru 1983).
190/195	7001 thru 7999; 16000 thru 16183.
210-5 (205)	205-0001 thru 205-0577 (1963 and 1964).
206, U206, TU206.	206-0001 thru U20604649 (1964 thru 1978).
P206, TP206	P206-0001 thru P20600647 (1965 thru 1970).
207, T207	20700001 thru 20700771 (1969 thru 1984).
210	57001 thru 57575; 21057576 thru 21058818 (1960 thru 1966).
T210	T210-0001 thru T210-0197 (1966).
A182	A182-0001 thru A182-0146 (1966 thru 1974).
F182	F18200001 thru F18200094 (1976 thru 1978).
FR182	FR18200001 thru FR18200020 (1978).

Compliance: Required as indicated, unless already accomplished:

To prevent power loss or engine stoppage due to water contamination of the fuel system, accomplish the following:

(a) Within the next 50 hours time-in-service after the effective date of this AD, on all applicable airplanes, install quick drains in the fuel tank sumps and fuel tank reservoirs where applicable, in accordance with the kits specified by Cessna Service Letters SE79-45 dated September 10, 1979, and SE84-8 dated March 16, 1984, or using equivalent aircraft standard hardware.

(b) Within the next 50 hours time-in-service after the effective date of this AD, inspect the fuel tank filler area for proper sealing in accordance with the following:

(1) On all applicable airplanes:

(i) Visually inspect the wing aft of the fuel filler for indications of inflight fuel leakage.

(ii) Visually inspect the fuel cap locking mechanism and seals for cracking, distortion and any condition which might prevent sealing.

(iii) Remove the fuel filler caps and inspect the adapter sealing face for distortion, scratches, corrosion or any condition which may prevent the cap from sealing.

(2) In addition, on all applicable airplanes except models 190 and 195 airplanes:

(i) Visually check the sealing and security of the attachment of the adapter flange to the adapter plate paying particular attention to the adhesive (if present) between the parts.

(ii) Check the fuel cap seal by actuating the locking tab and noting that force is maintained between the cap, seal, and adapter when the tab is in the overcenter locked position or conduct a fuel cap seal test in accordance with Cessna Single Engine Service Information Letter SE82-34 dated July 23, 1982.

(3) Correct any deficiencies disclosed by the above inspections by parts replacement or adjustment, as required, before returning the airplane to service.

(c) Within the next 50 hours time-in-service after the effective date of this AD, on all applicable airplanes, except models 190 and 195, conduct an inspection for fuel tank wrinkles in accordance with the following:

(1) Drain and wing fuel tanks.

(2) Note any wrinkles which retain fluid after draining. Remove diagonal wrinkles across the inboard rear corner in the vicinity of the fuel tank drain by installation of Cessna drain kit described in Service Letter SE84-9 dated March 23, 1984, or by replacement of the fuel bladder. Verify that no wrinkles exist in the tank sump drain area before returning the airplane to service.

Note: The manufacturer has identified some new bladder cells which may require installation with a special adapter to prevent the information of the above described wrinkles and has included this part with these bladder cells. Use of this part, or the drain kit, may be necessary to eliminate these wrinkles.

(3) If wrinkles are found in the tank bottom at a location other than diagonally across the inboard rear corner, determine the amount of fluid which is trapped by these wrinkles in accordance with the following:

(i) Place the airplane in the normal ground (water) attitude.

(ii) Service tank(s) with enough fuel to completely cover bottom of tank surface. Drain tank and note any wrinkles which retain fuel.

(iii) Direct all trapped fluid to the tank drain area, using a non-absorbent squeegee or other tool compatible with the fuel bladder, and drain and measure the fluid retained in both tanks.

(iv) If this total does not exceed three ounces, no further action is required.

(v) If the total quantity drained exceeds three ounces, check the snaps and fasteners for security. If necessary, blend and smooth the tank bottom to remove wrinkles. Blending may include replacement of the protective tape on the corners or edges to maintain a tank surface which will not trap excess fluid. Caution: Excessive blending or smoothing may cause leaks to develop in the tank.

(vi) If the tanks trap fluid in excess of three ounces after compliance with paragraph (v) above accomplish either paragraph (A) or paragraph (B) as follows:

(A) Fabricate using letters at least .10 inches in height, and install a placard in full view of the pilot which states as follows:

"Prior to flight following exposure to rain, sleet, snow, or after fueling from an unfiltered fuel source:

1. Drain and catch the contents of the fuel gascolator, wing, and (if equipped) reservoir tank sumps and check for water contamination.

2. Place the airplane on a level surface and lower the tail to within 5 inches of the ground (on nose gear airplanes).

3. Rock the wings 10 inches up and 10 inches down at least 12 times.

4. Drain and catch the contents of the fuel gascolator, wing, and (if equipped) reservoir tank sumps and check for water contamination.

5. If water is found in step 4 above, repeat steps 3 and 4 until no additional water is detected, or drain the entire airplane fuel system.

(B) Install reduced diameter (raised filler neck) fuel caps on all fuel filler openings in accordance with Cessna Service Kit SK182-85 dated September 10, 1984. If SK182-85 is accomplished, paragraph (d) below no longer applies.

(d) Within 12 months after initial compliance with this AD, and each 12 months thereafter, reinspect the fuel installation of airplanes that require the placard per paragraph (c)(3)(vi) in accordance with paragraph (b) of this AD.

(e) The placard required by paragraph (c)(3)(vi) may be fabricated and installed by the airplane owner, or operator, providing that this person possesses at least a private pilot license.

(f) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished if it is determined that no water is present in the tank from which fuel will be used.

(g) An equivalent means of compliance with this AD may used if approved by the Manager, Aircraft Certification Office, Federal Aviation Administration, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209. Fuel cells and quick drain valves that are approved for the applicable airplanes are approved as an equivalent means of compliance in replacement of corresponding parts required to be installed by this AD.

All persons affected by this directive may obtain copies of the document(s) referred to herein upon request to Cessna Aircraft Company, Customer Service, P.O. Box 1521, Wichita, Kansas 67201; or may examine the document(s) referred to herein at the Federal Aviation Administration, Office of the

Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment revises AD 84-10-01, Amendment 39-4863 (49 FR 21507, May 22, 1984), effective May 22, 1984.

This amendment becomes effective on July 5, 1988.

Issued in Kansas City, Missouri, on May 18, 1988.

Paul K. Bohr,

Director, Central Region.

[FR Doc. 88-11938 Filed 5-26-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-CE-07-AD; Amdt. 39-5941]

Airworthiness Directives; Cessna Models 177RG and F177RG Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This Amendment adopts a new Airworthiness Directive (AD), which requires installation of a control to actuate the fuel strainer (gascolator) quick drain on Cessna Models 177RG and F177RG airplanes. The FAA has determined that these airplanes are not equipped with a quick drain control to remove water from the fuel strainer. This action will preclude engine power loss caused by undrained water in the fuel strainer.

DATES: *Effective Date:* July 5, 1988. *Compliance:* As prescribed in the body of the AD.

ADDRESSES: Cessna Pilots Association Supplemental Type Certificates (STCs) SA2335CE and SA2336CE information may be obtained from Mr. John Frank, Editor Cessna Pilots Association, Wichita Mid-Continent Airport, 2120 Airport Road, P.O. Box 12948, Wichita, Kansas 67277, telephone (316) 946-4777. Air Plains Inc. STCs SA2344CE and SA2345CE information may be obtained from Mr. Kent McIntyre, Vice President, Air Plains, Inc., P.O. Box 541, Wellington, Kansas 67152, telephone (316) 326-8581. Information on this Final Rule may also be obtained from the Rules Docket, FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. Paul O. Pendleton, Aerospace Engineer, ACE-140W, Federal Aviation Administration, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209, telephone (316) 946-4427.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an AD requiring installation of fuel strainer quick drain controls on certain Cessna 177RG and F177RG airplanes was published on February 22, 1988, in the **Federal Register** (53 FR 5192).

The proposal resulted from accident and incident reports on Cessna Models 177RG and F177RG airplanes which indicated that water collected in the fuel strainer (gascolator) and then passed to the engine in quantities sufficiently large enough to cause power loss. Water may enter the engine fuel system or ice crystals may form from water and restrict fuel from entering the engine fuel system. These occurrences were attributed to the fact that the airplanes were not equipped with quick drain control provisions on the fuel strainer at the time of manufacture. Accordingly, the proposed amendment would require installation of fuel strainer quick drain controls on Cessna Models 177RG and F177RG airplanes. The fuel strainer quick drain control provisions are identical to those installed on other Cessna airplanes that were equipped with fuel strainer quick drain controls at the time of manufacture.

Interested persons have been afforded an opportunity to comment on the proposal. No comments were received. Accordingly, the proposal is adopted without change.

The FAA has determined that this regulation involves approximately 1100 airplanes at an approximate cost for parts and labor of $200 per airplane.

The cost of compliance with the proposed AD is so small that the expense of compliance will not be a significant financial impact on any small entities operating these airplanes.

The regulations set forth in this amendment are promulgated pursuant to authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt State law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Therefore, I certify that this action (1) is not a "major rule" under the provisions of Executive Order 12291, (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **"ADDRESSES".**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the FAR as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new AD:

Cessna: Applies to all serial numbers of Models 177RG and F177RG airplanes certificated in any category.

Compliance: Required within the next 75 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent power loss or engine stoppage due to water contamination of the fuel system, accomplish the following:

(a) Modify the airplane fuel system using one of the options in subparagraphs (a)(1), (a)(2), or (a)(3) below:

(1) Install a fuel strainer quick drain control in accordance with STC SA2344CE or SA2345CE.

Note 1: These STCs are owned by Air Plains, Inc., P.O. Box 541, Wellington, Kansas 67152, telephone (316) 326-8581.

(2) Install a fuel strainer quick drain control in accordance with STC SA2335CE or SA2336CE.

Note 2: These STCs are owned by Cessna Pilots Association, Inc., Wichita Mid-Continent Airport, 2120 Airport Road, P.O. Box 12948, Wichita, Kansas 67277, telephone (316) 946-4777.

(3) Install a fuel strainer quick drain control by using equivalent aircraft standard hardware.

Note 3: The FAA has received reports of corrosion inside the fuel strainer bowl caused by undrained water. A check of the condition of the fuel strainer and bowl can be made during installation of the fuel strainer quick drain control.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An equivalent means of compliance with this AD may be used, if approved by the Manager, Wichita Aircraft Certification Office, Federal Aviation Administration, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209.

All persons affected by this AD may obtain copies of the document(s) referred to herein upon request to: Cessna Pilots Association Supplemental

Type Certificates (STCs) SA2335CE and SA2336CE information may be obtained from Mr. John Frank, Editor Cessna Pilots Association, Wichita Mid-Continent Airport, 2120 Airport Road, P.O. Box 12948, Wichita, Kansas 67277, telephone (316) 946-4777. Air Plains Inc. STCs SA2344CE and SA2345CE information may be obtained from Mr. Kent McIntyre, Vice President, Air Plains, Inc., P.O. Box 541, Wellington, Kansas 67152, telephone (316) 326-8581. These documents may also be examined at FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This Amendment becomes effective on July 5, 1988.

Issued in Kansas City, Missouri, on May 18, 1988.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 88-11939 Filed 5-26-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 85-CE-33-AD; Amdt. 39-5938]

Airworthiness Directives; EMBRAER Models EMB-110P1 and EMB-110P2 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, Rescission.

SUMMARY: This amendment rescinds Airworthiness Directive (AD) T85-18-51 (Amendment 39-5174), applicable to EMBRAER Models 110P1 and EMB-110P2 airplanes. This AD was issued following a runaway trim incident on an EMB-110 model airplane. Subsequent to its issuance, the FAA has learned that the incident was an isolated occurrence and the reported high failure rate of the dual trim switches is not supported by the facts.

EFFECTIVE DATE: May 31, 1988.

ADDRESSES: Information pertaining to this action may be obtained from the Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 85-CE-33-AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. W.H. Trammell, Atlanta Aircraft Certification Office, FAA, ACE-130A, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia 30349; telephone (404) 991-3020.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to rescind AD T85-18-51, Amendment 39-5174 (50 FR 49350) was published in the **Federal Register** on Thursday, November 12, 1987 (52 FR 43342). The AD requires inhibition of the operation of the Bendix Electric Trim System and the Bendix Autopilot System (if installed) by disconnection from the power source of all EMBRAER EMP-110P1 and EMB-110P2 airplanes. The proposal to rescind the AD resulted from a re-evaluation of the justification for the issurance of the AD. The AD was prompted by a single report of a runaway trim incident on an EMB-110 airplane, assumed to be caused by a dual trim switch which would not return to the neutral position after activation and a purportedly abnormally high failure rate of these switches.

Subsequent investigations has determined that a runaway trim situation is unlikely, that adequate safeguards are provided for runaway trim should it ever occur, and that the abnormally high failure rate referenced in the AD cannot be supported by facts. The Bendix Electric Trim System is designed to be single fault free. The swtich has two elements: One controls the servo motor and the second controls the servo clutch. If either portion of the switch sticks or is separately activated, there is an audible warning which sounds after one second. The electric trim, if in a runaway condition (both switches stuck up or down), can be easily controlled by pilot action to return both switches to center or to opposite trim momentarily as required. Also, trim can be controlled and easily overpowered by the use of the Manual Trim wheel control and the electric trim system can be disconnected by pulling the circuit breaker.

Following issuance of the AD, the switch involved in the single incident was again examined, tested, disassembled, and reassembled, and the reported failure could not be duplicated. Based on this evaluation and the fact that no other reports of both switches sticking have been received, this incident is now recognized as an isolated instance. Therefore, since a switch induced runaway trim can be readily overcome and corrected and the high failure rate does not exist, the AD is unnecessarily restrictive.

Interested persons have been afforded an opportunity to comment on the proposal. Only one comment was received and it agreed with the FAA intention to rescind the AD. Accordingly, the proposal is adopted without change.

Consequently, the effect of rescinding AD T85-18-51 is to permit the removal of the "Electric Trim System Inoperative per AD T85-18-51" placard located on the instrument panel and the reconnection of the stowed trim servo plug in the aft fuselage section. The FAA has determined that this regulation only involves 120 airplanes at an approximate one-time cost of $60 for each airplane and $7,200 total.

The regulations set forth in this amendment are promulgated pursuant to authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt State law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Therefore, I certify that this action (1) is not a "major rule" under the provisions of Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES.**"

Lists of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Administration amends § 39.13 of Part 39 of the FAR as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By rescinding AD T85-18-51, Amendment 39-5174 (50 FR 49350, December 2, 1985).

This amendment becomes effective on May 31, 1988.

Issued in Kansas City, Missouri, on May 16, 1988.

Paul K. Bohr,

Director, Central Region.

[FR Doc. 88-11940 Filed 5-26-88; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 87-ASW-58]

Revision of Transition Area; Cherokee Village, AR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment will revise the transition area located at Cherokee Village, AR. The relocation of the Cherokee Village Nondirectional Radio Beacon (NDB) from on the Cherokee Village Airport to approximately 5 miles south of the airport made this revision necessary. In addition, a new standard instrument approach procedure (SIAP) has been developed utilizing the Cherokee Village NDB is its new location. The intended effect of this revision is to provide adequate controlled airspace for aircraft executing the new SIAP to the airport. Coincident with this action, the status of the Cherokee Village Airport will change from visual flight rules (VFR) to instrument flight rules (IFR).

EFFECTIVE DATE: 0901 u.t.c., June 30, 1988.

FOR FURTHER INFORMATION CONTACT: Bruce C. Beard, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193-0530, telephone (817) 624-5561.

SUPPLEMENTARY INFORMATION:

History

On March 22, 1988, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by revising the transition area located at Cherokee Village, AR (53 FR 11101).

Interested persons were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is that proposed in the notice. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D, dated January 1, 1988.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations revises that transition area located at Cherokee Village, AR. The Cherokee Village NDB is being relocated from on the airport to approximately 5 miles south of the airport. The relocation of the NDB has required the development of a new SIAP, utilizing the Cherokee Village NDB in its new location, thus necessitating this revision. The intended effect of this revision is to provide adequate controlled airspace for aircraft executing the new SIAP to the airport. Coincident with this action, the status of the airport will change from VFR to IFR.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended as follows:

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Cherokee Village, AR [Revised]

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Cherokee Village Airport (latitude 36°15'55" N., longitude 91°33'45" W.).

Issued in Fort Worth, TX, on May 16, 1988.

Larry L. Craig,

Manager, Air Traffic Division, Southwest Region.

[FR Doc. 88-11941 Filed 5-26-88; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 87-ACE-15]

Revocation of VOR Federal Airway V-426; Missouri

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment revokes Federal Airway V-426 located between St. Louis, MO, and Decatur, IL. FAA is revoking the entire segment of V-426 because records indicate that V-426 is rarely requested or utilized. This action removes that airway from the National Airspace System thereby reducing chart clutter.

EFFECTIVE DATE: 0901 u.t.c., August 25, 1988.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9250.

SUPPLEMENTARY INFORMATION:

History

On March 2, 1988, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to revoke VOR Federal Airway V-426 located in the vicinity of St. Louis, MO, (53 FR 6666). This action revokes the entire segment of V-426. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations revokes VOR Federal Airway V-426 located between St. Louis, MO, and Decatur, IL. FAA has documentation that indicates V-426 is rarely used or requested by pilots and FAA has revoked this VOR Federal Airway. This action reduces chart clutter.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major

rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airway.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§71.123 [Amended]

2. Section 71.123 is amended as follows:

V-426 [Removed]

Issued in Washington, DC, on May 19, 1988.

Temple H. Johnson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 88-11937 Filed 5-26-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 87-ASW-55]

Amendment to Transition Area; Levelland, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The action will amend the transition area located at Levelland, TX. The development of a new standard instrument approach procedure (SIAP) to Runway 35 at the Levelland Airport, utilizing the Levelland Nondirectional Radio Beacon (NDB), has made this amendment necessary. The intended effect of this amendment is to provide adequate controlled airspace for aircraft executing all SIAP's now serving the airport.

EFFECTIVE DATE: 0901 UTC, October 20, 1988.

FOR FURTHER INFORMATION CONTACT: Bruce C. Beard, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193-0530, telephone (817) 624-5561.

SUPPLEMENTARY INFORMATION:

History

On March 19, 1988, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by amending the transition area located at Levelland, TX (53 FR 10546).

Interested persons were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. One comment objecting to the proposal was received from the United States Air Force (USAF). The objection centered around the arrival extension south of the Levelland Airport and the fact that it would interfere with T-37 student training at Terry County Air Force Auxiliary Field. In reviewing the SIAP, it was determined that the south arrival extension could be reduced from the initial proposal of 11.5 miles south of the Levelland NDB to 8.5 miles south of the NDB and still provide adequate controlled airspace for the SIAP. This reduction of airspace was acceptable to the USAF and they removed their objection. The legal description of this transition area reflects this change. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D, dated January 1, 1988.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations will amend the transition area located at Levelland, TX. The development of a new SIAP to Runway 35 at the Levelland Airport, utilizing the Levelland NDB, has necessitated this amendment. The existing transition area will remain unchanged, but a new arrival extension south of the airport will be added. The intended effect of this amendment is to provide adequate controlled airpace for aircraft executing all SIAP's serving the airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended as follows:

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§71.181 [Amended]

2. Section 71.181 is amended as follows:

Levelland, TX [Amended]

By adding to the end of the legal description: "and within 3.5 miles each side of the 175° bearing of the Levelland NDB, extending from the 7-mile radius to 8.5 miles south of the Levelland NDB.

Issued in Forth Worth, TX, on May 12, 1988.

Larry L. Craig,

Manager, Air Traffic Division, Southwest Region.

[FR Doc. 88-11943 Filed 5-26-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 87-ASW-68]

Establishment of Transition Area; Oakwood, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The amendment will establish a transition area at Oakwood, TX. The development of a special instrument approach procedure (SIAP) to the Carter Ranch Airport, Oakwood, TX, utilizing the Leona Very High Frequency Omnidirectional Radio Range/Tactical Air Navigation (VORTAC), has made this amendment

necessary. The intended effect of this amendment is to provide adequate controlled airspace for aircraft executing the new SIAP. Coincident with this amendment is the changing of the status of the Carter Ranch Airport from visual flight rules (VFR) to instrument flight rules (IFR).

EFFECTIVE DATE: 0901 u.t.c., July 28, 1988.

FOR FURTHER INFORMATION CONTACT: Bruce C. Beard, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193–0530, telephone (817) 624–5561.

SUPPLEMENTARY INFORMATION:

History

On March 24, 1988, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by establishing a transition area at Oakwood, TX (53 FR 11100).

Interested persons were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is that proposed in the notice. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D, dated January 1, 1988.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations will establish a new transition area at Oakwood, TX. The development of a new SIAP to the Carter Ranch Airport, utilizing the Leona VORTAC, has necessitated this amendment. The intended effect of this amendment is to provide adequate controlled airspace for aircraft executing the new SIAP. Coincident with this amendment is the changing of the status of the Carter Ranch Airport from VFR to IFR.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended as follows:

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Oakwood, TX [New]

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Carter Ranch Airport (latitude 31°34'00" N, longitude 95°45'59" W.), and within 4.5 miles either side of the 0.22° radial of the Leona VORTAC (latitude 31°07'26" N., longitude 95°58'04" W.), extending from the 6.5-mile radius area to 9 miles south of the airport, excluding that portion that overlies the Palestine, TX, Transition Area.

Issued in Fort Worth, TX, on May 12, 1988.

Larry L. Craig,

Manager, Air Traffic Division, Southwest Region.

[FR Doc. 88–11942 Filed 5–26–88; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 8c

[Docket No. 40923–7270]

Enforcement of Nondiscrimination on the Basis of Handicap in Department of Commerce Programs

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: This regulation requires that the Department of Commerce operate all of its programs and activities to ensure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for individual with handicaps and qualified individual with handicaps, and establishes a complaint mechanism for resolving allegations of discrimination. This regulation in issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal Executive agencies.

EFFECTIVE DATE: July 26, 1988.

FOR FURTHER INFORMATION CONTACT: Richard A Stearns, Chief, EEO Programs Division, Office of Civil Rights, U.S. Department of Commerce, Washington, DC 20230; (202) 377–5691 (voice) or 377–5691 (TDD).

These are not toll free numbers.

Copies of this regulation are available on tape for those with impaired vision. They may be obtained from the EEO Programs Division, Office of Civil Rights, U.S. Department of Commerce, Room 6012, Washington, DC 20230.

SUPPLEMENTARY INFORMATION: On November 21, 1984, the Department of Commerce published a Notice of Proposal Rulemaking (NPRM) in the **Federal Register** (49 FR 45861) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs and activities conducted by the Department of Commerce, to be codified at 15 CFR Part 8c. Shortly after the NPRM was published, the Department received eight comments from individuals and organizations representing individuals with handicaps. After analysis of the comments received, the Department of Justice's (DOJ) section 504 regulation for its own programs and activities, and the joint publications by eighteen agencies on February 5, 1986 (51 FR 4566) and 21 agencies on June 23, 1986 (51 FR 22880), the Department of Commerce decided to adopt this final rule. The decisions that the Department made in response to comments, however, were not made on the number of comments addressing any one point but on a thorough consideration of the merits of the points of view expressed in the comments. Copies of written comments will remain available for public inspection at the Department of Commerce, 14th and Constitution Avenue NW., Washington, DC in Room 6012 from 8:30 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays, until July 26, 1988.

Section 504 requires that regulations that apply to the programs and activities of Federal Executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submittted. The Department has

today submitted this regulation to the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor. The regulation will become effective on July 26, 1988.

This rule applies to all programs and activities conducted by the Department of Commerce.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Department of Commerce (DOC). As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (sec. 119, Pub. L. 95–602, 92 Stat. 2982), and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that:

> No otherwise qualified individual with handicaps in the United States, * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*
>
> ((29 U.S.C. 794) (1978 amendment italicized).)

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. *See* 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13897 (remarks of Rep. Brademas); *id.* at 38552 (remarks of Rep. Sarasin).

There are, however, some language differences between this final rule and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and the subsequent U.S. Courts of Appeals decisions interpreting *Davis* and section 504. *See Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (*APTA*); *see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its *Divis* decision, the Court explained that section 504 requires only "reasonable" modifications, *id.* at 300, and explicitly noted that "the regulations implementing § 504 [for federally assisted programs] are consistent with the view that *reasonable* adjustments in the nature of the benefit offered must at times be made to assure meaningful access" (*id.* at 301, n.21) (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs, as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the courts in *Davis*, subsequent lower court cases interpreting *Davis*, and *Alexander*; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various Courts of Appeals. Of Course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the agency believes that there are no significant differences between this final rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298).

It has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared.

The General Counsel has certified to the Chief Counsel for Advocacy, Small Business Administration, that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Analysis has not been prepared for purposes of the Regulatory Flexibility Act (5 U.S.C. 601–612).

This rule does not contain collections of information for purposes of the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Section-by-Section Analysis and Response to Comments

Section 8c.1 Purpose.

Section 8c.1 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

No comments were received on this section and it remains unchanged from the proposed rule.

Section 8c.2 Application.

The regulation applies to all programs or activities conducted by the agency. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: Those involving general public contact as part of ongoing agency operations and those directly administered by the agency for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the agency's facilities. Activities in the second category include programs that provide Federal services or benefits. This regulation does not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

No comments were received on this section.

Section 8c.3 Definitions.

"Agency." For purposes of the regulation "agency" means Department of Commerce.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 8c.60(a)(1), they may also be necessary to meet other requirements of the regulation. Comments on the definition of "auxiliary aids" are discussed in connection with § 8c.60(a)(1).

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180 day period for the agency's investigation (*see* § 8c.70(g)) begins when it receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted to clarify its coverage. The phrase, "or interest in such property," is deleted because the term "facility," as used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used in §§ 8c.49, 8c.50, and 8c.70(f).

"Individual with handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps." The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) of the definition states that a "qualified individual with handicaps" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition is based on the Supreme Court's *Davis* decision. In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program gives." 442 U.S. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," *id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "fundamental alteration in the nature of the program." *Id.* at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The definition of "qualified individual with handicaps" has been revised to make clear that the agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in §§ 8c.50(a)(2) and 8c.60(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

Paragraph (2) adopts the existing definition of "qualified handicapped person" with respect to services in the coordination regulation for programs receiving Federal financial assistance (28 CFR 41.32(b)). Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

Paragraph (3) explains that "qualified individual with handicaps" means "qualified handicapped person" as that term is defined for purposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 1613.702(f), which is made applicable to this part by § 8c.40. Nothing in this part changes existing regulations applicable to employment.

"Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 8c.10 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in

the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

This final rule uses the same provision adopted by the Department of Justice in its final rule implementing section 504 for its federally conducted programs. 28 CFR 39.110. The Department of Justice determined that this regulatory language was appropriate after it had analzyed the Federal Advisory Committee Act (5 U.S.C. app.), Executive Order 12024, and 41 CFR Part 101–6, the regulation of the General Services Administration implementing the Act.

This final rule provides that the agency shall provide an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process and development of transition plans by submitting comments (both oral and written).

Section 8c.11 Notice.

Section 8c.11 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 8c.11 is, in fact, a broader and more detailed version of the proposed rule's requirement (at § 8c.60(d)) that the agency provide individuals with handicaps with information concerning their rights. Because § 8c.11 encompasses the requirements of proposed § 8c.60(d), that latter paragraph has been deleted as duplicative.

Section 8c.30 General prohibitions against discrimination.

Section 8c.30 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51). This regulatory provision attracted relatively few public comments and has not been changed from the proposed rule.

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 8c.30 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in § 8c.30. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (*e.g.*, epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participaton in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to disqualify automatically all those who are bling in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (§§ 8c.49–8c.51) and communications (§ 8c.60) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and to the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in § 8c.30(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the agency from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification. A person is a "qualified individual with handicaps" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (see § 8c.3).

In addition, the agency may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. For example, the agency must comply with this requirement when establishing safety standards for the operations of licensees. In that case the agency must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with handicaps in an impermissible manner.

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations

Some commenters argued that the regulation should extend to the activities of licensees or certified entities, citing *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983). In that case, the Court held that section 504 as applied to federally assisted programs did not require the Federal Communications Commission to prohibit discrimination on the basis of handicap by licensed broadcasters, but that "the policies underlying the Communications Act" might authorize the Commission to issue a regulation governing such discrimination. The Court did not, however, indicate that section 504 itself could serve as the source of such regulatory authority.

The Court has held that "the use of the words 'public interest' in a regulatory statute is not a board license to promote the general public welfare. Rather the words take meaning from the purposes of the regulatory legislation." *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976). Section 504 does not of itself extend an agency's regulatory authority to the activities of licensees or certified entities.

Some commenters objected to the omission of a paragraph from the regulations for federally assisted programs that prohibits a recipient from providing significant assistance to an organization that discriminates. To the extent that assistance from the agency would provide significant support to an organization, it would constitute Federal financial assistance, and the organization, as a recipient of such assistance, would be covered by the agency's section 504 regulation for federally assisted programs. The regulatory "significant assistance" provisions, however, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Paragraph (c), provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

Section 8c.40 Employment.

Section 8c.40 prohibits discrimination on the basis of handicap in employment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith v. U.S. Postal Service*, 742 F.2d 257, 259–260 (6th Cir. 1984); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 302–04 (5th Cir. 1981). *Contra McGuiness v. U.S. Postal Service*, 744 F.2d 1318, 1320–21 (7th Cir. 1984); *Boyd v. U.S. Postal Service*, 752 F.2d 410, 413–14 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 504 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Smith*, 742 F.2d at 262; *Prewitt*, 662 F.2d at 304. Accordingly, § 8c.40 (Employment) of this rule adopts the definitions, requirements and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. In addition to this section, § 8c.70(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

The final rule has not been changed, except that a reference to the Equal Employment Opportunity Commission has been added. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. While this rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, the agency has adopted EEOC's recommendation that to avoid duplicative, competing, or conflicting standards with respect to Federal employment, reference in these regulations to the government-wide EEOC rules is sufficient. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 8c.49 Program accessibility: Discrimination prohibited.

Section 8c.49 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 8c.50 and 8c.51.

Section 8c.50 Program accessibility: Existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, § 8c.50 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (§ 8c.50(a)(1)). However, § 8c.50, unlike 28 CFR 41.57, places explicit limits on the agency's obligation to ensure program accessibility § 8c.50 (a)(2)).

Paragraph (a)(2) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in § 8c.60(d). This provision is based on the Supreme Court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), that section 504 does not require program

modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, Courts of Appeals have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. *See, e.g., Dopico v. Goldschmidt, supra; American Public Transit Association v. Lewis (APTA), supra.*

Paragraphs (a)(2) and § 8c.60(d) are also supported by the Supreme Court's decision in *Alexander v. Choate*, 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination prohibited by section 504 or its implementing regulation (*id.* at 299).

Relying on *Davis*, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the grantee offers" (*id.* at 301) and that "*reasonable adjustments* in the nature of the benefit being offered must at times be made to assure meaningful access." (*Id.*, n.21) (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration(s) in the nature of a program' " (*id.*, n.20) (citations omitted). *Alexander* supports the position, based on *Davis* and the earlier, lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus the failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation. This provision is therefore unchanged from the proposed rule.

Some commenters asserted that the holding in *Davis* was that the plaintiff was not a qualified handicapped person and that the subsequent reference to "undue financial and administrative burdens" was mere *dicta*. This view overlooks the interpretations of *Davis* provided by the Federal Courts of Appeals cases mentioned above. The *APTA* and *Dopico* decisons made it clear that financial burdens can limit the obligation to comply with section 504. *See also New Mexico Association for Retarded Citizens v. New Mexico*, 678 F. 2d 847 (10th Cir. 1982). In addition, the Court in *Alexander* held that the "administrative costs" of subjecting any action affecting Medicaid recipients to a detailed analysis of its effects on handicapped people "would be well beyond the accommodations that are required under *Davis*." (469 U.S. at 308).

One comment included a lengthy analysis opposing the undue burdens defense. This comment was premised on the assumption that the proposed regulation was substantively inconsistent with the regulations for federally assisted programs. This assumption is incorrect. Judicial interpretations have established that neither section 504 nor the regulations for federally assisted programs establish an unlimited obligation to modify programs or activities to accommodate individuals with handicaps.

This comment also argued that APTA is no longer good law, in view of the Supreme Court's decision in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (*Conrail*), in which the Court said that Congress intended, through the 1978 amendments to the statute, to codify the HFW regulation. Other commenters also argued that *Conrail* prohibits departures from the language of the federally assisted regulation. The *Conrail* decision addressed only the question of employment coverage under the Statute and cannot be read to mean that Congress "codified" other parts of the regulation. Furthermore, the undue burdens defense is not inconsistent with the HEW regulation; in fact, the employment provisions of the HEW regulation—those addressed in *Conrail*—do include an "undue hardship" defense. This position is confirmed by the Supreme Court's decision in *Alexander*. There the Court referred to its previous recognition in *Conrail* of the regulation as "an important source of guidance on the meaning of section 504," *Alexander*, 469 U.S. at 304, n.24, and at the same time, as discussed above, emphasized that section 504 does not mandate extensive costs and administrative burdens.

The agency is adopting the proposed rule's procedural requirements for application of the "fundamental alteration" and "undue financial and administrative burdens" language. The agency believes that, in most cases, making an agency program accessible will not result in undue burdens. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with section 8c.50(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the Secretary of Commerce or the Secretary's designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Secretary's decision or failure to make a decision may file a complaint under the compliance procedures established in section 8c.70. This paragraph, however, does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

A commenter argued that the decision that an action would result in undue burdens should be based on the resources of the agency as a whole. The agency believes that its entire budget is an inappropriate touchstone for making determinations as to undue financial and administrative burdens. Parts of the agency's budget can be earmarked for specific purposes and are simply not available for use in making the agency's programs accessible to disabled persons.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with

provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 8c.51 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction and alterations under section 504, section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). Section 8c.51 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101–19.600 to 101–19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). It is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in § 8c.50. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of § 8c.51.

Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In *Rose v. United States Postal Service*, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. the *Rose* court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 8c.60 Communications.

Section 8c.60 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 8c.60(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (§ 8c.60(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 8c.60(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with *Davis* and the lower court opinions interpreting it (*see supra* preamble § 8c.50(a)(2)). Unless not required by § 8c.60(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

One commenter argued that the communication section should require that communications for handicapped people be "equal" to those for non-handicapped people, not merely "effective." The regulation requires the agency to provide auxiliary aids to ensure that individuals with handicaps have "an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency." Where the form of communication is different for individuals with handicaps than for non-handicapped people (*e.g.*, oral instead of written for blind people, sign language instead of speech for deaf people) the effectiveness of the communication is the only appropriate measurement of equality of treatment.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (*e.g.*, a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. When sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (§ 8c.60(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

A commenter suggested that the language in proposed § 8c.60(a)(1)(ii) that states that the agency need not provide individually prescribed devices or readers for personal use or study be modified to state that such devices are

not required for "nonprogram material." This suggestion has not been adopted because it is less clear than the existing formulation, which is intended to distinguish between communications that are necessary to obtain the benefits of Federal programs and those that are not, and which parallels the requirements of the Federal Government's section 504 regulations for federally assisted programs. For example, a federally operated library would have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signs at inaccessible facilities that direct users to locations with information about accessible facilities.

Section 8c.70 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (c) of the proposed rule provided that the head of the agency would designate an official to be responsible for coordinating implementation of this section. However, this regulation has been revised to designate the official responsible for coordinating implementation of § 8c.70 and to provide an address to which complaints may be sent.

The agency is required to accept and investigate all complete complaints (§ 8c.70(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (§ 8c.70(e)).

One commenter on the compliance procedures suggested that the agency should be required to refer a complaint to the appropriate agency when it does not have jurisdiction over it. The proposed rule merely required the agency to make reasonable efforts to do so. The agency has not adopted this suggestion because of several possible circumstances in which the agency might not be able to successfully refer a complaint. For example, the agency might receive a complaint that no Federal agency would have jurisdiction over or that did not contain sufficient information to identify the appropriate agency.

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (§ 8c.70(g)). One appeal within the agency shall be provided (§ 8c.70 (i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (§ 8c.70(i)).

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

One commenter suggested that the compliance procedures include: (a) A provision to ensure that all other regulation forms and directives issued by the agency are superseded by the nondiscrimination requirements of this regulation; (b) a provision for judicial review; (c) a provision for the availability of the Federal agency to award attorney fees in administrative proceedings; and (d) a provision for the availability of compensation to the prevailing party.

A statement that previous inconsistent agency directives are superseded is unnecessary as that is the ordinary effect of regulations. The purpose of the regulations on compliance procedures is to notify affected persons of the means to seek an administrative remedy. It is beyond our jurisdiction to specify that judicial review is available to complainants. That issue is for the courts to resolve. Nothing in title V of the Rehabilitation Act provides for the agency award of attorneys fees or compensation to complainants in administrative proceedings other than those involving Federal employees.

List of Subjects in 15 CFR Part 8c

Blind, Buildings, Civil Rights, Employment, Equal Employment Opportunity, Federal buildings and facilities, Handicapped, Government employees.

Date: April 14, 1988.

Katherine Bulow,

Assistant Secretary for Administration.

For the reasons set forth in the preamble, Chapter 15, subtitle A of the Code of Federal Regulations is amended by adding Part 8c to read as follows:

PART 8c—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF COMMERCE

Sec.

8c.1 Purpose.
8c.2 Application.
8c.3 Definitions.
8c.4 through 8c.9 [Reserved]
8c.10 Self-evaluation.
8c.11 Notice.
8c.12 through 8c.29 [Reserved]
8c.30 General prohibitions against discrimination.
8c.31 through 8c.39 [Reserved]
8c.40 Employment.
8c.41 through 8c.48 [Reserved]
8c.49 Program accessibility: Discrimination prohibited.
8c.50 Program accessibility: Existing facilities.
8c.51 Program accessibility: New construction and alterations.
8c.52 through 8c.59 [Reserved]
8c.60 Communications.
8c.61 through 8c.69 [Reserved]
8c.70 Compliance procedures.
8c.71 through 8c.99 [Reserved]

Authority: 29 U.S.C 794.

§ 8c.1 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 8c.2 Application.

This part applies to all programs or activities conducted by the agency except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 8c.3 Definitions.

For purposes of this part, the term—

"Agency" means the Department of Commerce.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participant in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 8c.40.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978)Pub. L. 95–602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 8c.4. through 8c.9 [Reserved]

§ 8c.10 Self-evaluation.

(a) The agency shall, by July 26, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 8c.11 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the Secretary of Commerce or the Secretary's designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§ 8c.12 through § 8c.29 [Reserved]

§ 8c.30 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate

in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicaps; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 8c.31 through 8c.39 [Reserved]

§ 8c.40 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 8c.41 through 8c.48 [Reserved]

§ 8c.49 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 8c.50, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 8c.50 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with section § 8c.50(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Secretary of Commerce or the Secretary's designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by September 26, 1988, except that where structural changes in facilities are

undertaken, such changes shall be made by July 26, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by January 26, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its program or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 8c.51 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 8c.52 through 8c.59 [Reserved]

§ 8c.60 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applications and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 8c.60 would result in such alteration or burdens. The decision that compliance would result in such alteration of burdens must be made by the Secretary of Commerce or the Secretary's designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 8c.61 through 8.69 [Reserved]

§ 8c.70 Compliance procedures

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Chief of the Compliance Divison shall be responsible for coordinating implemention of this section. Complaints may be sent to Chief, Compliance Division, Office of Civil Rights, Room 6012, Herbert C. Hoover Building, 14th and Constitution Avenue, Washington, D.C., 20230.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 8c.70(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Assistant Secretary for Administration.

(j) The Assistant Secretary for Administration shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Assistant Secretary for Administration determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additonal information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of the section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§§ 8c.71 through 8c.99 [Reserved]

[FR Doc. 88-9009 Filed 5-26-88; 8:45 am]
BILLING CODE 3510-BT-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1501

Method for Identifying Toys and Other Articles Intended for Use by Children Under 3 Years of Age Which Present Choking, Aspiration, or Ingestion Hazards Because of Small Parts; Interpretation

AGENCY: Consumer Product Safety Commission.

ACTION: Rule; Statement of Interpretation, Stay of Enforcement.

SUMMARY: In this statement, the Commission * announces its interpretation of its regulation on toys and other articles intended for use by children under the age of three that are or contain small part components made of paper, fabric, yarn, fuzz, elastic, and string. The Commission interprets its small parts regulation as applying to such components. However, in view of its staff's previously publicly disclosed interpretation that the small parts regulation did not apply to such components, the Commission is temporarily staying enforcement of the small parts regulation for such components. This stay of enforcement will give firms which may have relied on the previous staff guidance an adequate opportunity to bring their products into compliance with the small parts regulation and should not unduly risk the safety of children.

DATES: Effective May 27, 1988. Enforcement of the Commission's interpretation of §1501.4(b)(2), that the exclusion for paper, fabric, yarn, fuzz, elastic, and string applies only to bits and pieces that break off from a larger component and does not apply when substantially all of a component made of such materials becomes detached, is stayed from May 27, 1988 until November 23, 1989.

FOR FURTHER INFORMATION CONTACT: Robert Poth, Director, Division of Regulatory Management, Directorate for Compliance and Administrative Litigation, Consumer Product Safety Commission, Washington, DC 20207, telephone: (301) (492-6400).

SUPPLEMENTARY INFORMATION:

A. The Regulation

In June, 1979, the Commission issued a final regulation classifying as a banned hazardous substance any toy or other article intended for use by children under three (3) years of age, that presents a choking, aspiration, or ingestion hazard because of small parts, ("small parts" regulation), 16 CFR Part 1501. The regulation took effect on January 1, 1980.

The small parts regulation sets forth a test procedure for determining whether a product is or contains a small part banned under the regulation. 16 CFR 1501.4. Under the test procedure, if a product or any of its separate parts fits entirely within a cylinder described in the regulation, the product is banned. If the entire product or any of its separate parts does not fit within the cylinder, the product is subjected to the appropriate "test methods for simulating use and abuse of toys and other articles intended for use by children" (hereinafter "use and abuse"), 16 CFR 1500.50, 1500.51 or 1500.52. Any components or pieces of the product which become detached from the article as a result of the use and abuse testing are then placed in the cylinder, one at a time. If any components or pieces fit entirely within the chlinder, the product is banned.

The section of the small parts regulation dealing with components and pieces of a product also addresses, among other things, the applicability of the regulation to components or pieces that are made of paper, fabric, yarn, fuzz, elastic, and string in the following manner:

> Any components or pieces (excluding paper, fabric, yarn, fuzz, elastic, and string) which have become detached from the article as a result of the use and abuse testing shall be placed into the cylinder, one at a time. If any such components or pieces fit entirely within the cylinder, in any orientation and without being compressed, the article fails to comply with the test procedure.

16 CFR 1501.4(b)(2).

Beginning in 1981, the Commission staff interpreted the section of the regulation quoted above as excluding from its scope both "components" and "pieces" of a product made of paper, fabric, yarn, fuzz, elastic, and string. This staff interpretation initially was included in internal enforcement programs later publicly disclosed, and in response to inquiries from individual firms.

In mid 1987, a particular violation of the small parts regulation resulted in the staff of the Commission's Compliance Directorate and Office of the General Counsel examining more closely the interpretation of the small parts regulation's applicability to fabric components. In doing so, the staff reviewed the language in the preamble to the small parts regulation which discussed and explained the exclusion for paper, fabric, yarn, fuzz, elastic, and string (hereinafter, referred to collectively as "fabric"). It became clear from this review that the regulation excluded only fabric pieces and bits that broke off from a larger component and did not exclude the fabric component itself. This distinction is significant. It means that if substantially all of a fabric component of a product, a pom pon or a fabric eyebrow on a stuffed animal, for example, separates from the product during use and abuse testing, and the component fits within the small parts cyclinder, the product is banned. If, however, a bit or piece of the fabric component breaks off during use and abuse testing, the product is not banned even if the bit or piece fits within the small parts cylinder.

It is clear from the preamble that the basis for the exclusion from the small parts regulation for bits and pieces of material was testing limitations rather than because the material did not present an unreasonable risk of injury. The preamble explains the exclusion as follows:

> [T]he Commission's proposed regulation excluded from coverage certain substances that could become exposed as a result of the use and abuse testing. These were bits of fabric, yarn, paper, and fuzz. *The reason for these exclusions was that these fibrous type materials cannot be meaningfully tested with the truncated cylinder when they are pulled off or out of a toy.* For example, the bits of fuzz that can be "picked off" a teddy bear and the clumps of yarn hair that can be plucked from a doll's head cannot be tested in the cylinder with any precision. The Commission does not expect these minor exclusions to affect the overall effectiveness of the regulation.

44 FR 34892, 34898, 34899 (June 15, 1979) (emphasis added).

This issue is further discussed in another part of the preamble:

* The Commission approved this statement by a 2-1 vote with Commissioner Carol G. Dawson dissenting. Copies of Commissioners' separate statements are available from the Commission's Office of the Secretary, 5401 Westbard Avenue, Bethesda, MD 20207.

(g) *Articles made of fabric, yarn, fuzz, and paper.* The proposed regulation excluded from the test procedure any piece or "bit" of paper, fabric, yarn or fuzz that became detached from a toy as a result of use and abuse testing. As already discussed in this section, these exclusions (as well as exclusions for elastic and string) are contained in the final regulation (§ 1501.4(b)(2)). *They are based on the testing limitations posed by these bits of materials.* (Emphasis added) A number of commenters have suggested that products made of the same materials be added to the list of exempted products in § 1501.3. The Commission declines to do so because products made entirely of these materials present the same potential small parts risk as products made of all other materials. It is only bits of the materials which cannot be tested meaningfully and which have therefore been excluded in § 1501.4(b)(2). (For a different reason, products made of paper are already exempted. In addition, fuzz is, by definition a bit of material, and an entire product would not be made of fuzz). (emphasis added)

44 FR 34892, 34900 (June 15, 1979)

The testing limitation referred to in the excerpt from the preamble quoted above, concerns the random size of a fabric "bit" or "piece" that may detach from an article when subjected to use and abuse testing. However, the Commission is unaware that there actually ever existed any such similar testing limitation for fabric components that may detach and, therefore, no such technical basis for excluding fabric components from the scope of the small parts regulation.

Due to the July, 1987 staff reinterpretation of fabric components coverage under the small parts regulation, several toys and other articles intended for use by children were seized in joint operations with the Customs Service.

B. Commission Interpretation

The Commission believes that the new interpretation is in all respects proper and in accordance with law. However, the Commission also believes that in view of the previous publicly disclosed staff interpretation that the small parts regulation did not apply to fabric components, immediate enforcement of the new interpretation could result in unfairness and inequities, particularly to those firms that may have relied in good faith on the prior staff interpretation of the small parts regulation.

In view of the Commission's affirmation of the new staff interpretation of the small parts regulation as it applies to components made of paper, fabric, yarn, fuzz, elastic, and string, the Commission has decided as a matter of enforcement discretion to stay all future enforcement of the small parts regulation as it applies to these components effective from May 27, 1988, until November 23, 1989. The Commission believes that the stay of enforcement until May 23, 1989, will give industry, if any confusion exists, an adequate opportunity to bring toys and other articles intended for use by children under the age of three (3) containing fabric components into compliance with the small parts regulation. The Commission further believes the stay of enforcement will not unduly risk the safety of children under the age of three because in the event a particular component made of paper, fabric, yarn, fuzz, elastic, or string creates a significant risk of injury to children, the Commission can use the authority of section 15(c) of the FHSA, 15 U.S.C. 1274(c), to seek public notice of the hazard and removal of the product from the marketplace.

Of course, the Commission expects and urges firms to make necessary modifications in their products to bring products bearing fabric components into compliance with the small parts regulation as much in advance of that date as possible.

The Commission also notes that although its new interpretation of 16 CFR 1501.4 could be read to require components made of paper to comply with the small parts regulation, another section of the small parts regulation, 16 CFR 1501.3(b), exempts "[b]ooks and other articles made of paper * * *" In view of that exemption, components made of paper are not subject to the small parts regulation. However, as noted previously, if a particular paper component presents a substantial risk of injury to children, the Commission can use the authority of 15 U.S.C. 1274(c) to seek public notice of the hazard and the removal of that product from the marketplace.

In any enforcement action based on the interpretation set forth below, affected parties who disagree with the action will have a full opportunity in a federal district court and/or administrative proceeding to challenge the Commission's interpretation concerning the applicability of the small parts regulation to components made of fabric and the other named materials. Affected parties of course had the opportunity for notice and comment on the previously promulgated small parts regulation, 44 FR 34903 (June 15, 1979).

Accordingly, pursuant to the Federal Hazardous Substances Act, 74 Stat. 372, 378, 80 Stat. 1303–1304, 83 Stat. 187, 189; 15 U.S.C. 1261, 1262, 1269; and under authority vested in the Commission by the Consumer Product Safety Act (Pub. L. 573, 30(a), 86 Stat. 1231, 15 U.S.C. 2079(a), 16 CFR Part 1501 is amended as follows:

PART 1501—[AMENDED]

1. By inserting a new Subpart A heading immediately preceding § 1501.1 to read as follows:

Subpart A—Regulations

2. By adding a new Subpart B to read as follows:

Subpart B—Interpretations

§ 1501.20 Components.

(a) To eliminate any confusion concerning the staff's interpretation of the small parts regulation's applicability to components of a product which become detached from the article as a result of use and abuse testing, it is the Commission's interpretation of § 1501.4(b)(2) of this regulation that the exclusion for paper, fabric, yarn, fuzz, elastic, and string, applies only to bits and pieces that break off from a larger component. That exclusion does not apply when substantially all of a component made of paper, fabric, yarn, fuzz, elastic, or string becomes detached. Paper, however, is exempted from the regulation by § 1501.3(b). Based on that exemption for paper, paper components would not be subject to § 1501.4(b)(2).

(b) In the event a product intended for use by children under the age of three (3) bears a component made of paper, that the Commission believes may present a significant risk of injury to children, the Commission has the authority under 15 U.S.C. 1274(c) to seek public notice of the hazard and the removal of the product from the marketplace. Similarly, the Commission has the authority under 15 U.S.C. 1274(c) to seek public notice and the removal from the marketplace of products from which bits and pieces separate if those bits and pieces may present a substantial risk of injury to children.

Dated: May 19, 1988.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 88–11690 Filed 5–26–88; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 154, 157, 260, 284, 385 and 388

[Docket No. RM87-17-001; Order No. 493]

Natural Gas Data Collection System

Issued: May 19, 1988.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of availability of record formats and Order providing new effective date.

SUMMARY: On May 2, 1988, the Federal Energy Regulatory Commission (Commission) granted rehearing of Order No. 493 concerning the natural gas data collection system, 53 FR 15023 (Apr. 27, 1988), for the purpose of further consideration. The order granting rehearing providing applicants filing timely petitions for rehearing an additional period of time to review the record formats in Order No. 493. The order granting rehearing also suspended the effective date of Order No. 493 until the record formats were available.

This notice provides that the record formats in Order No. 493 were made available on May 19, 1988. Applicants that have filed petitions for rehearing of Order No. 493 will have until July 5, 1988, to supplement these petitions for rehearing with respect to the record formats.

This notice also provides that the new effective date for Order No. 493 is August 1, 1988.

DATES: This notice of availability is effective May 19, 1988.

Supplements to the petitions for rehearing with respect to the record formats in Order No. 493 are due on or before July 5, 1988.

The new effective date for Order No. 493 is August 1, 1988.

FOR FURTHER INFORMATION CONTACT: Julia Lake White, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capital Street, NE., Washington, DC 20426, (202) 357-8530.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

On May 2, 1988, the Federal Energy Regulatory Commission (Commission) issued an order granting rehearing of Order No. 493[1] for the purpose of further consideration. The Commission also suspended the effective date of Order No. 493 until the record formats for electronic date submission of certain rate filings, certificate and abandonment applications and FERC Forms were available to the public for review and comment.[2]

The record formats in Order No. 493 are available at the Commission as of May 19, 1988. The record formats may be obtained from three sources. A limited number of printed copies of the record formats are available in the Commission's Public Reference Room.

The record formats are also available on diskette (3½" or 5¼") from the Commission's photocopying contractor for a fee of $5.00 per diskette. Requests should be forwarded to: Public Reference Room, 825 North Capitol Street, NE., Room 1000, Washington, DC 20426, (202) 898-1151.

Finally, the record formats are available through the Commission Issuance Posting System (CIPS) for a period of ten days. The CIPS is an electronic bulletin board offered at no charge to the user and available 24 hours a day using a personal computer and modem. For additional information on CIPS, contact the Commission's Public Reference Room at (202) 357-8118.

The following files are available on diskette and can be accessed through CIPS:

File name	Contents	Hardcopy reference
1. FORM2.P1	Form 2, Part 1	Pages 1-79.
2. FORM2.P2	Form 2, Part 2	Pages 80-163.
3. FORM2.P3	Form 2, Part 3	Pages 164-239.
4. FORM2.P4	Form 2, Part 4	Pages 240-284.
5. FORM2.P5	Form 2, Part 5	Pages 285-331.
6. FORM2A.P1.	Form 2A, Part 1	Pages 1-85.
7. FORM2A.P2.	Form 2A Part 2	Pages 86-181.
8. FORM8	Form 8	Pages 1-23.
9. FORM11	Form 11	Pages 1-34.
10. FORM14	Form 14	Pages 1-34.
11. FORM15	Form 15	Pages 1-38.
12. FORM16	Form 16	Pages 1-39.
13. RATES.P1	Rate Filings, Part 1.	Pages 1-101.
14. RATES.P2	Rate Filings, Part 2.	Pages 102-202.
15. TARIFFS	Tariffs	Pages 1-17.
16. CERTS	Certificate Applications.	Pages 1-19.

Petitioners filing petitions for rehearing in this docket will have 45 days to supplement their petitions with additional comments on the record formats. Supplementary comments must be filed with the Commission on or before July 5, 1988.

Subject to OMB approval, the new effective date for Order No. 493 is August 1, 1988.

By the Commission.

Lois D. Cashell

Acting Secretary.

[FR Doc. 88-11911 Filed 5-26-88; 8:45 am]

BILLING CODE 6717-01-M

[1] 53 FR 15023 (Apr. 27, 1988).

[2] 53 FR 16058 (May 5, 1988).

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

Approval of Amendment to the Ohio Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule.

SUMMARY: OSMRE is announcing the approval of a proposed amendment submitted by the State of Ohio as a modification to its permanent regulatory program (hereinafter referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment consists of changes to the Ohio program regulations regarding historic properties.

EFFECTIVE DATE: May 27, 1988.

FOR FURTHER INFORMATION CONTACT: Ms. Nina Rose Hatfield, Director, Columbus Field Office, Office of Surface Mining Reclamation and Enforcement, Room 202, 2242 South Hamilton Road, Columbus, Ohio 43232; Telephone: (614) 866-0578.

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio program

The Ohio program became effective on August 16, 1982, following conditional approval by the Secretary of the Interior on August 10, 1982. Information pertinent to the Ohio program submission, as well as the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Ohio program, can be found in the August 10, 1982 **Federal Register** (47 FR 34688). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 935.11, 935.12, 935.15 and 935.16.

II. Discussion of Amendment

By letter dated October 16, 1987 (Administrative Record No. OH-0984) Ohio submitted Program Amendment

Number 31, which revised various provisions of the Ohio Administrative Code (OAC) concerning the protection of historic properties from the adverse effects of coal exploration and surface coal mining and reclamation operations.

The proposed revisions were submitted, in part, to satisfy the requirements of a June 9, 1987 letter from OSMRE to Ohio setting forth those provisions of the Ohio program in need of amendment to remain no less effective than the corresponding Federal regulations revised and promulgated on February 10, 1987. The amendment also satisfies one of the requirements the Director placed on Ohio when he approved Program Amendment Number 25 on July 17, 1987 (52 FR 26959–26972), as codified at 30 CFR 935.16(d).

The December 7, 1987 Federal Register announced receipt of the proposed amendment and invited public comment on its adequacy (52 FR 46377).

III. Director's Findings

As discussed below, the Director finds, in accordance with SMCRA and 30 CFR 732.15 and 732.17, that Program Amendment Number 31, as submitted by Ohio on October 16, 1987, meets the requirements of SMCRA and 30 CFR Chapter VII.

1. *OAC 1501:13–1–02 Definitions.*

(a) *Cemetery.* Ohio proposes to revise the definition of "cemetery" in paragraph (M) of this section to delete the exclusion of isolated grave sites and family burial grounds owned by private citizens. On July 17, 1987, as codified at 30 CFR 935.12(c) and 935.16(d), OSMRE disapproved this exclusion and required that Ohio amend its regulations accordingly (52 FR 26959). This amendment fulfills that requirement.

The revised rule defines "cemetery" as "any area of land where human bodies are interred." Since this language is identical to the corresponding Federal definition at 30 CFR 761.5, the Director finds that it is no less effective than that regulation. Therefore, the disapproval of OAC:13–1–02(M) listed at 30 CFR 935.12(c) and the requirement that Ohio amend its program to include private family burial grounds within the definition of cemetery, as directed by § 935.16(d), can be removed.

(b) *Fragile and historic lands.* Ohio proposes to revise the definition of "fragile lands" in paragraph (PP) of this section to add paleontological sites to the list of examples of fragile lands and to delete buffer zones for areas in which mining is prohibited from that list. The changes parallel those made to the corresponding Federal definition at 30 CFR 762.5. As noted in the preamble to that rule (52 FR 18793, May 19, 1987), deletion of buffer zones from the list of examples of fragile lands does not prohibit such lands from being disignated as unsuitable for mining where the regulatory authority deems it appropriate to do so; it merely recognizes the fact that buffer zones are not in and of themselves fragile lands.

In addition, Ohio proposes to revise the definition of "historic lands" in paragraph (YY) of this section by deleting paleontological sites from the list of examples of historic lands and adding National Historic Landmarks to that list to parallel the revised Federal definition of this term at 30 CFR 762.5.

Both definitions have been revised to delete the requirement that, before lands can be designated as fragile or historic, the petitioner demonstrate that historic or fragile resources could suffer irreparable damage or be destroyed by coal mining operations. This revision is in accordance with a December 3, 1984 order of the U.S. District Court for the District of Columbia in *In re: Permanent Surface Mining Regulation Litigation II* (Civil Action No. 79–1144), as reflected in the revised Federal definitions promulgated on May 19, 1987.

Therefore, since Ohio's proposed definitions of "fragile lands" and "historic lands" are identical to the corresponding Federal definitions, the Director finds that they are no less effective than those definitions.

2. *OAC 1501: 13–3–03 Areas Where Mining is Prohibited or Limited.*

Ohio proposes to revise paragraph (C) of this section to remove the prohibition on the conduct of coal mining operations on lands where mining would adversely affect places eligible for listing, but not actually listed, on the National Register of Historic Places. The corresponding Federal rule at 30 CFR 761.11(c) affords such protection only to publicly owned parks and properties actually listed on the Register. Since the Ohio rule retains equivalent protection for such sites, the Director finds that OAC 1501:13–3–03(C) is no less effective than the Federal regulation at 30 CFR 761.11(c).

Ohio also proposes to revise paragraph (G) of this section to specifically allow relocation of cemeteries if authorized under State law or regulations. Since the corresponding Federal rule at 30 CFR 761.11(g) contains an identical provision, the Director finds that OAC 1501:13–3–03(G) is no less effective than that Federal regulation.

3. *OAC 15:13–3–04 Procedures for Identifying Areas Where Mining Is Prohibited or Limited.*

Ohio proposes to revise paragraph (E) of this section to eliminate its applicability to places eligible for listing, but not actually listed, on the National Register of Historic Places. The rule would continue to apply to publicly owned parks and places listed on the Register. In addition, Ohio has added a new subparagraph authorizing the Chief to grant an extension of the timeframe within which the agency jurisdiction over the park or place must approve or disapprove permit applications for operations which would adversely affect the park or place. Since the revised rule is identical to the corresponding Federal rule at 30 CFR 761.12(f), the Director finds that it is no less effective than that regulation.

4. *OAC 1501:13–4–01 General Content Requirements for Permit Applications.*

Ohio proposes to amend paragraph (B) of this section, which requires coordination of permit application review and issuance with all other applicable Federal or State permitting processes, to include compliance with the Archaeological Resources Protection Act of 1979 where Federal or Indian lands are involved. The Director finds that this change corresponds to a similar revision in the analogous Federal rule at 30 CFR 773.12 and that it is therefore no less effective than that rule. However, he expects that a punctuation error in the amendment, which could be misinterpreted as limiting the applicability of the Bald Eagle Protection Act to Federal and Indian lands rather than all lands, will be corrected prior to promulgation or in a subsequent rulemaking.

5. *OAC 1501:13–4–04 and 1501:13–4–13 Permit Application Requirements for Information on Environmental Resources.*

In addition to minor editorial revisions, Ohio proposes to revise paragraph (A) of these two sections, which apply to surface and underground mining operations, respectively, to authorize the Chief to require the applicant to identify and evaluate historic resources within the proposed permit area. The proposed language is identical to that of the corresponding Federal regulations at 30 CFR 779.12(b) and 783.12(b); therefore, the Director finds that the amended Ohio provisions are no less effective than the Federal rules.

Ohio is also revising paragraph (K)(7) of these two sections by deleting language made redundant by the revised definition of cemetery. Since the changes to this paragraph, which requires that all human burial sites within 100 feet of the proposed permit area be identified on the application map, do not substantively alter any requirement, the Director finds that the

revised State regulations are no less effective than the corresponding Federal regulations at 30 CFR 779.24(j) and 783.24(j), which contain identical cemetery mapping requirements.

6. *OAC 1501:13–4–05 and 1501:13–4–14 Permit Application Requirements for Reclamation and Operations Plans*

OAC 1501:13–4–05(K) and OAC 1501:13–4–14(J), which apply to surface and underground operations, respectively, require the applicant to explain how public parks and historic places will be protected during mining. Ohio proposes to revise these rules to specify that the reclamation and operations plan must describe how adverse impacts to these sites will be prevented, or, if valid existing rights exist or joint agency approval has been requested, how such impacts will be minimized. In addition, the proposed rules clarify that the Chief has the authority to require the applicant to protect properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures.

The revised State rules are identical to the corresponding Federal requirements at 30 CFR 780.31 and 784.17; therefore, the Director finds that the amended State provisions are no less effective than these Federal regulations.

7 *OAC 1501:13–5–01 Review, Public Participation and Approval or Disapproval of Permit Applications and Permit Terms and Conditions.*

OAC 1501:13–5–01(E)(16) currently requires that, prior to approving any application for a permit, significant revision or renewal, the Chief find that the mining and reclamation operations will not adversely affect a private family burial ground. Since the revised definition of "cemetery" includes private family burial grounds, this finding no longer serves any purpose. Accordingly, Ohio is now deleting this finding and replacing it with one that the Chief has taken into account the effect of the proposed permitting action on properties listed on or eligible for listing on the National Register of Historic Places.

The corresponding Federal regulation at 30 CFR 773.15(c)(11) was similarly revised on February 10, 1987 (52 FR 4262). Therefore, the Director finds that the Ohio finding as revised is no less effective than the Federal rule.

IV. Public and Agency Comments

Public Comments

The public comment period and opportunity to request a public hearing announced in the December 7, 1987 **Federal Register** ended January 6, 1988. No written comments were received. Only one person requested an opportunity to testify at a public hearing. Therefore, on January 4, 1988, a public meeting was held in place of the hearing scheduled at OSMRE's Columbus Field Office. A record of this meeting was prepared, attached to the legal documents entered in testimony by the commenter, and placed in the Ohio Administrative Record (OH–1010).

At this meeting, the commenter, representing Holmes Limestone Company, stated that the OSMRE requirement that Ohio remove the reference to private family burial grounds and isolated grave sites from the definition of "cemetery" at OAC 1501:13–1–02(M) was inconsistent with the May 3, 1985 finding of the U.S. District Court for the Northern District of Ohio in *Holmes Limestone Company, et al.*, v. *Cecil B. Andrus, et al.*, Case Number C–80–993A. In this decision, the court found that, to be consistent with the purposes of SMCRA and avoid a substantial constitutional question, the term "cemetery" should be construed as excluding private family burial grounds or sites. On the basis of the history of this issue as outlined below, the Director does not agree that the findings of the court in this case require him to disapprove the proposed definition.

On March 13, 1979, the Secretary promulgated a regulation defining cemetery as "any area of land where human bodies are interred" (44 FR 15341). On June 6, 1980, Holmes Limestone Company filed suit (*Holmes Limestone* v. *Andrus*) challenging this definition to the extent that it included private family burial sites located on private property. On October 7, 1980, the District Court dismissed this suit, finding that, under Section 526(a)(1) of SMCRA, it had no jurisdiction to hear challenges to the Secretary's regulations. However, on August 6, 1981, the U.S. Court of Appeals for the Sixth Circuit (Case No. 80–3666, 655 F.2d 732) reversed this jurisdictional finding and remanded the case to the District Court for reconsideration. Although the decision of the Court of Appeals was confined to the question of jurisdiction and did not reach the merits of the plaintiffs' arguments, in an opinion accompanying the decision, the Court also noted that there appeared to be no basis for the inclusion of private family burial grounds within the definition of cemetery. On May 24, 1982, the U.S. Supreme Court denied the government's petition for a writ of certiorari, thus allowing the decision of the Court of Appeals to stand (456 U.S. 995, 102 S. Ct. 2280).

In accordance with these decisions and the opinion of the Court of Appeals, OSMRE subsequently promulgated a revised definition of cemetery which excluded private family burial grounds (48 FR 41348, September 14, 1983). However, on July 15, 1985, the U.S. District Court for the District of Columbia ruled that, the *Holmes Limestone* decision notwithstanding, the revised definition and in particular the exclusion of private family burial grounds, was inconsistent with SMCRA (*In re: Permanent Surface Mining Regulation Litigation II*, Civil Action No. 79–1144). To comply with this decision, OSMRE on February 10, 1987, repromulgated the original March 13, 1979 definition of cemetery, which states simply that "cemetery means any area of land where human bodies are interred." Therefore, since the regulation which was the subject of the *Holmes Limestone* litigation has been revised and relitigated subsequent to that decision, the Director believes that the decision of the U.S. District Court for the Northern District of Ohio is no longer controlling.

Agency Comments

Pursuant to Section 503(b) of SMCRA and the implementing regulations at 30 CFR 732.17(h)(11)(i), comments were solicited from various Federal agencies with an actual or potential interest in the Ohio program. The Farmers Home Administration identified an insignificant typographical error in OAC 1501:13–4–14(J)(2) and suggested that the wording of two other regulations (neither of which is the subject of this rulemaking) be modified for clarity. The Mine Safety and Health Administration and the U.S. Army Corps of Engineers submitted comments pertaining only to program provisions which are not the subject of this amendment; therefore, the Director did not consider them in this rulemaking. No other comments were received. OSMRE has suggested that Ohio correct the typographical error prior to promulgation and has forwarded all other comments to the State for consideration in future rulemakings as appropriate.

Pursuant to 30 CFR 732.17(h)(4), copies of the amendment were provided to the State Historic Preservation Officer and the Advisory Council on Historic Preservation for review and comment. The State Historic Preservation Officer stated that, while he felt additional consideration should be afforded cultural resources, he did not object to the amendment and recognized that the changes were in concert with those promulgated by OSMRE on February 10,

1987 (Administrative Record No. OH–0976). No comments were received from the Advisory Council.

V. Director's Decision

Based upon the findings discussed above, the Director is approving the amendment as submitted on October 16, 1987, and is amending Part 935 of 30 CFR Chapter VII to implement this decision. In additon, as explained in Finding 1(a), the Director is amending 30 CFR 935.12(c) and 935.16(d) to (1) remove his disapproval of the definition of cemetery at OAC 1501:13–1–02(M) and (2) delete the requirement that Ohio amend this definition to include private family burial grounds. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to conform their programs with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

1. Compliance With the National Environmental Policy Act

The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C., 1291(d), no environmental impact statement need be prepared on this rulemaking.

2. Compliance With Executive Order 12291

On August 28, 1981, the Office of Management and Budget (OMB) granted OSMRE an exemption from Sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

3. Compliance With the Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

4. Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 935

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Date: May 19, 1988.

Robert E. Boldt,

Deputy Director.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 935—OHIO

1. The authority citation for Part 935 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. In § 935.12, the introductory language of paragraph (c) is removed and paragraphs (c)(1) through (c)(3) are redesignated as paragraphs (a) through (c), respectively.

3. In § 935.15, a new paragraph (ee) is added to read as follows:

§ 935.15 Approval of regulatory program amendments.

* * * * *

(ee) The following amendment concerning the treatment and protection of historic properties and the definition of "fragile lands," as submitted to OSMRE on October 16, 1987, is approved effective May 27, 1988: Revisions to the following provisions of Chapter 1501 of the Ohio Administrative Code: 13–1–02(M), (PP) and (YY); 13–3–03 (C) and (G); 13–3–04(E); 13–4–01(B); 13–4–04 (A) and (K)(7); 13–4–05(K); 13–4–13 (A) and (K)(7); 13–4–14(J) and 13–5–01(E)(16).

§ 935.16 [Removed and reserved]

4. In § 935.16, paragraph (d) is removed and reserved.

[FR Doc. 88–12009 Filed 5–26–88; 8:45 am]
BILLING CODE 4310–05–M

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 527

[Army Regulation 210–60]

Personal Check Cashing Control and Abuse Prevention

AGENCY: Army Department, DOD.

ACTION: Final rule.

SUMMARY: This regulation standardizes dishonored check procedures at check-cashing facilities on Army installations and implements fair, but firm, controls over dishonored check writers.

EFFECTIVE DATE: June 27, 1988.

ADDRESS: Ofc of the Dir. Fin & Acctg (FM), (SAFM–FAP–B), Indianapolis, IN 46249–1016.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Johnson, (317) 542–3250.

SUPPLEMENTARY INFORMATION: 32 CFR Part 527 is published to give the Army's procedures on dishonored checks. These procedures are intended to protect and assist the check writers and the check-cashing institutions. Some changes from AR 210–60, July 15, 1984 are:

- The definition of an offense is any insufficient funds check.
- Suspension policy reflects the policies of check-cashing facilities.
- Appeal policy has been relaxed to accommodate the new definition of an offense.
- RCS: CSCOA–105 added Row C, total number of check writers. Manual ICCO reporting systems may report only total dollar amount and total number of dishonored checks. Enlisted groupings have been changed from E1–E3 and E4–E6 to E1–E4 and E5–E6.

Title 32, Chapter V, Subchapter A is amended by adding Part 527 to read as follows:

PART 527—PERSONAL CHECK CASHING CONTROL AND ABUSE PREVENTION

Subpart A—Introduction

Section I—General

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527.1 Purpose and scope.
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527.4 Department of the army objective.

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527.38 Source of Data.
527.39 Preparation.
527.40 Frequency, routing, and due dates.
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527.42 Ethics and military competence.
527.43 Personal financial readiness/soldier money management.
527.44 Initial entry training.
527.45 Remedial training.

Appendix A—References

A. References

Authority: 5 U.S.C. 5511–5512; 37 U.S.C. 1007; 18 U.S.C. 1382; Articles 123a, 133, and 134, Uniform Code of Military Justice (UCMJ, Art 123a, 133, and 134).

Subpart A—Introduction

Section I General

§ 527.1 Purpose and scope.

(a) This regulation prescribes policies and procedures to—

(1) Control and prevent abuse of check-cashing privileges.

(2) Reduce losses to appropriated fund (AF) and nonappropriated fund (NAF) activities.

(b) Policies and procedures for cashing checks or redeeming dishonored checks at check-cashing facilities are not within the scope of this regulation. These are prescribed by the proponent agencies of the activities providing check-cashing services to patrons for their facilities in—

(1) AR 60–20/AFR 147–14 and Exchange Service Manual 55–21 for Army and Air Force Exchange Service (AAFES) facilities.

(2) AR 30–19 and the Commissary Operating Manual for commissary resale activities.

(3) AR 215–1 and AR 215–2 for U.S. Army Community and Family Support activities.

(4) AR 37–103 for finance and accounting offices.

(c) Policies and procedures for all suspensions of check-cashing privileges and appeal actions on such suspensions, regardless of where the dishonored check was returned on the installation, are governed by this regulation.

§ 527.2 References.

Required and related publications are listed in Appendix A to this part.

§ 527.3 Explanation of abbreviations and terms.

Abbreviations and special terms used in this regulation are explained in the glossary.

§ 527.4 Department of the Army (DA) objective.

Prevention of abuse of check-cashing privileges includes all measures taken to reduce acts of abuse or misuse to the lowest possible level. Factors leading to this abuse stem mainly from lack of education and experience in managing personal finances. The DA objective is to ensure all soldiers acquire and maintain knowledge, skills, and motivation needed to practice responsible personal financial management.

Section II Responsibilities

§ 527.5 Director, Finance & Accounting, Assistant Secretary of the Army (Financial Management).

The Director, Finance & Accounting, Assistant Secretary of the Army (Financial Management) (OASA (FM)) establishes and administers the Department of the Army (DA) program to control and prevent abuse of check-cashing privileges on Army installations by Department of Defense (DOD) personnel. The Director, Finance & Accounting (OASA(FM)) will—

(a) Give technical assistance to major Army commands (MACOMs) and installations with regard to their dishonored check programs.

(b) Coordinate with Deputy Chief of Staff, Personnel (DCSPER)/USACFSC on aspects of the check-cashing abuse prevention program pertaining to morale and welfare.

(c) Maintain liaison with the Deputy Chief of Staff for Operations and Plans and the Commanding General, U.S. Army Training and Doctrine Command (TRADOC) on Personal Financial Readiness/Soldier Money Management (PFR/SMM) in DA service schools and training centers.

§ 527.6 Deputy Chief of Staff for Personnel/U.S. Army Community and Family Support Center.

The Deputy Chief of Staff for Personnel/U.S. Army Community and Family Support Center (DCSPER/USACFSC) will—

(a) Adivse the Director, Finance & Accounting (OASA (FM)) on personnel aspects of the program affecting the morale and welfare of DA members.

(b) Establish, maintain, and administer PFR/SMM and counseling services for DA personnel and their family members within the Army Community Service (ACS) Center program.

(c) Coordinate with the Director, Finance & Accounting (OASA(FM)) on the PFR/SMM aspect of the ACS consumer education training and budget counseling.

(d) Include PFR/SMM in the curriculum of the Army Continuing Education System and other DA schools administered by DSCPER that serve DA personnel and their family members.

§ 527.7 Heads of Headquarters, Department of the Army and field operating agencies.

Heads of Headquarters, Department of the Army (HQDA) and field operating agencies will—

(a) Prescribe procedures and conditions for providing check-cashing service to patrons of their facilities.

(b) Coordinate with the Director, Finance & Accounting (OASA(FM)) on policies and procedures to control and prevent dishonored checks. (See AR 310–3, para 1–9.)

§ 527.8 Commanders of major Army commands (MACOMs).

MACOM commanders will—

(a) Support and monitor the Dishonored Check Control Program—

(1) At intermediate or subordinate commands.

(2) At installations reporting directly to their headquarters.

(b) Give policy and procedural guidance to subordinate elements within their jurisdictions.

(c) Monitor effectiveness of the command Dishonored Check Control Program.

(d) Evaluate the Dishonored Check Control Program monthly.

(e) Ensure all subordinate elements within their jurisdiction conduct ongoing PFR/SMM training and educational programs. (See Training Circular 21–7)

(f) Establish a monitoring and evaluation system to ensure—

(1) Training programs are managed effectively.

(2) Training programs agree with DA goals, objectives, and guidelines.

§ 527.9 Commanding General, U.S. Army Training and Doctrine Command.

The Commanding General, U.S. Army Training Doctrine Command (TRADOC) will—

(a) Develop and maintain the course of instruction for the PFR/SMM training of all soldiers.

(b) Ensure time is allotted in basic training, advanced individual training, or one station unit training for—

(1) Training of enlistees.

(2) Repeat of the course for trainees not achieving the lesson standard.

(c) Ensure programs of instruction (POI) of the Army Finance School include courses that equip finance officers and noncommissioned officers to assist in providing PFR/SMM to soldiers and units in the field. (See Training Circular 21–7).

§ 527.10 Installation commanders.

Installation commanders (or equivalent) or designated representatives will—

(a) Maintain, support, and monitor installation programs to control and prevent abuse of check-cashing privileges.

(b) Set up check control offices under the direct control of active duty commissioned or warrant officers, senior noncommissioned officers, or DA civilians GS–7 and above. Prior to the appointment of an installation check control officer (ICCO), the commander should review the provisions of §§ 527.13 and 527.31, and consider which major organizational element has staff supervision over—

(1) The majority of check-cashing facilities.

(2) The extension or withdrawal of installation privileges.

(3) The overstamping of identification (ID) cards.

(c) Ensure that if responsibility of ICCO is transferred from one organizational element to another, that resources are transferred also.

(d) Approve/disapprove appeals of suspended check-cashing privileges when checkwriter has committed four or more offenses.

(e) Appoint an individual or individuals serving at an installation staff directorate level to act on appeals of suspended check-cashing privileges when the checkwriter has committed 3 offenses.

(f) Appoint an individual or individuals serving at an installation staff division level to act on appeals of suspended check-cashing privileges when the checkwriter has committed 2 offenses.

(g) Ensure the priority of educational efforts is based on the needs of personnel under their command.

(h) Ensure the POI for suspended personnel will stress—

(1) Career consequences of abuse of check-cashing privileges.

(2) Referral to individual and family counseling sources, when required.

(i) During inprocessing at permanent change of station for the following:

(1) Soldiers (E1 through E5). Emphasis will be on—

(i) Basics of checkbook management.

(ii) Check to financial organization pay option.

(iii) Consequences of abuse of check-cashing privileges.

(iv) Counseling services.

(2) Leaders (E6 through E9 and officers). Education will stress—

(i) The command unique elements of the dishonored check problem.

(ii) Leaders' responsibilities for role setting, training troops, and applying discipline.

(3) DA civilians and Family members. Education and counseling will be offered on a voluntary basis in accordance with AR 608–1.

§ 527.11 Unit commanders.

Unit commanders will assist the post/installation commander in the control and prevention of check-cashing privilege abuse. Unit commanders will—

(a) Advise all newly arrived personnel during the initial interview of their responsibilities for the proper use of personal checking accounts and check-cashing privileges and ensuring that their family members are aware of the same. Also determine the capabilities of the soldier for maintaining their checking account.

(b) Deliver notices of dishonored check offenses and suspensions to unit members and counsel them within 2 days of written notification.

(c) Take actions to properly settle the personal debts of soldiers if soldiers under their command issue dishonored checks. Articles 15, 121, 123a, and 133 or 134 of the UCMJ may be applied as stated in AR 600–20, para 5–10.

(d) Approve/disapprove appeals of suspended check-cashing privileges if a soldier or family member has committed a first offense.

(e) Recommend approval or disapproval of appeal actions to the individual appointed by the installation commander for 2 or more offenses.

(f) Determine whether the overstamping of an ID card is necessary if this is the checkwriter's first or second offense. As a disciplinary and control action this is advised.

(g) Schedule soldiers for remedial training and encourage family members who have written dishonored checks to attend this training.

§ 527.12 Supervisors of civilians.

Where DOD civilians are authorized check-cashing privileges the supervisors of these civilians will—

(a) Deliver notices of dishonored check offenses and suspensions to employees and counsel them.

(b) Approve/disapprove appeals of suspended check-cashing privileges if the employee has committed a first offense.

(c) Recommend approval or disapproval of appeal actions to the individual appointed by the installation commander for 2 or more offenses.

(d) Schedule employees for remedial training when the checkwriter has committed an offense.

§ 527.13 Installation check control officer.

The ICCO is the primary contact for dishonored check matters The ICCO will—

(a) Serve as liaison between commander and check-cashing facilities.

(b) Be authorized to suspend check-cashing privileges.

(c) Maintain and circulate a dishonored check list. (See § 527.32(c))

(d) Maintain a central file of dishonored checkwriters (See § 527.32(a))

(e) Establish a grace period of 10 calendar days. The grace period will be 10 calendar days from the date of the written dishonored check notification. The ICCO may allow additional time on a case by case basis (i.e. checkwriter is TDY or no leave away from the installation.). There will be a standard grace period for all check-cashing facilities.

(f) Establish an installation test on checkbook maintenance. Those attending remedial training will have to pass this test prior to being removed from the dishonored check list. The test may be open book. The test criteria should include:

(1) Posting samples of: checks written, deposits (direct deposits, interest, cash, and checks), check charges, printing fees, and bank card transactions.

(2) Maintaining the check register balance.

(3) Reconciling check register to bank statement.

(4) Scoring 70 or greater to pass.

(g) Evaluate the effectiveness of the installation Dishonored Check Control Program using the Monthly Dishonored

Check Report (RCS: CSCOA–105). Distribute the report in accordance with § 527.40.

(h) Set up points of contact with all installation facilities providing financial management and consumer awareness training and counseling. Make unit commanders aware of these resources.

(i) Notify installation commander and military police or Army criminal investigation office of any pattern of check-cashing abuse suggesting fraud, forgery, or improper use of ID cards.

(j) Set up liaison with installation ID card issuing facility.

(k) Reinstate check-cashing privileges when an appeal has been approved in accordance with § 527.25 through § 527.28 or when the suspension period is over. The checkwriter must have redeemed the dishonored check, paid the administrative/service charges, attended remedial training, and passed the installation test on checkbook maintenance.

(l) Maintain and conduct an effective installation PFR/SMM program, as required by Subpart E. (See Training Circular 21–7).

(m) Maintain a counseling or counseling referral service to help personnel solve personal financial problems, develop budgets, formulate debt liquidation plans, get consumer protection, and buy on credit wisely. All installation resources will be used to develop this service; for example, ACS centers and on post financial institutions. Counseling services will be open to personnel and their families on a voluntary basis.

(n) Ensure DA issued articles are published in post media in coordination with the public affairs office. Publicize benefits of the counseling service, with emphasis on the preventive nature of the program.

§ 527.14 Finance officer.

The finance officer will assist the ICCO in the control and prevention of check-cashing privilege abuse. The finance officer will—

(a) Assist the unit commander in conducting training for personnel in checkbook maintenance by providing instructional material.

(b) Provide installation commander with management information concerning the level of dishonored checks using the Monthly Dishonored Check Report (Fig 4–1).

(c) Cash a soldier's personal check when the soldier is on the dishonored check list, is on SURE-PAY, has a non-local checking account, and the soldier has a written request from his/her commander to the finance officer requesting this service. If the check is returned due to insufficient funds, collection action will occur IAW DODPM and AR 37–103 for the amount of the check, plus any administrative or service charge.

(d) Establish procedures in Central Accounting Office for accounting for nonappropriated fund dishonored checks.

(e) Process DD Form 139 (Pay Adjustment Authorization) received from the check-cashing facility and return completed copy to the ICCO.

(f) Distribute amounts collected from soldier's or civilian's pay to the appropriate check-cashing facility.

(g) Analyze the RCS CSCOA–105 received from the ICCO.

(h) Inform the installation commander of dishonored check analysis.

§ 527.15 Personnel Administration Center.

The Personnel Administration Center (PAC) will assist unit commanders by completing some of the paperwork and other administrative details. Where PACs do not exist the unit commander will be responsible for completing these actions as well as those listed in § 527.11. The PAC will—

(a) Schedule soldiers and family members for remedial training when the checkwriter has committed an offense.

(b) Notify the ICCO when timely notification of dishonored check or suspension cannot be made because the soldier is absent from duty due to TDY, hospitalization, etc.

(c) Verify ID card overstamping has occurred and notify ICCO in writing.

§ 527.16 Director of Personnel & Community Activities.

The Director of Personnel & Community Activities (DPCA) will—

(a) Overstamp ID cards when requested by the ICCO.

(b) Ensure the quality of PFR/SMM training taught at the installation.

§ 527.17 Heads of check-cashing facilities.

In addition to the requirements of their proponent agencies, heads of check-cashing facilities will—

(a) Coordinate with the ICCO on administrative matters relating to the Dishonored Check Control Program.

(b) Ensure all personnel under their supervision know the installation policies and procedures for cashing checks and review the ICCO dishonored checklist prior to approving checks for encashment.

(c) Prominently display the sign cited below at each check-cashing point:

NOTICE TO CHECK CASHERS:
DISCLOSURE OF SOCIAL SECURITY NUMBER (SSN) AND OTHER PERSONAL INFORMATION IS SOLICITED BY AUTHORITY OF SECTION 3012 AND 8012, TITLE 10, UNITED STATES CODE, AND IS MANDATORY IF YOU WISH TO CASH A CHECK.
ALL INFORMATION FURNISHED, INCLUDING SSN, WILL BE USED TO IDENTIFY WRITERS OF CHECKS RETURNED UNPAID.

(d) Require a consent statement authorizing immediate collection from pay for a dishonored check be placed on each check and signed by the individual. The consent statement to use is: "If this check is returned as dishonored, I consent to immediate collection from my pay for the amount of the dishonored check plus any related service or administrative charges." A prominently displayed consent sign at check cashing points may be used in lieu of the statement placed on each check.

(e) Obtain a stamp for recording additional information on the back of all personal checks if the information is not on the face of the check. This information is: name, rank, SSN, duty station, home address, home/duty phone number, and branch of service.

(f) Notify checkwriters in writing through their unit commander or first line supervisor for civilian employees of a dishonored check that has been returned by the financial institution.

§ 527.18 Persons with check-cashing privileges.

All persons with check-cashing privileges will—

(a) Fill out check properly and legibly. Include all information to be recorded on the back. Checks should be completed in black or blue/black ink, not water soluble. A pencil or any other type of writing instrument that can be erased, changed, or modified should not be used.

(b) Maintain sufficient funds in their checking account to cover the full amount of the checks.

(c) Notify the ICCO, unit commander, military police, and bank upon discovery of any lost/stolen personal checks.

(d) Provide check-cashing facilities with required information when attempting to cash a check.

(e) Have their ID card overstamped when directed to do so.

(f) Take full responsibility for any check cashed on their checking account including those cashed by family members.

(g) Redeem all checks written against their checking account which have been returned for insufficient funds.

(h) Attend remedial training when directed to do so by the ICCO.

(i) Distribute copies of disclaimer notices to check-cashing facilities.

Subpart B—Controls

Section I—Policy

§ 527.19 Authority.

(a) Policies in this regulation are based on statutory authority including, but not limited to, the following:

(1) Sections 5511–5512, title 5, United States Code.

(2) Section 1007, title 37, United States Code.

(3) Section 1382, title 18, United States Code.

(4) Articles 123a, 133, 134, Uniform Code of Military Justice (UCMJ, Art. 123a, 133, and 134).

(b) Debts to instrumentalities and agencies of the United States can be collected from military personnel by involuntary deductions from their pay when such action is authorized by law. (See Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), part seven, chapter 7, and Department of Defense Retired Pay Manual (DODRPM).)

§ 527.20 General.

(a) DA policy is to give maximum service to persons entitled to use Army facilities. Installation activities extend check-cashing privileges for the convenience of their customers.

(b) The personal check is more than a simple promise to pay. By signing a check, the person makes a binding agreement to the receiver (in exchange for goods, services, or cash) that enough money to cover the check is in the person's account.

(c) The number of dishonored checks and the subsequent loss of funds to Army facilities call for firm measures to control and prevent dishonored checkwriting. Timely administrative action will be taken in all cases involving abuse or misuse of check-cashing privileges. Moral persuasion and command supervision will be used as primary measures to ensure dishonored checks are promptly redeemed and dishonored checkwriting ceases. Commanders will not tolerate or make excuses for dishonored checks issued by soldiers and their family members. Soldiers, their eligible family members, and other authorized patrons of Army facilities are expected to pay their just financial debts. Commanders will take immediate action to ensure prompt redemption of dishonored checks. They will counsel and take disciplinary action where appropriate to prevent abuse or fraud by soliders under their command.

(d) Patrons who have abused check-cashing privileges will be given a chance to present evidence in their behalf. (See §§ 527.24 and 527.35.)

(e) Patrons may have their check-cashing privileges suspended indefinitely if they show a chronic attitude of personal and financial irresponsibility.

(f) If a person is found using an unstamped ID card during their suspension period and when they are required to have their card overstamped, the person's check-cashing privileges may be suspended indefinitely.

(g) Suspension procedures in this chapter do not preclude action under the UCMJ.

(h) All persons who abuse check-cashing privileges are subject to pertinent civil laws. Reported check-cashing abuses may be referred to civil law enforcement authorities or, if applicable under local U.S. procedures, to a U.S. magistrate. (See AR 190–29.)

§ 527.21 Two party checks.

When a two party check is returned "unpaid", the endorser may be subject to the dishonored check provision of this regulation only if the endorser fails to redeem the check within the grace period. If the original maker of the check is proven to have written a previous dishonored check, then an additional offense will be charged to the original maker and appropriate suspension imposed. If the endorser is currently under suspension, an additional offense will be charged and the suspension period will be increased. The endorser will be required to execute a consent statement to authorize collection from his/her pay if the two party check is returned for insufficient funds. The consent statement to be executed by the endorser is stated in § 527.17(d).

§ 527.22 Sponsor responsibility.

(a) Sponsors may be held liable for acts of family members when a family member uses their dependent ID card and their sponsor's SSN for check cashing. If a family member commits an offense under these conditions, the sponsor may then be placed on the dishonored checklist. The family member may be placed on the dishonored checklist in their own right if they used a civilian ID card with their own SSN as identification and the check becomes dishonored.

(b) Sponsors who wish to disclaim responsibility for dishonored checks written by family members may do so by filing a letter of disclaimer with the ICCO. (See fig. 2–1 for a sample letter.) This letter announces a sponsor's voluntary withdrawal of responsibility for acts of family members. It will be updated annually. Absence of a disclaimer does not prove agency relationship between sponsor and family members.

(c) Some facilities may deny check-cashing privileges to family members of sponsors who have filed a letter of disclaimer. The sponsor will inform family members of this denial.

Section II—Offenses and Penalties

§ 527.23 Offense and related offense.

(a) *Offense.* An offense has been committed when an individual does not redeem a dishonored check or redeems 3 or more checks within the grace period.

(b) *Related offense.* An individual may write several dishonored checks which are related. For example one error in the checkbook could cause several dishonored checks. All of these dishonored checks are considered related to each other and if not redeemed will be considered as a single offense. The individual must prove to the ICCO that the dishonored checks are related. If proof is not provided, each dishonored check will be considered an offense if not redeemed within the grace period. Related checks normally occur within a 10 day period.

§ 527.24 Bank or other excusable error.

If an individual can prove bank or other excusable error, dishonored checks resulting from these errors will not be considered offenses. The checkwriter's name will not be added to any list or central file.

§ 527.25 First offense.

(a) An individual who writes a check which later becomes dishonored and does not redeem it within the grace period has committed a first offense.

(b) An individual who writes 3 dishonored checks which are unrelated to each other and redeems them all within the grace period has committed a first offense.

(c) The penalty for a first offense is required attendance at remedial training and suspension of check-cashing privileges for 6 months from date of suspension letter. The ID card may be overstamped.

(d) The individual may be removed from the dishonored checklist prior to the end of the suspension period if the check has been redeemed, all charges have been paid, remedial training has been completed, the individual has passed the installation checkbook maintenance test, and the unit commander (for soldiers and family members) or first line supervisor (for civilians) approves.

§ 527.26 Second offense.

(a) An individual who writes a second dishonored check, unrelated to the first dishonored check, and does not redeem it within the grace period has committed a second offense.

(b) An individual who writes 4 dishonored checks which are unrelated to each other and redeems them all within the grace period has committed a second offense.

(c) The penalty for a second offense is required attendance at remedial training and suspension of check-cashing privileges for 12 months from date of suspension letter if checkwriter is not currently on the dishonored checklist. If the checkwriter is currently on the dishonored checklist, the suspension period will be increased by 12 months. The ID card may be overstamped.

(d) The individual may be removed from the dishonored checklist prior to the end of the suspension period if the check has been redeemed, all charges have been paid, remedial training has been completed, the individual passed the installation checkbook maintenance test, and the individual appointed by the installation commander (§ 527.10(f)) so approves.

§ 527.27 Third offense.

(a) An individual who writes a third dishonored check, unrelated to the previous dishonored checks, and does not redeem it within the grace period has committed a third offense.

(b) An individual who writes 5 dishonored checks which are unrelated to each other and redeems them all within the grace period has committed a third offense.

(c) The penalty for a third offense is required attendance at remedial training overstamping of the ID card, and suspension of check-cashing privileges for 18 months from date of suspension letter if the checkwriter is not currently on the dishonored checklist. If the checkwriter is currently on the dishonored checklist, the suspension period will be increased by 18 months.

(d) The individual may be removed from the dishonored checklist prior to the end of the suspension period if the check has been redeemed, all charges have been paid, remedial training has been completed, the individual passed the installation checkbook maintenance test, and the individual appointed by the installation commander (§ 527.10(c)) so approves.

§ 527.28 Fourth or greater offense.

(a) An individual who writes a fourth dishonored check, unrelated to the previous checks, and does not redeem it within the grace period has committed a fourth offense.

(b) An individual who writes 6 dishonored checks which are unrelated to each other and redeems them all within the grace period has committed a fourth offense.

(c) The penalty for a fourth offense is required attendance at remedial training, overstamping of the ID card, and suspension of check-cashing privileges indefinitely from the date of suspension letter.

(d) The individual may be removed from the dishonored checklist if the check has been redeemed, all charges have been paid, remedial training has been completed, the individual passed the installation checkbook maintenance test, and the installation commander (§ 527.10(d)) so approves.

Subpart C—Procedures

§ 527.29 Check-cashing facility.

In addition to the requirements of its proponent agency, the head of the facility to which a check is returned unpaid will do the following:

(a) Notify the checkwriter through the checkwriter's unit commander (for soldier or family member) or checkwriter's supervisor (for civilian) of the dishonored check. See figure 3–1 for a sample notification letter. A copy of the notification will be furnished to the ICCO. Sufficient copies will be sent to the commander or supervisor so a copy can be returned to the ICCO acknowledging receipt and indicating action to be taken. Notices will include, but are not limited to, the following:

(1) Name of checkwriter (or endorser, if a two party check).

(2) Date and amount of check.

(3) SSN of checkwriter.

(4) Status (active duty, retired, Reserve, National Guard, family member, civilian employee, etc.) and service (Army, Navy, Air Force, Marine Corps, or Coast Guard).

(5) Name, grade, SSN, and duty station of sponsor, if applicable.

(6) Home address and telephone number.

(7) Clear instructions covering—.

(i) Method of redemption.

(ii) Time allowed in which redemption must be made.

(iii) Administrative/service charges.

(iv) Appeal rights.

(b) Notify the ICCO as soon as—

(1) The check is redeemed. Provide date of redemption.

(2) Written evidence is furnished proving a bank or other error clearing the checkwriter of fault.

(3) The checkwriter fails to redeem the check within the grace period.

(4) the check is written off.

(c) Begin action for collection from pay when authorized, if all efforts at direct collection fail. (See AR 37–108, AR 37–104–3, and AR 37–104–10.)

§ 527.30 Unit commander.

On receipt of notice that a soldier or a soldier's family member of a commander's unit has written a dishonored check or has been placed on the dishonored checklist, the unit commander will (Some of these actions may be done by the PAC where PACs exist.)—

(a) Deliver the notice and counsel the checkwriter to comply with the requirements of the notice. See figure 3–2 for a sample counseling statement.

(b) Return copy of notification letter to the ICCO within 10 calendar days stating whether the dishonored check was redeemed within the grace period.

(c) Assist the checkwriter in determining the cause of the dishonored check. Make proper referral if budget counseling or financial assistance is needed.

(d) Assist the checkwriter in obtaining proof of bank or other excusable error clearing the checkwriter of fault.

(e) Schedule remedial checkbook maintenance training and ensure the checkwriter attends the training.

(f) Determine if checkwriter should have ID card overstamped if this is the first or second offense. If the decision is to overstamp the ID card, the unit commander will—

(1) Ensure the checkwriter receives notification and is counseled to comply with the instructions.

(2) Refer checkwriter to ID card issuing facility for reissuing of new ID card with overstamp.

(3) Ensure that the checkwriter received an overstamped ID card.

(4) Notify ICCO within 15 days from date of notification letter which notified the checkwriter of placement on dishonored checklist that ID card was overstamped.

(g) Work with the finance officer to cash checks for a soldier who is on the dishonored check list, is on SURE-PAY, and has a non-local bank account.

(h) Ensure checkwriter redeems the check and pays any administrative/service charge.

(i) Take administrative or disciplinary action, when proper. (See AR 600–31 and AR 600–37.)

(j) Approve/disapprove appeal actions on first offense if remedial training has been completed, the checkwriter passed the installation checkbook maintenance test, the check has been redeemed, and the

administrative/service charges have been paid. If approval is given, send a letter to the ICCO stating that approval is granted to remove the soldier or family member from the dishonored checklist. Letter must indicate action taken on counseling and training, that the checkwriter passed the installation test on checkbook maintenance, that checks have been redeemed, and administrative/service charges have been paid.

(k) Forward appeal actions on second and greater offenses to the individual designated by the installation commander to handle such appeal actions if the conditions in paragraph (j) of this section.

(l) Maintain soldier on SURE-PAY if at all possible.

§ 527.31 Supervisor of civilian.

On receipt of notice that a civilian employee under his/her supervision has written a dishonored check or has been placed on the dishonored checklist, the first line supervisor will—

(a) Deliver the notice and counsel the checkwriter to comply with the requirements of the notice.

(b) Return a copy of the notification to ICCO within 10 calendar days of date of notice indicating receipt and proposed action to be taken.

(c) Schedule remedial checkbook maintenance training and ensure the checkwriter attends the training.

(d) Ensure checkwriter redeems check(s) and pays any administrative service charges.

(e) Approve/disapprove appeal actions on first offense if training has been completed, the checkwriter passed the installation checkbook maintenance test, the check has been redeemed, and the administrative/service charges have been paid. If approval is given, send a letter to ICCO stating that approval is granted to remove the checkwriter from the dishonored checklist. Letter must indicate action taken on counseling and training, that the checkwriter passed the installation checkbook maintenance test, that the check has been redeemed, and that administrative/service charges have been paid.

(f) Forward appeal actions of second or greater offenses to individual designated by the installation commander if the conditions in paragraph e. above have been met.

§ 527.32 Installation check control officer.

(a) On receipt of notice from the check-cashing facility that a check was returned as dishonored, the ICCO will update the central file on dishonored checkwriters. (See § 527.13(d)). This file will contain, as a minimum, the following information:

(1) Name and SSN.

(2) Status (active duty, retired, Reserve, National Guard, family member, civilian employee, etc.) and Service (Army, Navy, Air Force, Marine Corps, or Coast Guard).

(3) Name, grade, and SSN of sponsor, if applicable.

(4) Organization address and telephone number.

(5) Home address and telephone number.

(6) Amount of dishonored check.

(7) Date check was returned as dishonored.

(8) Date check was redeemed.

(9) Effective date of suspension of check-cashing privileges.

(10) Date check-cashing privileges are restored.

(b) The central file on dishonored checkwriters will be maintained on all personnel, including those who redeem the dishonored check within the grace period. The file will be used for reference to identify repeat offenders.

(c) The dishonored checklist will be updated at least monthly to accurately show the current status of suspensions. The list will include suspension expiration dates and will be circulated at least monthly to installation check-cashing and ID card issuing facilities. On post banks and credit unions may also receive a copy of the dishonored checklist. The list may not be circulated to any other institution on or off the installation.

(d) The ICCO may be provided terminal access to an electronic check verification system. The ICCO may use this system to verify check-cashing privileges of individual checkwriters at the request of installation check-cashing facilities.

(e) If the checkwriter commits a first offense (see § 527.25), the ICCO will—

(1) Add the checkwriter's name to the dishonored check list.

(2) Suspend check-cashing privileges for 6 months.

(3) Inform the commander (supervisor if checkwriter is a civilian) and checkwriter by letter that check-cashing privileges are suspended for 6 months from the date of letter and that the checkwriter must attend remedial training. (See figure 3–3.) The check writing privileges will be restored when the suspension period is over or earlier if the checkwriter has met the conditions in § 527.25(d) and the unit commander for soldiers and their family members or the first line supervisor for civilians decides to restore check-cashing privileges sooner.

(f) If the checkwriter commits a second offense (See § 527.26), the ICCO will—

(1) Add the checkwriter's name to the dishonored checklist if currently not on the list.

(2) Suspend check-cashing privileges for 12 months or increase suspension by 12 months if checkwriter is currently under suspension.

(3) Inform the unit commander (supervisor if checkwriter is a civilian) and checkwriter by letter that check-cashing privileges are suspended for 12 months from date of letter or increased by 12 months and that the checkwriter must attend remedial training. (See figure 3–4.) The check cashing privileges may be restored when the suspension period is over or earlier if the checkwriter has met the conditions in § 527.26(d) and the individual appointed by the installation commander to act on appeals of second offenses approves.

(g) If the checkwriter commits a third offense (see § 527.27), the ICCO will—

(1) Add the checkwriter's name to the dishonored checklist if currently not on the list.

(2) Suspend check-cashing privileges for 18 months or increase suspension by 18 months if checkwriter is currently under suspension.

(3) Inform the commander (supervisor if checkwriter is a civilian) and checkwriter by letter that check-cashing privileges are suspended for 18 months from date of letter or increased by 18 months, that the checkwriter must attend remedial training, and that the ID card must be overstamped. (See figure 3–5.) The check-cashing privileges may be restored when the suspension period is over or earlier if the checkwriter has met the conditions in § 527.27(d) and the individual appointed by the installation commander to act on appeals of third offenses approves.

(h) If the checkwriter commits a fourth offense (see § 527.28), the ICCO will—

(1) Add checkwriter's name to the dishonored checklist if currently not on the list.

(2) Suspend check-cashing privileges indefinitely.

(3) Inform the commander (supervisor if checkwriter is a civilian) and checkwriter by letter that check-cashing privileges have been suspended indefinitely, that the checkwriter must attend remedial training, and that the ID card must be overstamped. (See figure 3–6.) The installation commander may reinstate check-cashing privileges if the checkwriter has met the conditions in § 527.28(d).

(i) If the checkwriter continues to write dishonored checks after the fourth

offense, the ICCO will follow guidance in paragraph (h) of this section.

(j) The ICCO will remove an individual from the dishonored checklist at the end of the suspension period or at the request of the individual having appeal approval authority. The checkwriter must have redeemed the dishonored checks, paid the administrative/service charges, attended remedial training, and passed the installation checkbook maintenance test.

(k) If proof of bank error or other excusable error is given, the ICCO will—

(1) Clear checkwriter's name from central file of offenders.

(2) Cancel any suspension imposed because of this error.

(3) Inform checkwriter by letter of action taken.

§ 527.33 Identification card issuing facility.

(a) When informed by the ICCO or the unit commander that an authorized user of the installation check-cashing facilities is suspended for issuing a dishonored check and is required to have their ID card overstamped, the ID card issuing facility will take action under AR 640–3, paragraph 4–10, to overstamp the offender's ID card.

(b) When reissuing ID cards lost, stolen, etc., the dishonored checklist will be examined to determine if the individual applying for a new or replacement card is on it. The individual's unit or civilian's supervisor should be contacted to determine whether the ID card should be overstamped.

§ 527.34 Personnel of other Services.

DA officials may not overstamp ID cards issued by other Services. DA officials may suspend check-cashing privileges of members of other Services, or their family members, by placing them on the dishonored checklist. Repeated abuse of check cashing privileges may result in barring from the installation persons not assigned thereto, except for needed medical services (See figs 3–7 and 3–8.) This barring may apply to family members and retirees of any Service.

§ 527.35 Appeals.

(a) Any person whose check-cashing privileges are suspended may submit a written appeal for removal of the suspension. Active duty soldiers or their family members will send the appeal to their unit commander. Civilian employees will send their appeals to their first line supervisor. The appeal will include the following:

(1) Date check-cashing privileges were suspended.

(2) Check-cashing facility where check was cashed.

(3) Date and where full payment, including administrative/service charges, was made.

(4) Date remedial training was completed.

(5) Grade received on installation checkbook maintenance test.

(6) Reasons privileges should be restored.

(b) ICCOs will not restore privileges if the checkwriter has not attended required training, has not passed the installation checkbook maintenance test, or has not paid in full all dishonored checks and administrative/service charges that did not result from bank or other excusable error.

(c) If appeal was approved, the ICCO will—

(1) Remove checkwriter's name from dishonored checklist.

(2) Inform checkwriter promptly of action taken.

§ 527.36 Disposal and transfer of records.

ICCOs will—

(a) Dispose of inactive files as required by AR 25–400–2 for file number 210–60a (Check-cashing Privileges).

(b) Ensure that the ICCO is added to the installation out-processing checklist.

(c) Send active dishonored check files directly to the ICCO of the gaining installation when offenders are reassigned before the end of their or their family member's suspension period.

(d) Place incoming individuals on check cashing suspensions, if their existing suspensions have not expired. These individuals will remain on suspension until the suspension expires or an appeal is approved.

Subpart D—Monthly Dishonored Check Report, RCS: CSCOA–105

§ 527.37 Purpose.

The Monthly Dishonored Check Report, RCS: CSCOA–105, provides data needed for control and management purposes.

§ 527.38 Source of data.

Data for preparation of the report will be obtained from records kept at each installation.

§ 527.39 Preparation.

(a) The Monthly Dishonored Check Report will be prepared by the ICCO in the format at figure 4–1 for ICCOs with automated systems. For ICCOs with manual systems, the report need only contain the total number of dishonored checks and total dollar value. Figure 4–1 is preferred. Negative reports are required. Items, such as corrective actions taken, may improve the report as needed.

(b) Statistics for transferred personnel will be dropped by the losing installation and picked up by the gaining installation for suspension purposes.

§ 527.40 Frequency, routing, and due dates.

The ICCO will—

(a) Prepare the report monthly.

(b) Send the original report to their MACOM.

(c) Send copy of the report to finance and accounting officer for evaluation (see § 527.14(b)) and ultimate routing to installation commander.

(d) Send copy of the report to the Office of the Director of Finance and Accounting, ATTN: SAFM–FAP–B, Indianapolis, IN 46249–1016, due no later than 15 calendar days (30 days for overseas) after the end of the reporting period.

(e) Provide unit commander with unit dishonored check data.

§ 527.41 Relinquishing data.

Data in the Monthly Dishonored Check Report may be provided to banks and credit unions operating on military installations.

Subpart E—Training

§ 527.42 Ethics and military competence.

Ethics and military competence are closely related. Poor performance in one area contributes to poor performance in another. Therefore, a major element in personal financial management is ethics. Responsibility, integrity, and high standards of conduct will be stressed. This aspect of responsible financial management is considered a part of leader development and should be included in leadership instruction.

§ 527.43 Personal financial readiness/soldier money management (PFR/SMM).

PFR/SMM training will be conducted throughout the Army training system as shown in §§ 527.44 and 527.45.

§ 527.44 Initial entry training.

Emphasis during initial entry training will be on prevention of abuse of check-cashing privileges. Recruits will be—

(a) Given overview of basic pay entitlements, DA Form 3686 (JUMPS–Army Leave and Earnings Statement), and maintenance of a checkbook.

(b) Made aware of counseling resources and procedures.

(c) Instructed on their financial responsibilities to themselves, their family members, and their peers.

(d) Made aware of the disciplinary and career consequences of the abuse of check-cashing privileges.

§ 527.45 Remedial training.

Remedial training is mandatory for checkwriters committing an offense. Emphasis will be on checkbook management skills. This training is a prerequisite for removal from check-cashing suspensions. (See § 527.25 through § 527.28.) Remedial training will include budget counseling when budget problems exist. After completion of the remedial training the individual will be given a test on checkbook maintenance. The ICCO will require 70% or greater correct responses for passing the test. The individual must be able to demonstrate successful completion of the training and that he/she has the ability to properly maintain a checking account.

(Office Symbol) (Date)
MEMORANDUM THRU (Installation Check Control Officer)
FOR (All Installation Check-cashing Facilities)
SUBJECT: Disclaimer of Responsibility

1. Effective this (date) day of (month and year) I, (name), disclaim responsibility for any check issued by the person(s) listed below:

Name _____
SSN _____
Address _____
Relationship _____

2. I have advised the individual(s) named above that I have disclaimed responsibility for check(s) presented by them to military check-cashing facilities. I have also advised the above named person(s) that their check-cashing privileges in these facilities may no longer be authorized.

(Signature)
(SSN)
(Address)
(Unit)

Note.—This memorandum must be notarized by a licensed notary public prior to submission.

Figure 2–1. Sample of Notice of Disclaimer of Responsibility By Sponsor

(Office Symbol) (Date)
MEMORANDUM THRU (unit commander of active duty check writer or sponsor, State adjutant general for members of the Army National Guard, or supervisor for civilians)
FOR (Check writer)
SUBJECT: Notification of Dishonored Check

1. Reference AR 210–60, Personal Check-cashing Control and Abuse Prevention, dated (date of regulation).

2. Your check(s) in the amount of ($), dated (date), was/were returned to (name of check-cashing facility) as dishonored.

3. You have 10 calendar days from the date of this letter to make redemption and pay any administrative/service fee. Failure to make full restitution will result in a suspension of your check-cashing privileges. Restitution for the above check(s) must be made by cash, certified check, or money order to (where redemption should be made).

4. If you can furnish proof of bank or other excusable error to the installation check control officer at (installation), your installation check-cashing privileges will be restored immediately. If proof is furnished, this would not be considered an offense, and no record of this transaction will be kept.

Note.—MEMORANDUM THRU of address applies when two or more offenses occurred.

Figure 3–1. Sample of Notification of Dishonored Check

(Office Symbol) (Date)
MEMORANDUM FOR (Check writer)
SUBJECT: Counseling Statement for Dishonored Check(s)

1. A Notification of Dishonored Check, dated (date), has been received and is given to you in conjunction with this counseling statement. The Notification requires you to perform one of the following:

a. Make restitution.

b. Furnish proof of bank error or other extenuating circumstances.

2. I have discussed the reason for the dishonored check with you, which is as follows:

3. Several offices are available to provide budgeting or financial assistance. I am/am not scheduling you for this training.

4. Consequences for abusing check-cashing privileges include the following:

a. Suspension of check-cashing privileges.
b. Letter of reprimand.
c. Appropriate comments in evaluation reports.
d. Administrative separation.
e. Bar to enlistment.
f. Denial of promotion.
g. Reduction in grade for inefficiency.

5. These consequences may be avoided by performing the requirements in paragraph 1 above. Subsequent offenses may be dealt with more severely.

(Signature of commander)

Soldier's Comments:

(Signature of check writer)

Figure 3–2. Sample Counseling Statement for Dishonored Check

(Office Symbol) (Date)
MEMORANDUM THRU (Unit commander of active duty check writer/sponsor, State adjutant general for members of the Army National Guard, or supervisor for civilians)
FOR (Check writer)
SUBJECT: Suspension of Check-Cashing Privileges—First Offense

1. Reference AR 210–60, Personal Check-cashing Control and Abuse Prevention, (date of regulation).

2. Your dishonored check(s) in the amount of (dollar amount), dated (date), and returned to (name of check-cashing facility) as dishonored was/were not redeemed within the grace period. Therefore, your installation check-cashing privileges are suspended for 6 months and you are required to attend remedial training on checkbook maintenance. The suspension period will end 6 months from the date of this letter, provided the check(s) has/have been redeemed and all administrative/service charges have been paid, you have attended remedial training, and you have passed the installation checkbook maintenance test. Failure to make redemption will result in collection action being taken against your pay account. A record of this occurrence will be kept in the check control office. Future dishonored check instances may result in more severe restrictions and/or disciplinary action against you.

3. You may appeal the suspension of your installation check-cashing privileges to your unit commander (if military or family member) or first line supervisor (if civilian). Your unit commander (if military or family member) or first line supervisor (if civilian) may approve restoring your check-cashing privileges prior to the end of 6 months. However, the check(s) must have been redeemed, all administrative/service charges paid, remedial training completed, and you must have passed the installation checkbook maintenance test.

(Installation check control officer)

Figure 3–3. Sample of Suspension Notification—first offense

(Office Symbol) (Date)
MEMORANDUM THRU (Unit commander of active duty check writer/sponsor, State adjutant general for members of the Army National Guard, or supervisor for civilians)
FOR (Check writer)
SUBJECT: Suspension of Check-Cashing Privileges—Second Offense

1. Reference AR 210–60, Personal Check-cashing Control and Abuse Prevention, (date of regulation).

2. Your dishonored check(s) in the amount of (dollar amount), dated (date), and returned to (name of check-cashing facility) as dishonored was/were not redeemed within the grace period. Therefore, your installation check-cashing privileges are suspended for 12 months and you are required to attend remedial training, since this is your second offense. The suspension period will end 12 months from the date of this letter, provided the check(s) has/have been redeemed and all administrative/service charges have been paid, you have attended remedial training, and you have passed the installation checkbook maintenance test. Failure to make redemption will result in collection action being taken against your pay account. A record of this occurrence will be kept in the check control office. Future dishonored check instances may result in more severe restrictions and/or disciplinary action.

3. You may appeal the suspension of your installation check-cashing privileges to your unit commander (if military or family member) or first line supervisor (if civilian). Your unit commander (if military or family member) or first line supervisor (if civilian) may approve restoring your check-cashing privileges prior to the end of 12 months. However, the check(s) must have been redeemed, all administrative/service charges paid, remedial training completed, and you

must have passed the installation checkbook maintenance test.

(Installation check control officer)

Note.—If the check writer is currently on the dishonored check list, change paragraph 2 to indicate that current suspension is increased by 12 months.

Figure 3–4. Sample of Suspension Notification—second offense

(Office Symbol) (Date)

MEMORANDUM THRU (Unit commander of active duty check writer/sponsor, State adjutant general for members of the Army National Guard, or supervisor for civilians)

FOR (Check writer)

SUBJECT: Suspension of Check-Cashing Privileges—Third Offense

1. Reference AR 210–60, Personal Check-cashing Control and Abuse Prevention, (date of regulation).

2. Your dishonored check(s) in the amount of (dollar amount), dated (date), and returned to (name of check-cashing facility) as dishonored was/were not redeemed within the grace period. Therefore, your installation check-cashing privileges are suspended for 18 months, you must have your ID card overstamped, and you are required to attend remedial training, since this is your third offense. The suspension period will end 18 months from the date of this letter, provided the check(s) has/have been redeemed and all administrative/service charges have been paid, you have attended remedial training, and you have passed the installation checkbook maintenance test. Failure to make redemption will result in collection action being taken against your pay account. A record of this occurrence will be kept in the check control office. Future dishonored check instances may result in more severe restrictions and/or disciplinary action against you.

3. You may appeal the suspension of your installation check-cashing privileges to your unit commander (if military or family member) or first line supervisor (if civilian). Your unit commander (if military or family member) or first line supervisor (if civilian) may approve restoring your check-cashing privileges prior to the end of 18 months. However, the check(s) must have been redeemed, all administrative/service charges paid, remedial training completed, and you must have passed the installation checkbook maintenance test.

(Installation check control officer)

Note.—If the check writer is currently on the dishonored check list, change paragraph 2 to indicate that current suspension is increased by 18 months.

Figure 3–5. Sample of Suspension Notification—third offense

(Office Symbol) (Date)

MEMORANDUM THRU (Unit commander of active duty check writer/sponsor, State adjutant general for members of the Army National Guard, or supervisor for civilians)

FOR (Check writer)

SUBJECT: Suspension of Check-Cashing Privileges—Fourth Offense

1. Reference AR 210–60, Personal Check-cashing Control and Abuse Prevention, (date of regulation).

2. Your dishonored check(s) in the amount of (dollar amount), dated (date), and returned to (name of check-cashing facility) as dishonored was/were not redeemed within the grace period. Therefore, your installation check-cashing privileges are suspended indefinitely, and you are required to attend remedial training, and you must have your ID card overstamped since this is your fourth offense. You must report to the ID card issuing facility to receive an overstamped ID card. The suspension period will end only at the approval of the installation commander, provided the check(s) has/have been redeemed and all administrative/service charges have been paid, you have attended remedial training, and you have passed the installation checkbook maintenance test. Failure to make redemption will result in collection action being taken against your pay account. A record of this occurrence will be kept in the check control office. Future dishonored check instances may result in more severe restrictions and/or disciplinary action against you.

3. You may appeal the suspension of your installation check-cashing privileges to your unit commander (if military or family member) or first line supervisor (if civilian). The installation commander may approve restoring your check-cashing privileges. However, the check(s) must have been redeemed, all administrative/service charges paid, remedial training completed, and you must have passed the installation checkbook maintenance test.

(Installation check control officer)

Figure 3–6. Sample of Suspension Notification—fourth offense

(Office Symbol) (Date)

MEMORANDUM FOR (Check writer)

SUBJECT: Intent to Debar from United States Military Installation

1. You are hereby notified of intent to bar you from entering or reentering the limits of (name of installation), except to enter and exit the installation by the most direct route for needed medical treatment at (name of hospital of clinic). This bar to the installation is because (reason for debarment). This bar to the installation will be removed (date or when certain actions are completed).

2. Section 1382, title 18, United States Code, states: "Whoever within the jurisdiction of the United States, goes upon any Military, Naval, or Coast Guard Reservation, Post, Fort, Arsenal, Yard, Station or Installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof shall be fined not more than $500 or imprisoned not more than 6 months, or both."

3. After debarment, if you are found within the limits of (name of installation) without having received prior approval to enter the installation, except for the purpose of obtaining needed medical care, you will be detained by military authorities and turned over to Federal authorities for prosecution under the above law.

4. Prior to final action barring you from entering or reentering the limits of (name of installation), you are hereby given an opportunity to present evidence on your behalf and to comply with the requirements set forth in paragraph 1 above. This information may be presented to (ICCO). If a reply is not received within (number of) days of the date you receive this letter, a letter of debarment will automatically be sent to you.

(Installation commander)

Figure 3–7. Sample Notice of Intent to Debar From Installation

(Office Symbol) (Date)

MEMORANDUM FOR (Check writer)

SUBJECT: Debarment from United States Military Installation

1. You are hereby prohibited as of this date from entering or reentering the limits of (name of installation), except to enter and exist the installation by the most direct route for needed medical treatment at (name of hospital of clinic). This bar to the installation is because (reason for debarment). This bar to the installation will be removed (date or when certain actions are completed).

2. Section 1382, title 18, United States Code, states: "Whoever within the jurisdiction of the United States, goes upon any Military, Naval, or Coast Guard Reservation, Post, Fort, Arsenal, Yard, Station or Installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof shall be fined not more than $500 or imprisoned not more than 6 months, or both."

3. If you are hereafter found within the limits of (name of installation) without having received prior approval to enter the installation, except for the purpose of obtaining needed medical care, you will be detained by military authorities and turned over to Federal authorities for prosecution under the above law.

4. If you wish to appeal this debarment, a written request for a hearing on the matter should be sent to (ICCO) within (number of) days of the date of this letter. You will be informed by letter of the date, time, and place of the hearing for your appeal.

(Installation commander)

CF:
PM
SJA

Figure 3–8. Sample Notice of Debarment From Installation

MONTHLY DISHONORED CHECK REPORT

		AAFES	Commissary	FAO	NAF	Other	Total
1 E1–E4	A						
	B						
	C						
2. E5–E6	A						
	B						
	C						
3. E7–E9	A						
	B						
	C						
4 W01/05	A						
	B						
	C						
5. 06/Above	A						
	B						
	C						
6 Total (Line 1–5)	A						
	B						
	C						
7 Other Services	A						
	B						
	C						
8 Retired Military	A						
	B						
	C						
9 NG/Res	A						
	B						
	C						
10 Family Member	A						
	B						
	C						
11. All Other (DOD Civ)	A						
	B						
	C						
12. Total (Line 7–11)	A						
	B						
	C						
13. Grand Total (Line 6+12)	A						
	B						
	C						

Row A=Number of dishonored checks by category for the month.
Row B=Total dollar value of dishonored checks by category for the month. (Dollar values will be rounded to the nearest dollar.)
Row C=Number of dishonored check writers by category for the month.

Figure 4–1. Sample format of Monthly Dishonored Check Report, RCS: CSCOA–105.

Appendix A—References

*Army publications referenced in this document are available from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, Telephone: (703) 487–4684.

Section I

Required Publications

AR 30–19
Army Commissary Store Operating Policies. (Cited in § 527.1(b))
AR 37–103
Finance and Accounting for Installations: Disbursing Operations. (Cited in § 527.1(b))
AR 37–104–3
Military Pay and Allowances Procedures: Joint Uniform Military Pay System (JUMPS–Army). (Cited in § 527.29(c))
AR 37–104–10
Military Pay and Allowances Procedures for Inactive Duty Training: Joint Uniform Military Pay System—Reserve Components (JUMPS–(RC)–Army). (Cited in § 527.29(c))
AR 37–109
General Accounting and Reporting for Finance and Accounting Offices. (Cited in § 527.29(C))
AR 60–20/AFAR 147–14
Army and Air Force Exchange Service (AAFES) Operating Policies. (Cited in § 527.1(b))
AR 190–29
Minor Offenses and Uniform Violation Notices Referred to U.S. District Courts. (Cited in § 527.19(h))
AR 215–1
Administration of Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in § 527.1(b))
AR 215–2
The Management and Operation of Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in § 527.1(b)) Preparation, Coordination, and Approval of Department of the Army Publications. (Cited in § 527.7(b))
AR 600–20
Army Command Policy and Procedures. (Cited in § 527.11(c))
AR 600–31
Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings. (Cited in § 527.30(i))
AR 600–37
Unfavorable Information. (Cited in § 527.30(i)) Identification Cards, Tags, and Badges. (Cited in § 527.33(a))

Section II

Related Publications

A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.
Department of Defense Military Pay and Allowances Entitlements Manual (DODPM).
Exchange Service Manual 55–21.

Section III

Referenced Forms

DA Form 3686
JUMPS-Army Leave and Earnings Statement
DD Form 2A (Act)
Active Duty Military ID Card
DD Form 2A (Res)
Armed Forces of the United States ID Card (Reserve).
DD Form 2A (Ret)

United States Uniformed Services ID Card (Retired)
DD Form 139
Pay Adjustment Authorization

Glossary

Section I

Abbreviations

AAFES—Army and Air Force Exchange Service
ACS—Army Community Service
AF—appropriated fund
ASA(FM)—Assistant Secretary of the Army (Financial Management)
CG—commanding general
DA—Department of the Army
DCSPER—Deputy Chief of Staff, Personnel
DOD—Department of Defense
DODPM—Department of Defense Military Pay and Allowances Manual
DODRPM—Department of Defense Retired Pay Manual
DPCA—Deputy for Personnel and Community Activities
HQDA—Headquarters, Department of the Army
ICCO—installation check control office(r)
ID—identification
MACOM—major Army command
NAF—nonappropriated fund
OASA(FM)—Office of the Assistant Secretary of the Army (Financial Management)
PAC—Personnel Administration Center
PFR/SMM—personal financial readiness/soldier money management
POI—program of instruction
RCS—requirement control symbol
SSN—social security number
TDY—temporary duty
TRADOC—U.S. Army Training and Doctrine Command
UCMJ—Uniform Code of Military Justice
USACFSC—U.S. Army Community and Family Support Center

Section II

Terms

Agency relationship. Relationship that exists when an individual authorizes a person (or persons) to act on the individual's behalf
Check-cashing facility. Appropriated fund or non appropriated fund activity that accepts or cashes checks for merchandise, services, cash, or payment of debts to the Government
Dishonored check. Check returned unpaid by the financial institution on which it was drawn due to insufficient funds, closed account, no account, or other like cause
Central file of offenders. A file maintained by the installation check control officer listing all persons that have written a dishonored check. This file is not published for use by any of the check-cashing facilities
Dishonored check list. Manual list or listing stored in an electronic check verification system of persons whose check-cashing privileges are suspended
Electronic check verification system. Automated system that identifies persons whose check-cashing privileges have been denied; for example, the AAFES' TRW system, or the commissary's National Cash Register electronic point of sales system
Grace period. Time allowed (10 calendar days from date of notification letter) in which redemption of a dishonored check must be made
Offense. An offense occurs when a check writer does not redeem a dishonored check within the grace period. The dishonored check was not the result of a bank or other excusable error
Habitual dishonored check writer. A soldier who writes dishonored checks on a regular basis but redeems the check within the grace period, thus never being placed on the dishonored check list
Overstamped ID card. DD Form 2A (Act) (Active Duty Military ID Card), DD Form 2A (Res) (Armed Forces of the United States ID Card (Reserve)), DD Form 2A (Ret) (United States Uniformed Services ID Card (Retired)), or other form of identification for Active, Reserve Components, retired or civilian personnel stamped on the face to show check-cashing privileges are revoked
Proof of bank or other excusable error. Written admission of error by a financial institution or other responsible party clearing check writer of fault
Related offense. Any group of dishonored checks which resulted from a common error (for example, a subtraction error in the checkbook). The check writer must prove to the ICCO that these dishonored checks are related. If none of the checks are redeemed, they will be called one offense
Two-party check. A written order dated and signed by the maker directing the bank to pay a certain sum of money to the order of a second party.

Kenneth L. Denton,

Alternate Liaison Officer with the Federal Register.

[FR Doc. 88-11850 Filed 5-26-88; 8:45 am]
BILLING CODE 3710-08-M

Department of the Air Force

32 CFR Part 855

Use of United States Air Force Installations by Other Than United States Department of Defense Aircraft

AGENCY: Department of the Air Force, DOD.

ACTION: Final rule.

SUMMARY: The Department of the Air Force has decreased the amount of third party liability insurance required for civil aircraft use of Air Force airfields. This action was taken to make the cost of obtaining insurance less expensive for civil aircraft operators. The intended effect is to reduce the cost of the insurance.

EFFECTIVE DATE: May 27, 1988.

FOR FURTHER INFORMATION CONTACT: Ms. R.A. Young, HQ USAF/PRPJ, Washington, DC 20330-5000, telephone (202) 697-1796.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 855

Aircraft, Federal buildings and facilities.

Accordingly 32 CFR Part 855, Subpart D is amended as follows:

PART 855—USE OF UNITED STATES AIR FORCE INSTALLATIONS BY OTHER THAN UNITED STATES DEPARTMENT OF DEFENSE AIRCRAFT

1. The authority for Part 855 is revised to read as follows:

Authority: 10 U.S.C. 8013, 49 U.S.C. 1507.

§ 855.15 [Amended]

2. In 32 CFR Part 855, Subpart D, Table 1 under § 855.15 is revised to read as follows:

TABLE 1.—AIRCRAFT LIABILITY COVERAGE REQUIREMENTS

[Stated in U.S. dollars]

	Bodily injury	Property damage	Passenger
Civil aircraft without passenger seats:			
12,500 pounds and under:			
Each person	$100,000		
Each accident	300,000	$100,000	

TABLE 1.—AIRCRAFT LIABILITY COVERAGE REQUIREMENTS—Continued

[Stated in U.S. dollars]

	Bodily injury	Property damage	Passenger
Over 12,500 pounds			
Each person	100,000		
Each accident	1,000,000	1,000,000	
Civil aircraft with passenger seats:			
12,500 pounds and under:			
Each person	100,000		$100,000.
Each accident	300,000	100,000	$100,000 x number of passenger seats.
Over 12,500 pounds:			
Each person	100,000		$100,000.
Each accident	1,000,000	$1,000,000	$100,000 x 75% x number of passenger seats.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 88-11108 Filed 5-26-88; 8:45 am]

BILLING CODE 3910-01-M

VETERANS ADMINISTRATION

38 CFR Part 21

Veterans Education; Determination of Delimiting Date

AGENCY: Veterans Administration.

ACTION: Final regulation.

SUMMARY: On December 31, 1979, the Veterans Administration (VA) liberalized the regulation containing the criteria used by the VA in determining whether the character of service of a veteran who received an other than honorable discharge was under other than dishonorable conditions. Before this liberalization the regulation (38 CFR 3.12(d)) held that a discharge or release from active service because of homosexual acts will be considered to have been issued under dishonorable conditions. The liberalized regulation now provides that a discharge issued because of homosexual acts involving aggravated circumstances or other factors affecting performance of duty must be considered to have been issued under dishonorable conditions. Hence, discharges of many veterans which would have been considered to have been issued under dishonorable conditions before December 31, 1979, are now not considered to have been issued under dishonorable conditions. This regulation, which is used to determine the ending date of a veteran's eligibility under the Vietnam Era GI Bill, now states how to determine the ending date of eligibility for a veteran who is favorably affected by the liberalization.

EFFECTIVE DATE: May 5, 1988.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Education Policy and Program Administration, Vocational Rehabilitation and Education Service, Department of Veterans Benefits, (202) 233-2092.

SUPPLEMENTARY INFORMATION: On page 620 of the Federal Register of January 11, 1988, there was published a notice of intent to amend Part 21 to state how to determine the delimiting date of a veteran who has been favorably affected by a liberalized VA rule concerning character of discharge. Interested people were given 30 days to submit comments, suggestions or objections. The VA received one comment letter from a university official. The official stated that he agreed with the proposal. Accordingly, the VA is adopting the amended regulation.

The VA has determined that this final regulation does not contain a major rule as that term is defined by E.O. 12291, entitled Federal Regulation. The final regulation will not have a $100 million annual effect on the economy, and will not cause a major increase in costs or prices for anyone. It will have no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The Administrator of Veterans Affairs has certified that this final regulation will not have significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), the final regulation, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

This certification can be made because the regulation affects only individuals. It will have no significant economic impact on small entities, i.e. small businesses, small private and nonprofit organizations and small governmental jurisdictions.

The Catalog of Federal Domestic Assistance number for the program affected by this proposed regulatory amendment is 64.111.

List of Subjects in 38 CFR Part 21

Civil rights, Claims, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: May 5, 1988.

Thomas K. Turnage,

Administrator.

PART 21—[AMENDED]

In 38 CFR Part 21, *Vocational Rehabilitation and Education,* § 21.1042 is amended by adding paragraph (e)(4) to read as follows:

§ 21.1042 Ending dates of eligibility.

* * * * *

(e) *Eligibility established after the VA determines the character of the discharge.*

* * * * *

(4) If the veteran was discharged before December 31, 1979, and due to the veteran's commission of homosexual acts while on active duty, his or her discharge is considered to have been under dishonorable conditions pursuant to § 3.12 of this chapter as that section was written and interpreted on the date of his or her discharge, but is considered to have been under other than dishonorable conditions pursuant to § 3.12 of this chapter as that section was written and interpreted after December 30, 1979, educational assistance may be afforded the veteran through December 31, 1989.

(Authority: 38 U.S.C. 1662, 3103)

* * * * *

[FR Doc. 88-11944 Filed 5-26-88; 8:45 am]

BILLING CODE 8320-01-M

POSTAL SERVICE

39 CFR Part 111

Domestic Mail Manual; Updating of Table of Contents

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: Some changes and additions to the Domestic Mail Manual have caused changes or additions to the parts and section headings of the Manual. The purpose of this final rule is to make the parts and section headings of the Manual that are listed in the Code of Federal Regulations conform to the changed or added headings.

EFFECTIVE DATE: May 27, 1988.

FOR FURTHER INFORMATION CONTACT: Paul J. Kemp, (202) 268–2960.

SUPPLEMENTARY INFORMATION:

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 5001.

2. In § 111.5, the heading and the introductory text are republished and paragraphs (a)(2)(ii), (a)(2)(vi), (a)(3)(i), (a)(3)(ii), (a)(3)(vi), (a)(5)(i), (a)(5)(iv), (a)(5)(viii), (a)(6)(ii), (a)(7)(iii), (a)(7)(v), (b)(1)(i), (b)(1)(vi) are revised, and new paragraphs (a)(7)(vi), (b)(1)(v), (b)(2)(v), (b)(2)(vi) and (b)(2)(vii) are added; paragraphs (b)(4)(ii) and (b)(6)(iii) are revised; paragraphs (b)(7) (i)–(iii), (b)(8) (i)–(vii) are added; paragraphs (b)(9) (i)–(v) are revised, and paragraphs (b)(9)(vi) and (b)(9)(vii) are added; paragraphs (c)(2) (ii)–(iv) are revised, and paragraphs (c)(2)(v) and (c)(2)(vi) are added; paragraphs (c)(6) (i)–(iii) are revised, and paragraphs (c)(6) (iv)–(ix) are added; paragraphs (c)(7)(ii) and (c)(7)(iii) are revised, and new paragraph (c)(7)(iv) is added; paragraphs (c)(8) (i)–(iii) are revised; (d)(5) introductory text is revised and paragraphs (d)(5) (i)–(v) are added; paragraph (d)(6) is revised; paragraph (d)(6)(i) is revised; paragraphs (d)(6) (ii)–(iv) are revised; paragraphs (d)(6)(v) and (d)(6)(vi) are added; paragraphs (d)(6)(vii), (d)(6)(viii) and (d)(8)(iv) are added; paragraph (d)(9)(i) is revised; paragraph (e) is revised; paragraph (f)(2)(vi) is revised, and paragraphs (f)(2)(vii) and (f)(2)(viii) are deleted; paragraph (f)(6)(iii) is revised; paragraph (f)(6)(vi) is added; paragraphs (f)(6)(vii), (f)(6)(viii), (f)(9)(v) and (g)(5)(iii) are added; paragraphs (g)(6)(iii) and (g)(6)(iv) are revised; paragraph (g)(6)(v) is revised; paragraphs (g)(6) (vi)–(viii) are added; paragraphs (i)(1)(iv) and (i)(1)(vii) are revised; paragraphs (i)(1)(ix), (i)(3)(iv) and (i)(4)(vi) are added; paragraph (i)(5)(i) is revised to read as follows:

§ 111.5 Contents of the Domestic Mail Manual.

The Domestic Mail Manual contains the following parts:

(a) * * *

(2) * * *

(ii) Part 122—Delivery Address

* * * * *

(vi) Part 126—Mail Sent Via Department of State to U.S. Government Personnel Abroad

* * * * *

(3) * * *

(i) Part 131—Responsibilities

(ii) Part 132—Rates and Classification Centers

* * * * *

(vi) Part 136—Mixed Classes of Mail

* * * * *

(5) * * *

(i) Part 151—Mail Receptacles

* * * * *

(iv) Part 154—Plant-Load Operations

* * * * *

(viii) Part 158—Mail Claim Check System

* * * * *

(6) * * *

(ii) Part 162—Purpose and Selection of Commemorative Stamps, Postal Stationery, and Philatelic Products

* * * * *

(7) * * *

(iii) Part 173—Requirements for Obtaining Special Cancellation Die Hubs

* * * * *

(v) Part 175—Postal-Message Cancellations

(vi) Part 176—Mail Submitted for Special Cancellations

(b) * * *

(1) * * *

(i) Part 211—General Rate Information

* * * * *

(iv) Part 214—Express Mail Next Day and Second Day Service Rates

(v) Part 215—Address-Correction Fee

(2) * * *

(v) Part 225—Express Mail Second Day Service

(vi) Part 226—Express Mail Military Service

(vii) Part 227—Express Mail Reship Service

* * * * *

(4) * * *

(ii) Part 242—Express Mail Corporate Accounts

* * * * *

(6) * * *

(iii) Part 263—Express Mail Next Day, Second Day, and Military Services

(7) * * *

(i) Part 271—Express Mail Same Day Airport Service

(ii) Part 272—Express Mail Custom Designed Service

(iii) Part 273—Express Mail Next Day and Second Day Services

(8) * * *

(i) Part 281—Express Mail

(ii) Part 282—Corporate Account

(iii) Part 283—Federal Agencies

(iv) Part 284—USPS Mail

(v) Part 285—Pickup Charges

(vi) Part 286—Insufficient Prepayment

(vii) Part 287—Express Mail Shipments Not Bearing Postage

(9) * * *

(i) Part 291—Forwarding, Holding, and Return

(ii) Part 292—Address Correction and Directory Services

(iii) Part 293—COD Service

(iv) Part 294—Evidence of Mailing

(v) Part 295—Insurance and Indemnity

(vi) Part 296—Claims Procedures

(vii) Part 297—Return Receipts

(c) * *

(2) * * *

(ii) Part 322—Postal Cards and Postcards

(iii) Part 323—Presorted First-Class Mail and Carrier Route First-Class Mail

(iv) Part 324—ZIP + 4 First-Class Mail

(v) Part 325—ZIP + 4 Barcoded Rate

(vi) Part 326—Priority Mail

* * * * *

(6) * * *

(i) Part 361—Addressing

(ii) Part 362—Marking Requirements

(iii) Part 363—Sealing

(iv) Part 364—ZIP + 4 Barcoded First-Class Mail

(v) Part 365—Combined Presort Mailings

(vi) Part 366—Preparation Requirements for Optional Combined ZIP + 4 Presort and Presort First-Class Mailings (Destinating at Automated Sites)

(vii) Part 367—Preparation of Presort First-Class and First-Class Carrier Route Mailings

(viii) Part 368—Preparation Requirements for ZIP + 4 First-Class Mail

(ix) Part 369—Optional Endorsement Line in Address Block or Label

(7) * * *

(ii) Part 372—Matter Mailed at Carrier Route First-Class, Presorted First-Class,

Nonpresorted ZIP + 4, ZIP + 4 Presort, and ZIP + 4 Barcoded Rates
(iii) Part 373—Priority Mail
(iv) Part 374—Presort Verification
(8) * * *
(i) Part 381—Single Piece Rates (See Exhibit 310)
(ii) Part 382—Carrier Route First-Class, Presorted First-Class, Nonpresorted ZIP + 4, ZIP + 4 Presort, and ZIP + 4 Barcoded Rates
(iii) Part 383—Priority Mail Rates (See Exhibit 310)
* * * * *
(d) * * *
(5) Subchapter 450—Preparation of Mailing Pieces
(i) Part 451—Physical Limitations
(ii) Part 452—Addressing
(iii) Part 453—Marking Requirements and Endorsements
(iv) Part 454—Enveloping, Sealing, Folding
(v) Part 455—Special Requirements
(6) Subchapter 460—Preparation of Bulk-Rate Mailings
(i) Part 461—[Reserved]
(ii) Part 462—Preparation Requirements for the Carrier Route Level Rates (Levels C, I, and K)
(iii) Part 463—Preparation Requirements for the Five-Digit Level Rates (Levels B and H)
(iv) Part 464—Preparation Requirements for the Basic Rates (Levels A, D, G, and J)
(v) Part 465—[Reserved]
(vi) Part 466—[Reserved]
(vii) Part 467—Bundling and Palletizing
(viii) Part 468—Special Preparation Requirements or Options for Presort-Level Discount-Rated Pieces (Levels B, C, H, I, and K)
* * * * *
(8) * * *
(iv) Part 484—Statement of Publication of More Than One Issue on the Same Day
(9) * * *
(i) Part 491—Forwarding Local and Nonlocal Change of Address
* * * * *
(e) Chapter 5—[Reserved]
(f) * * *
(2) * * *
(vi) Part 626—Attachments
* * * * *
(6) * * *
(iii) Part 663—[Reserved]
* * * * *
(vi) Part 666—[Reserved]
(vii) Part 667—Preparation of Bulk Rate Mailings
(viii) Part 668—Optional Endorsement Line in Address Block or Label
* * * * *
(9) * * *
(v) Part 695—Nonmailable or Nonstandard Pieces
(g) * * *
(5) * * *
(iii) Part 753—Nonmachinable Surcharge
(6) * * *
(iii) Part 763—Carrier Route Bound Printed Matter
(iv) Part 764—Preparation of Special Fourth-Class Mail
(v) Part 765—[Reserved]
(vi) Part 766—Preparation of Library Rate-Materials
(vii) Part 767—Preparation of Bound Printed Matter
(viii) Part 768—Optional Endorsement Line in Address Block or Label
* * * * *
(i) * * *
(1) * * *
(iv) Part 914—Collect on Delivery (COD) Mail
* * * * *
(vii) Part 917—Business Reply Mail (BRM)
* * * * *
(ix) Part 919—Merchandise Return
* * * * *
(3) * * *
(iv) Part 934—Return Receipt for Merchandise
(4) * * *
(vi) Part 946—Address Squencing Services
(5) * * *
(i) Part 951—Post Office Box (P.O. Box) Service
* * * * *

Fred Eggleston,
Assistant General Counsel, Legislative Division.

[FR Doc. 88-11933 Filed 5-26-88; 8:45 am]
BILLING CODE 7710-12-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3386-2]

Standards of Performance for New Stationary Sources; Surface Coating of Plastic Parts for Business Machines; Correction

AGENCY: Environmental Protection Agency.

ACTION: Final rule; correction.

SUMMARY: This document corrects a final rule on standards of performance for new stationary sources for surface coating of plastic parts for business machines.

This action is necessary to correct an inadvertent inclusion of delegable functions in the list of nondelegable functions in § 60.726 of the regulation that was published in the Federal Register on January 29, 1988 (53 FR 2672).

EFFECTIVE DATE: January 29, 1988.

FOR FURTHER INFORMATION CONTACT: Doug Bell or Laura Butler, Standards Development Branch, ESD (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-5568 or (919) 541-5267.

SUPPLEMENTARY INFORMATION:

List of subjects is 40 CFR Part 60

Air pollution control.

Date: May 20, 1988.

Eileen Claussen,
Acting Assistant Administrator for Air and Radiation.

For reasons set out in the preamble, 40 CFR Part 60, § 60.726(b), is amended as follows:

PART 60—[AMENDED]

1. The authority citation for Part 60 continues to read as follows:

Authority: 42 U.S.C. 7411, and 7601(a).

2. Section 60.726 is amended by revising paragraph (b) to read as follows:

§ 60.726 Delegation of authority.

* * * * *

(b) Authorities which will not be delegated to the States:
Section 60.723(b)(1)
Section 60.723(b)(2)(i)(C)
Section 60.723(b)(2)(iv)
Section 60.724(e)
Section 60.725(b)

[FR Doc. 88-11852 Filed 5-26-88; 8:45 am]
BILLING CODE 6560-50-M

INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1104, 1111, 1113, 1118, 1130, 1131, 1132, 1136, 1137, 1139, 1143, 1150, 1152, 1154, 1161, 1169, 1170, 1182, 1183, 1185, 1186, and 1331

[Ex Parte No. 471]

Copies of Pleadings

AGENCY: Interstate Commerce Commission.

ACTION: Amendment of final rules.

SUMMARY: In a decision served March 25, 1988, 53 FR 10095 (March 29, 1988),

the Commission adopted final rules that specify, with limited exceptions, a uniform 10 copy requirement for pleadings and other documents filed in Commission proceedings. In response to a petition to reopen this proceeding, we have reconsidered the prior decision and have determined that the uniform 10 copy requirement would be unnecessarily burdensome in temporary authority (TA) and emergency temporary authority (ETA) application proceedings under 49 CFR Part 1162. The revised rules are vacated to the extent they applied to TA and ETA matters processed under 49 CFR Part 1162 and are amended accordingly.

EFFECTIVE DATE: May 27, 1988.

FOR FURTHER INFORMATION CONTACT: Suzanne Higgins O'Malley, (202) 275–7292; or Richard B. Felder, (202) 275–7691. [TDD for hearing impaired: (202) 275–1721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To obtain a copy of the full decision, write to Office of the Secretary, Room 2215, Interstate Commerce Commission, Washington, DC 20423 or call (202) 275–7428 [assistance for the hearing impaired is available through TDD services (202) 275–1721].

Environmental and Energy Considerations

These rule revisions will not significantly affect either the quality of the human environment or the conservation of energy resources.

Regulatory Flexibility Analysis

The Commission reiterates its prior certification that these rule revisions will not have a significant economic impact on a substantial number of small entities. The involved changes are ministerial only and do not impose additional substantive requirements on any entity. Indeed, the rules as amended here represent a reduced paperwork and administrative burden on TA and ETA applicants as compared with the rules previously adopted.

List of Subjects

49 CFR Parts 1104, 1113, 1118, 1130, and 1132

Administrative practice and procedure.

49 CFR Part 1111

Administrative practice and procedure, Investigations.

49 CFR Part 1131

Administrative practice and procedure, Investigations, Railroads.

49 CFR Part 1136

Administrative practice and procedure, Buses, Motor carriers, Railroads.

49 CFR Parts 1137 and 1150

Administrative practice and procedure, Railroads.

49 CFR Part 1139

Administrative practice and procedure, Buses, Freight, Motor carriers, Reporting and recordkeeping requirements.

49 CFR Part 1143

Administrative practice and procedure, Buses, Intergovernmental relations.

49 CFR Part 1152

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements, Uniform System of Accounts, Abandonments and discontinuances, Investigations, Public use conditions.

49 CFR Part 1154

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements.

49 CFR Parts 1161, 1182, and 1183

Administrative practice and procedure, Motor carriers.

49 CFR Part 1169

Administrative practice and procedure, Buses.

49 CFR Part 1170

Administrative practice and procedure, Buses, Employment.

49 CFR Part 1185

Administrative practice and procedure, Antitrust, Railroads.

49 CFR Part 1186

Administrative practice and procedure, Freight, Motor carriers.

49 CFR Part 1331

Buses, Freight forwarders, Maritime carriers, Motor carriers, Pipelines, Railroads.

Decided: May 19, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley.

Noreta R. McGee,

Secretary.

Title 49 of the Code of Federal Regulations is amended as follows:

The final rules published in the Federal Register of Tuesday, March 29, 1988, on pages 10095–10097 are withdrawn.

PART 1104—[AMENDED]

1. The authority citation for Part 1104 continues to read:

Authority: 49 U.S.C. 10321; 5 U.S.C. 559.

§ 1104.3 [Amended]

2. In § 1104.3 the numeral "6" in paragraph (a) is revised to read "10"

3. In § 1104.3 the words "one copy" in paragraph (b) are revised to read "10 copies."

PART 1111-[AMENDED]

4. The authority citation for Part 1111 continues to read:

Authority: 49 U.S.C. 10321; 5 U.S.C. 559.

§ 1111.3 [Amended]

5. In § 1111.3 the numeral "6" is revised to read "10."

§ 1111.4 [Amended]

5. In § 1111.4 the numeral "six" in paragraph (b) is revised to read "10."

PART 1113—[AMENDED]

7. The authority citation for Part 1113 continues to read:

Authority: 49 U.S.C. 10321; 5 U.S.C. 559.

§ 1113.7 [Amended]

8. In § 1113.7 the words "one additional copy" and "three copies" in paragraph (e) are revised to read "10 copies."

§ 1113.12 [Amended]

9. In § 1113.12 the words "one copy" in paragraph (a) are revised to read "10 copies."

§ 1113.13 [Amended]

10. In § 1113.13 the words "one copy" are revised to read "10 copies."

PART 1118—[AMENDED]

11. The authority citation for Part 118 continues to read:

Authority: 49 U.S.C. 10321; 5 U.S.C. 559.

§ 1118.4 [Amended]

12. In § 1118.4 the word "six" in paragraph (b) is revised to read "10."

PART 1130—[AMENDED]

13. The authority citation for Part 1130 continues to read:

Authority: 49 U.S.C. 10321 and 10707; 5 U.S.C. 553 and 559.

§ 1130.2 [Amended]

14. In § 1130.2 the word "six" in paragraph (f) is revised to read "10."

PART 1131—[AMENDED]

15. The authority citation for Part 1131 continues to read:

Authority: 49 U.S.C. 10321 and 11701; 5 U.S.C. 559.

§ 1131.8 [Amended]

16. In § 1131.8 the word "six" is revised to read "10."

§ 1131.9 [Amended]

17. In § 1131.9 the word "six" in paragraph (b) is revised to read "10."

PART 1132—[AMENDED]

18. The authority citation for Part 1132 continues to read:

Authority: 49 U.S.C. 10321 10707, 10708, and 10726; 5 U.S.C. 553 and 559.

§ 1132.1 [Amended]

19 In § 1132.1 the numeral "11" and the word "six" in paragraph (d) are revised to read "10."

§ 1132.2 [Amended]

20. In § 1132.2 the numeral '15" and the word "six" in paragraph (b) are revised to read "10."

PART 1136—[AMENDED]

21. The authority citation for Part 1136 continues to read:

Authority: 49 U.S.C. 10321 10707, and 10708; 5 U.S.C. 559.

§ 1136.2 [Amended]

22. In § 1136.2 the numeral "24" is revised to read "10."

PART 1137—[AMENDED]

23. The authority citation for Part 1137 continues to read:

Authority: 49 U.S.C. 10321 10705, and 10728; 5 U.S.C. 553 and 559.

§ 1137.1 [Amended]

24. In § 1137.1 the numeral "15" in paragraph (a)(1) and (d) is revised to read "10."

PART 1139—[AMENDED]

25. The authority citation for Part 1139 continues to read:

Authority: 49 U.S.C. 10321 and 10708; 5 U.S.C. 553 and 559.

§ 1139.7 [Amended]

26. In §1139.7 the numeral "16" is revised to read "10."

PART 1143—[Amended]

27. The authority citation for Part 1143 continues to read:

Authority: 49 U.S.C. 10321, 11501(e), and 5 U.S.C. 553.

§ 1143.5 [Amended]

28. In §1143.5 the numeral "12" and the word "six" are revised to read "10".

PART 1150—[AMENDED]

29. The authority citation for Part 1150 continues to read:

Authority: 49 U.S.C. 10321, 10901, and 10505; 5 U.S.C. 553 and 559.

§ 1150.10 [Amended]

30. In § 1150.10 the word "five" in paragraphs (b) and (g) is revised to read "10".

PART 1152—[AMENDED]

31. The authority citation for Part 1152 continues to read:

Authority: 5 U.S.C. 553, 559, and 704; 11 U.S.C. 1170; 16 U.S.C. 1247(d); and 49 U.S.C. 10321, 10362, 10505, and 10903 *et seq.*

§ 1152.24 [Amended]

32. In § 1152.24 the word "six" in paragraph (a) is revised to read "10".

§ 1152.25 [Amended]

33. In § 1152.25 the numeral "2" in paragraphs (c)(2) and (4) is revised to read "10'.'

§ 1152.40 [Amended]

34. In § 1152.40 the word "six" in paragraph (b) is revised to read "10".

§ 1152.42 [Amended]

35. In § 1152.42 the word "six" in paragraph (a) is revised to read "10".

PART 1154—[AMENDED]

36. The authority citation for Part 1154 continues to read:

Authority: 49 U.S.C. 10321 and 10905; 5 U.S.C. 559.

§ 1154.6 [Amended]

37. In § 1154.6 the numeral "15" in paragraph (a) is revised to read "10".

PART 1161—[AMENDED]

38. The authority citation for Part 1161 continues to read:

Authority: 49 U.S.C. 10321, 10931; 5 U.S.C. 559.

§ 1161.5 [Amended]

39. In § 1161.5 the word "six" is revised to read "10" in both places it appears.

PART 1169—[AMENDED]

40. The authority citation for Part 1169 continues to read:

Authority: 49 U.S.C. 10321 and 10935; 5 U.S.C. 553.

§ 1169.6 [Amended]

41. In § 1169.6 the word "two" in paragraph (b) is revised to read "10".

§ 1169.23 [Amended]

42. In § 1169.23 the word "two' in paragraph (a) is revised to read "10".

§ 1169.32 [Amended]

43. In § 1169.32 the word "two" is revised to read "10".

PART 1170—[AMENDED]

44. The authority citation for Part 1170 continues to read:

Authority: 49 U.S.C. 10321, 5 U.S.C. 553 and Pub. L. 97–261, sec. 27.

§ 1170.3 [Amended]

45. In § 1170.3 the words "one copy" in paragraph (e) are revised to read "10 copies."

§ 1170.7 [Amended]

46. In § 1170.7 the words "one copy" in paragraph (c) are revised to read "10 copies."

PART 1182—[AMENDED]

47. The authority citation for Part 1182 continues to read:

Authority: 49 U.S.C. 10321, 11343, 11344 and 11345(a); 5 U.S.C. 559.

§ 1182.1 [Amended]

48. In § 1182.1 the word "two (2)" in paragraph (e)(1) is revised to read "10".

§ 1182.2 [Amended]

49. In § 1182.2 the words "one copy" in paragraph (c) are revised to read "10 copies."

§ 1182.4 [Amended]

50. In § 1182.4 the word "two" in paragraph (c)(1) is revised to read "10" and in paragraph (c)(2), the word "one" is revised to read "10".

§ 1182.5 [Amended]

51. In § 1182.5 the word "two" in paragraph (e) is revised to read "10".

PART 1183—[AMENDED]

52. The authority citation for Part 1183 continues to read:

Authority: 49 U.S.C. 10321, 11341, 11343, 11344 and 11345a; 5 U.S.C. 559.

§ 1183.1 [Amended]

53. In § 1183.1 the word "three" in paragraph (b) is revised to read "10".

§ 1183.4 [Amended]

54. In § 1183.4 the word "three" in paragraph (b) is revised to read "10".

§ 1183.5 [Amended]

55. In § 1183.5 the word "three" in paragraph (b) is revised to read "10".

PART 1185—[AMENDED]

56. The authority citation for Part 1185 continues to read:

Authority: 49 U.S.C. 10321 and 11322; 5 U.S.C. 559.

§ 1185.7 [Amended]

57. In § 1185. 7 the word "six" is revised to read "10".

PART 1186—[AMENDED]

58. The authority citation for Part 1186 continues to read:

Authority: 49 U.S.C. 10321 and 11343(e) and 5 U.S.C. 553.

§ 1186.3 [Amended]

59. In § 1186.3, introductory text, the word "four" is revised to read "10".

PART 1331—[AMENDED]

60. The authority citation for Part 1331 continues to read:

Authority: 49 U.S.C. 10321, 10721.

§ 1331.3 [Amended]

61. In § 1331.3(b) the word "twenty" is revised to read "10".

[FR Doc. 88–11957 Filed 5–26–88; 8:45 am]
BILLING CODE 7035–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 675

[Docket No. 71147–8002]

Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of closure.

SUMMARY: NOAA announces the closure of the Bering Sea subarea to directed joint venture (JVP) fishing for pollock under provisions of the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). This action is necessary to limit joint venture fishing to the amount of pollock specified for JVP. It is intended to assure optimum use of groundfish and promote the orderly conduct of the groundfish fisheries.

DATES: This closure is effective from 0759 G.m.t. May 25, 1988, through December 31, 1988. Comments will be accepted through June 8, 1988.

ADDRESS: Comments should be mailed to James W. Brooks, Acting Director, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802, or be delivered to Room 453, Federal Building, 709 West Ninth Street, Juneau, Alaska.

FOR FURTHER INFORMATION CONTACT: Patricia A. Peacock (Resource Management Specialist, NMFS), 907–586–7230.

SUPPLEMENTARY INFORMATION: The FMP governs the groundfish fishery in the exclusive economic zone under the Magnuson Fishery Conservation and Management Act. The FMP was developed by the North Pacific Fishery Management Council and is implemented by rules appearing at 50 CFR 611.93 and Part 675. The FMP establishes a split-season apportionment of pollock for JVP and divides the JVP amount of pollock into two parts. Part One, equal to 40 percent of the sum of the initial JVP for pollock plus 15 percent of the TAC for pollock, is available to the directed JVP fishery for pollock from January 15, through April 15. Directed fishing is defined in § 675.2. Part Two, the remainder of the initial JVP for pollock plus any reserve releases, is available for the directed JVP fishery from April 16 through December 31.

In 1988, Part One of the JVP apportionment for pollock in the Bering Sea Subarea was 274,335 mt (50 FR 894, January 14, 1988). As many as 90 U.S. catcher boats delivered pollock to about 70 foreign processors. Total daily deliveries by the fishing fleet included as much as 16,000 mt of pollock. Part One of the JVP apportionment (less 5,000 mt of pollock for bycatch in other fisheries) was taken by February 9, when the Bering Sea Subarea was closed to directed fishing for pollock (53 FR 4178, February 12, 1988).

Amounts reapportioned from the reserve, 100,000 mt (53 FR 12772, May 10, 1988) and 95,000 mt (May 25, 1988), increased the JVP apportionment for pollock to 685,838 mt. Total daily catches during Part Two are slightly smaller than total daily catches during Part One. As many as 100 U.S. catcher boats are delivering pollock to about 50 foreign processors, and as much as 11,000 mt of pollock are delivered daily. NMFS estimates 680,838 mt of pollock will be taken by May 25, 1988.

Notice of Closure to Directed Fishing

Under § 675.20(b)(3)(ii), when the Regional Director determines that an unharvested amount of pollock in Part Two is necessary for bycatch in JVP fisheries for other groundfish species, the Secretary will publish a notice in the **Federal Register** prohibiting directed fishing for pollock for the remainder of Part Two.

The Regional Director estimates that directed JVP fisheries for Pacific cod, yellowfin sole, and other flatfish will require a bycatch of 5,000 mt of pollock. To preserve this bycatch amount, U.S. fishermen delivering catches to foreign processing vessels must cease directed fishing for pollock at 0759 G.m.t. May 25, 1988. Interested persons are invited to submit comments in writing to the address above for 15 days after the effective date of this notice.

Classification

The Assistant Administrator for Fisheries, NOAA, finds for good cause that it is impractical and contrary to the public interest to provide prior notice and comment. Immediate effectiveness of this notice is necessary to prevent the JVP for pollock from being prematurely exceeded. This action is taken under the authority of § 675.20(b) and complies with Executive Order 12291.

List of Subjects in 50 CFR Part 675

Fish, Fisheries, Reporting and recordkeeping requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 24, 1988.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management.

[FR Doc. 88–12011 Filed 5–24–88; 3:57 pm]
BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 53, No.
Friday, May 27, 1988

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 401

[Amdt. No. 18; Doc. No. 5590S]

General Crop Insurance Regulations; Guaranteed Tobacco Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1989 and succeeding crop years, by adding a new section, 7 CFR 401.127, be known as the Guaranteed Tobacco Endorsement. The intended effect of this rule is to provide the provisions of crop insurance protection on tobacco guaranteed in an endorsement to the general crop insurance policy.

DATE: Written comments, data, and opinions on this proposed rule must be submitted not later than July 26, 1988, to be sure of consideration.

ADDRESS: Written comments on this proposed rule should be sent to Peter F. Cole, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC, 20250, telephone (202) 447–3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512–1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1993.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect of the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith proposes to add to the General Crop Insurance Regulations (7 CFR Part 401), a new section to be known as 7 CFR 401.127, the Guaranteed Tobacco Endorsement, effective for the 1989 and succeeding crop years, to provide the provisions for insuring tobacco.

Upon publication of 7 CFR 401.127 as a final rule, the provisions for insuring tobacco contained in 7 CFR 401.127 will supersede those provisions contained in 7 CFR Part 436, the Guaranteed Tobacco Crop Insurance Regulations, effective with the beginning of the 1989 crop year.

The present policy contained in 7 CFR Part 436 will be terminated at the end of the 1988 crop year and later removed and reserved. FCIC proposes to amend the title of 7 CFR Part 436 by separate document so that the provisions therein are effective only through the 1988 crop year.

Minor editorial changes have been made to improve compatibility with the new general crop insurance policy. These changes do not affect meaning or intent of the provisions. In adding the new Guaranteed Tobacco Endorsement to 7 CFR Part 401, FCIC makes other changes in the provisions for insuring tobacco as follows:

1. Section 1—Add a provision stating that tobacco destroyed to comply with other U.S. Department of Agriculture programs will not be insured. This provision was added to prevent insurance from attaching to the crop intended for eventual destruction to comply with other U.S. Department of Agriculture programs.

2. Section 4—Provide that insurance will begin and end on each unit or portion of a unit. This change is made to avoid instances when delayed planting of part of a unit until after the final planting date would prevent insurance from attaching on timely planted acreage. The end of insurance period for type 31 tobacco has also been changed to February 28 for consistency between policies.

3. Section 5—Unit division provisions are included in this section of the endorsement.

4. Section 7—Added language stating production commingled between ASCS farm serial number units will be prorated. Language has been clarified in this section to indicate that if appraisals for uninsured causes are made in conjunction with other appraisals, we intend to count the entire uninsured appraisal.

5. Section 10—Added definition ("Average value per pound") to provide a method to establish a value for grades of tobacco which, after delivery to the market warehouse, does not sell.

FCIC is soliciting public comment on this proposed rule for 60 days following publication in the Federal Register. Written comments received pursuant to this proposed rule will be available for public inspection and copying in the Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250, during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

General crop insurance regulations, Guaranteed tobacco endorsement.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), proposed to be effective for the 1989 and succeeding crop years, as follows

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: Secs. 506, 516, Pub. L. 75–430, 52 Stat. 73, 77, as amended (7 U.S.C. 1506, 1516).

2. 7 CFR Part 401 is amended to add a new section to be known as 7 CFR 401.127, Guaranteed Tobacco Endorsement, effective for the 1989 and succeeding crop years, to read as follows:

§401.128 Guaranteed tobacco endorsement.

The provisions of the Guaranteed Tobacco Endorsement for the 1989 and subsequent crop years are as follows:

Federal Crop Insurance Corporation

Guaranteed Tobacco Endorsement

1. Insured crop and acreage.

a. The crop insured will be any of the following tobacco types you elect which are grown on insured acreage and for which a guarantee and premium rate are provided by the actuarial table:

Flue Cured

Type 11A
Type 11B
Type 12
Type 13
Type 14

Fire Cured

Type 21
Type 22
Type 23

Maryland

Type 32

Cigar Filler

Type 41
Type 42
Type 44

Cigar Wrapper

Type 61

Burley

Type 31

Dark Air

Type 35
Type 36
Type 37

Cigar Binder

Type 51
Type 52
Type 54
Type 55

b. In addition to the tobacco not insurable under section 2 of the general crop insurance policy, we do not insure any acreage:

(1) On which the tobacco crop was destroyed or put to another use for the purpose of conforming with any other program administered by the United States Department of Agriculture; or

(2) Planted to tobacco of a discount variety under provisions of the tobacco price support program.

2. Causes of loss

The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

a. Adverse weather conditions;
b. Fire;
c. Insects;
d. Plant diseases;
e. Wildlife;
f. Earthquake;
g. Volcanic eruption; or
h. If applicable, failure of the irrigation water supply due to an unavoidable cause occurring after the beginning of planting;

unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

3. Annual premium.

a. The annual premium amount is computed by multiplying the production guarantee for the unit times the applicable price election, times the premium rate, times the insured acreage, times your share at the time of planting.

b. If you are eligible for a premium reduction in excess of 5 percent based on your insurance experience through the 1983 crop year under the terms of the experience table contained in the guaranteed tobacco policy in effect for the 1984 crop year, you will continue to receive the benefit of the reduction subject to the following conditions:

(1) No premium reduction will be retained after the 1989 crop year;

(2) The premium reduction amount will not increase because of favorable experience;

(3) The premium reduction amount will decrease because of unfavorable experience in accordance with the terms of the policy in effect for the 1984 crop year;

(4) Once the loss ratio exceeds .80, no further premium reduction will apply; and

(5) Participation must be continuous.

4. Insurance period.

In lieu of the provisions of section 7 of the general crop insurance policy insurance attaches on each unit or part of a unit when the tobacco is transplanted and ends at the earliest of:

a. total destruction of the tobacco;
b. weighing-in at the tobacco warehouse;
c. removal of the tobacco from the unit (except for curing, grading, packing, or immediate delivery to the tobacco warehouse);
d. final adjustment of a loss; or
e. the following dates immediately after the normal harvest period:

(1) Types 11 and 12..... November 30;
(2) Type 13..... October 31;
(3) Type 14..... October 15;
(4) Type 31 and 36.....February 28;
(5) Types 21, 35 and 37..... March 15;
(6) Types 22 and 23.....April 15;
(7) Type 32.....May 15;
(8) All other types.....April 30.

5. Unit division.

a. In lieu of subsection 17.q. of the general crop insurance policy, a unit will be defined as all of the insurable acreage of the tobacco type you elect to insure in the county at the time insurance first attaches, (1) in which you have an insured share, and (2) which is identified by a single ASCS Farm Serial Number.

b. We may reject or modify an ASCS reconstitution for the purpose of unit definition if the reconstitution was in whole or in part to defeat the purpose of the Federal Crop Insurance Program or to gain disproportionate advantage under this policy.

c. If you have a loss on any unit, production records for all harvested units must be provided. Production that is commingled between units will be prorated by us.

6. Notice of damage or loss.

In addition to the provisions in section 8 of the general crop insurance policy:

a. You may not destroy any tobacco on which an indemnity will be claimed until we give consent; and

b. For purposes of section 8 of the general crop insurance policy, the representative sample of the unharvested crop must be at least 10 feet wide and the entire length of the field.

7. Claim for indemnity.

a. An indemnity will be determined for each unit by:

(1) Multiplying the insured acreage by the production guarantee;

(2) Subtracting therefrom the total production of tobacco to be counted (see subsection 7.b.);

(3) Multiplying the remainder by the applicable price election; and

(4) Multiplying this result by your share.

b. The total production (in pounds) to be counted for a unit will include all harvested and appraised production.

(1) Harvested tobacco production which, due to insurable causes, has a value less than the market price for tobacco of the same type, will be adjusted by:

(a) Dividing the average value per pound of the harvested production by the market price per pound; and

(b) Multiplying that result by the number of pounds of such damaged harvested tobacco.

(c) If due to insurable causes there is no market price available for the grade being adjusted, the value of production to count will be reduced 20% for each grade that the production falls below the lowest marketable grade with a market price (see subsection 10.d.(2)).

(2) All harvested tobacco production which is not damaged by insurable causes and cannot be sold in the current market year will be considered production to count.

(3) To enable us to determine the fair market value of tobacco not sold through auction warehouses, we must be allowed:

(a) To inspect such tobacco before it is sold, contracted to be sold, or otherwise disposed of; and

(b) At our option to obtain additional offers on your behalf.

(4) Appraised production to be counted will include:

(a) Not less than the guarantee for any acreage which is abandoned or put to another use without prior written consent or damaged solely by an uninsured cause;

(b) Not less than 35 percent of the guarantee for all unharvested acreage;

(c) Unharvested production on harvested acreage; and

Potential production lost due to uninsured causes and to failure to follow recognized good tobacco farming practices.

(5) We may appraise any acreage of tobacco types 11, 12, 13, or 14 on which the stalks have been destroyed prior to our consent at not less than the guarantee.

(6) Any appraisal we have made on insured acreage for which we have given written consent to put to another use will be considered production unless such acreage is:

(a) Not put to another use before harvest of tobacco becomes general in the county and reappraised by us; or

(b) Further damage by an insured cause and reappraised by us; or

(c) Harvested.

(7) The commingled production of units will be prorated to such units in proportion to our liability on the harvested acreage of each unit.

(8) No replanting payment wil be made under this endorsement.

8. Cancellation and termination dates.

State and county	Cancellation and termination dates
Alabama; Florida; Georgia; South Carolina; and Surry, Wilkes, Caldwell, Burke, and Cleveland counties, North Carolina, and all North Carolina counties east thereof.	March 31.
All other North Carolina counties and all other states.	April 15.

9. Contract changes.

Contract changes will be available at your service office by December 31 prior to the cancellation date.

10. Meaning of terms.

a. "*Average value per pound*" means the total value of all harvested production from the unit divided by the harvested pounds and may include the value of any harvested production which is not sold.

b. "*County*" means that land defined in the general crop insurance policy and any land identified by an ASCS Farm Serial Number for the county but physically located in another county.

c. "*Harvest*" means the completion of cutting or priming of tobacco on any acreage from which at least 20 percent of the production guarantee per acre shown by the actuarial table is cut or primed.

d. "*Market price*":

(1) For types, 11, 12, 13, 14, 21, 22, 23, 31, 35, 36, 37, 42, 44, 54, and 55, means the average price support level per pound for the insured type of tobacco as announced by the United States Department of Agriculture under the tobacco price support progamr (If for any crop year a price support for the insured type is not in effect, we will use the season average price in the belt or area through the day tobacco sales are completed on any unit or part thereof which is harvested); and

(2) For types 32, 41, 51, 52, and 61 means the season average price for the applicable type of tobacco (Such price will be the season average price for the current crop year for any unit or part thereof which is harvested) and may be established by including the value of sold and unsold production.

e. "*Planting*" means transplanting the tobacco plant from the bed into the field.

Done in Washington, DC on May 4, 1988.

Edward D. Hews,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 88-11929 Filed 5-26-88; 8:45 am]

BILLING CODE 3410-08-M

7 CFR Part 401

[Amdt. No. 25; Doc. No. 4986S]

General Crop Insurance Regulations; Quota Tobacco Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1989 and succeeding crop years, by adding a new section, 7 CFR 401.133, Quota Tobacco Endorsement. The intended effect of this rule is to provide the regulations containing the provisions of crop insurance protection on tobacco (quota) in an endorsement to the general crop insurance policy.

DATE: Written comments, data, and opinions on this proposed rule must be submitted not later than July 26, 1988, to be sure of consideration.

ADDRESS: Written comments on this proposed rule should be sent to Peter F. Cole, Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC, 20250.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, (202) 447-3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1993.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith proposes to add to the General Crop Insurance Regulations (7 CFR Part 401), a new section to be known as 7 CFR 401.133, the Quota Tobacco Endorsement, effective for the 1989 and succeeding crop years, to provide the provisions for insuring tobacco.

Upon publication of 7 CFR 401.133, as a final rule, the provisions for insuring tobacco contained therein will supersede those provisions contained in 7 CFR Part 435, the Tobacco (Quota) Crop Insurance Regulations, effective with the beginning of the 1989 crop year. The present policy contained in 7 CFR Part 435 will be terminated at the end of the 1988 crop year and later removed and reserved. FCIC will propose to amend the title of 7 CFR Part 435 by separate document so that the provisions therein are effective only through the 1987 crop year.

Minor editorial changes have been made to improve compatibility with the

new general crop insurance policy. These changes do not affect meaning or intent of the provisions. In adding the new Quota Tobacco Endorsement to 7 CFR Part 401, FCIC proposes to make changes in the provisions for insuring tobacco as follows:

1. Section 1—Add a provision stating that tobacco destroyed to comply with other U.S. Department of Agriculture programs will not be insured. This provision was added to prevent insurance from attaching to a crop that is intended for destruction or destroyed to comply with other USDA programs.

2. Section 2—Add language dealing with allocation and report of effective poundage quota.

3. Section 7—Provide that insurance will begin on each unit or portion of a unit. This change is made to avoid instances when delayed planting of part of a unit until after the final planting date would prevent insurance from attaching on timely planted acreage.

4. Section 8—Unit division provisions are now included in this section of the endorsement—Language was adding stating production commingled between Farm Serial Number units will be prorated.

FCIC is soliciting public comment on this proposed rule for 60 days following publication in the **Federal Register**. Written comments received pursuant to this proposed rule will be available for public inspection and copying in the Office of the Manager, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC 20250, during regular business hours, Monday through Friday.

List of Subjects in 7 CFR Part 401

Crop insurance, Quota tobacco endorsement.

Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation proposes to amend the General Crop Insurance Regulations (7 CFR Part 401), proposed to be effective for the 1989 and succeeding crop years, as follows:

401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

Authority: Secs. 506, 516, Pub. L. 75–430, 52 Stat. 73, 77, as amended (7 U.S.C. 1506, 1516).

2. 7 CFR Part 401 is amended to add a new section to be known as 7 CFR 401.133, Quota Tobacco Endorsement, effective for the 1989 and Succeeding Crop Years, to read as follows:

§ 401.133 Quota tobacco endorsement.

The provisions of the Quota Tobacco Crop Insurance Endorsement for the 1989 and subsequent crop years are as follows:

Federal Crop Insurance Corporation

Quota Tobacco Endorsement

1. Crop, acreage, and share insured.

a. The crop insured will be tobacco of the type shown as insurable in the actuarial table, which is grown on insured acreage and for which a guarantee and premium rate are provided by the actuarial table;

b. In addition to the tobacco not insurable in section 2 of the general crop insurance policy, we do not insure any tobacco on which the crop was destroyed or put to another use for the purpose of conforming with any other program administered by the United States Department of Agriculture;

c. Planted to tobacco of a discount variety under provisions of the tobacco price support program.

2. Insured poundage quota.

The insured poundage quota for each crop year will be the effective poundage marketing quota (within ASCS to tolerance) applicable to the unit as provided under ASCS Tobacco Marketing Quota Regulations for the crop year as reported by you or as determined by us, whichever we elect, not to exceed any amount which would be subject to a marketing quota penalty under ASCS Tobacco Marketing Quota Regulations. However:

a. The insured poundage marketing quota may be reduced for any carryover tobacco to be marketed under the poundage marketing applicable to the unit when such poundage reduction is clearly specified by you in filing the acreage and quota report;

b. The insured poundage quota will never exceed the pounds obtained by multiplying the insured acres by the applicable farm yield per acre; and

c. Unless otherwise provided by the actuarial table, for any crop year in which tobacco poundage marketing quota regulations are not in effect, the insured poundage quota will be the pounds obtained by multiplying the applicable farm yield per acre (as shown at ASCS) times the lower of the reported or insured acreage on the unit.

We will allocate the effective poundage quota for the unit proportionately by acreage, to all insured and uninsured acres in the unit except when designated by the insured by the acreage reporting date and approved in writing by our Field Underwriting Office.

3. Causes of loss.

The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

a. Adverse weather conditions;
b. Fire;
c. Insects;
d. Plant disease;
e. Wildlife;
f. Earthquake;
g. Volcanic eruption; or

h. If applicable, failure of the irrigation water supply due to an unavoidable cause occurring after the beginning of planting;

unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

4. Report of acreage, share, practice and poundage quota.

a. In addition to the requirements of Section 3 of the general policy, you are required to report:

(1) All the acreage of insurable types of tobacco in the county in which you have a share; and

(2) The effective poundage marketing quota applicable to the unit as provided under ASCS Tobacco Marketing Quota Regulations for the crop year. Such poundage marketing quota may be reduced for any carryover tobacco to be marketed under the poundage quota applicable to the unit, provided such poundage reduction is clearly specified in this report.

b. In addition to the factors of share, and practice, referred to in Section 3 of the General Policy, poundage quota is also a factor in determining the insured premium, indemnity, and coverage.

5. Amounts of insurance and coverage level.

a. The amount of insurance for a unit will be the dollar amount determined by multiplying the insured poundage quota for the unit by the percentage guarantee for the applicable coverage level established by the actuarial table and multiplying this product by the current year's support price for type 31 tobacco (rounded to the nearest cent) less six cents per pound for warehouse charges).

b. Subsection 4.d. of the general crop insurance policy is not applicable to this endorsement.

6. Annual premium.

a. The annual premium amount is computed by multiplying the amount of insurance for the unit, times the premium rate, times your share at the time of planting.

b. If you are eligible for a premium reduction in excess of 5 percent based on your insurance experience through the 1983 crop year under the terms of the experience table contained in the quota tobacco policy in effect for the 1984 crop year, you will continue to receive the benefit of the reduction subject to the following conditions:

(1) No premium reduction will be retained after the 1989 crop year;

(2) The premium reduction amount will not increase because of favorable experience;

(3) The premium reduction amount will decrease because of unfavorable experience in accordance with the terms of the policy in effect for the 1984 crop year;

(4) Once the loss ratio exceeds .80, no further premium reduction will apply; and

(5) Participation must be continuous.

7. Insurance period.

In lieu of the provisions in section 7 of the general crop insurance policy, insurance attaches on each unit or part of a unit when the tobacco is planted and ends at the earliest of:

a. Total destruction of the tobacco;

b. Weighing-in at the tobacco warehouse;
c. Removal of the tobacco from the unit (except for curing, grading, packing, or immediate delivery to the tobacco warehouse);
d. Final adjustment of a loss; or
e. February 28 immediately after the normal harvest period.

8. Unit division.

a. In lieu of subsection 17.q. of the general crop insurance policy, a unit will be defined as all of the insurable acreage of the tobacco type you elect to insure at the time insurance first attaches, (1) in which you have a share, and (2) which is identified by a single ASCS Farm Serial Number.
b. We may reject or modify any ASCS reconstitution for the purpose of unit definition if the reconstitution was in whole or in part to defeat the purpose of the Federal Crop Insurance Program or to gain disproportionate advantage under this policy.
c. If you have a loss on any unit, production records for all harvested units must be provided. Production that is commingled between units will be prorated.

9. Notice of damage or loss.

In addition to the provisions in section 8 of the general crop insurance policy;
a. You may not destroy any tobacco on which an indemnity will be claimed until we give consent;
b. For purposes of section 8 of the general crop insurance policy, the representative sample of the unharvested crop must be at least 10 feet wide and the entire length of the field; and
c. Notice must be given immediately if any tobacco is destroyed or damaged by fire during the insurance period.

10. Claim for indemnity.

a. An indemnity will be determined for each unit by:
(1) Subtracting from the amount of insurance for the unit, the value of the total production of tobacco to be counted. (See section 10.b.)
(2) Multiplying the remainder by your share.
b. The value of the total production to be counted for a unit will include the value of all harvested and appraised production.
(1) The value to count will include:
(a) The gross returns (less six cents per pound for warehouse charges) from tobacco sold on the warehouse floor;
(b) The fair market value of the tobacco sold other than on the warehouse floor;
(c) The fair market value of the tobacco harvested and not sold;
(d) The fair market value of any unharvested tobacco as if such tobacco were harvested and cured; and
(e) The current year's support price per pound (less six cents per pound for warehouse charges) for appraisals made by us for poor farming practices or uninsured causes of loss. (If a price support program is not in effect, such appraised production will be valued at the fair market price for the current crop year).
(2) To enable us to determine the fair market value of tobacco not sold through auction warehouses, we must be allowed to inspect such tobacco before it is sold, contracted to be sold, or otherwise disposed of, and if the best offer you receive for any such tobacco is considered by us to be inadequate, to obtain additional offers on your behalf.
(3) The value of appraised production to be counted will include:
(a) Not less than the average amount of insurance per insured acre for the unit for any acreage which is abandoned or put to another use without our prior written consent or damaged solely by an uninsured cause;
(b) Not less than 35 percent of the average amount of insurance per insured acre for the unit for all unharvested acreage;
(c) The value of any unharvested production on harvested acreage; and
(d) Any appraisal for the value of potential production lost due to uninsured causes and failure to follow recognized good tobacco farming practices.
(4) Any appraisals we have made on insured acreage for which we have given written consent to be put to another use will be considered production unless such acreage is:
(a) Not put to another use before harvest of tobacco becomes general in the county and reappraised by us;
(b) Further damaged by an insured cause and reappraised by us; or
(c) Harvested.
(5) The commingled production of units will be prorated to such units in proportion to our liability on the harvested acreage of each unit.
(6) No replanting payment will be made under the endorsement.

11. *Cancellation and termination dates*

The cancellation and Termination dates are April 15.

12. *Contract changes*

Contract changes will be available at your service office by December 31 prior to the cancellation date.

13. *Meaning of terms*

a. *"Carryover tobacco"* means any tobacco on hand from the previous year's production.
b. *"County"* means the land defined in the general crop insurance policy and any land identified by an ASCS Farm Serial Number for the county but physically located in another county.
c. *"Effective poundage marketing quota"* means the farm marketing quota as established and recorded by ASCS.
d. *"Farm Yield"* means the yield per acre used by ASCS in establishing the basic farm marketing poundage quota for the tobacco farm unless we have established a yield for the farm in the actuarial table (FCIC Yield). The FCIC yield may be constructed from any actual yields and established yields available.
e. *"Field Underwriting Office"* is the office of the Federal Crop Insurance Corporation which has rating responsibility for the county your tobacco is insured in.
f. *"Harvest"* means the completion of cutting of tobacco on any acreage from which at least 20 percent of the production guarantee per acre shown by the actuarial table is cut.
g. *"Market price"* for a crop year means the average auction price for the applicable type (less six cents per pound for warehouse charges) in the belt or area. The market price will be as determined by us.
h. *"Planting"* means the transplanting of the tobacco plant from the bed into the field.
i. *"Rounded"* means rounding up for ½ and above and rounding down for less than ½.
j. *"Support price per pound"* means the average price support level per pound for the insured type of tobacco as announced by the United States Department of Agriculture under the tobacco price support program. For any crop year in which a price support for the insured type is not in effect, the fair market price for that crop year will be used.

Done in Washington, DC, on May 5, 1988.

Edward D. Hews,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 88-11931 Filed 5-26-88; 8:45 am]

BILLING CODE 3410-08-M

FEDERAL RESERVE SYSTEM

12 CFR Part 208

[Regulation H; Docket No. R-0636]

Membership of State Banking Institutions in the Federal Reserve System

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Board of Governors of the Federal Reserve System proposes to amend Regulation H, 12 CFR Part 208. The purpose of the proposed amendment is to make available to the public information regarding the financial condition of State member banks and U.S. branches and agencies of foreign banks. The proposed amendment would require state member banks to make available to shareholders and any member of the public, upon request, information regarding each such bank's financial condition in the form of the bank's two most recent year-end Reports of Condition and Income ("Call Reports") (OMB No. 7100-0036). As alternatives to furnishing the Call Reports, at each bank's option, persons requesting such information could be given one of the following: (1) Specified schedules from the Call Reports; (2) in the case of a bank required to file statements and reports pursuant to Regulation H, a copy of the bank's annual report to shareholders for meetings at which directors are elected; (3) copies of independently audited financial statements (accompanied by a copy of the certificate or report of the independent auditor) if they contain information comparable to that presented in the Call Report schedules

specified for alternative (1) above; or (4) in the case of a state member bank that is the only bank subsidiary of a bank holding company, that is majority owned by that bank holding company, and has assets equal to 95 percent or more of the bank holding company's consolidated total assets: (A) A copy of the annual report of the one-bank holding company prepared in conformity with the regulations of the Securities and Exchange Commission; or (B) copies of those portions of the bank holding company's Form FR–Y–9C, "Consolidated Financial Statements for Bank Holding Companies with Total Consolidated Assets of $150 Million or More, or With More Than One Subsidiary Bank" (OMB No. 7100–0128), that are comparable to the Call Report schedules specified for alternative (1) above.

The proposed amendment would also require state licensed agencies of foreign banks and state licensed branches of such banks that are not insured by the Federal Deposit Insurance Corporation to make available, upon request, Call Report (OMB No. 7100–0032) Schedules RAL (Assets and Liabilities), E (Deposit Liabilities and Credit Balances), and P (Other Borrowed Money).

DATE: Comments must be received by August 19, 1988.

ADDRESS: Interested persons are invited to submit written comments to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, or to deliver such comments to Room B–2222, 20th & Constitution Avenue NW., Washington, DC, between 8:45 a.m. and 5:15 p.m. weekdays. Comments may be inspected in Room B–1122 between 8:45 a.m. and 5:15 p.m. weekdays, except as provided in § 261.6(a) of the Board's Rules Regarding Availability of Information. (12 CFR 261.6(a)). All written comments should refer to Docket No. R–0636.

FOR FURTHER INFORMATION CONTACT: Stephen L. Siciliano, Special Assistant to the General Counsel for Administrative Law, Legal Division (202/452–3920), Lorraine E. Waller, Attorney, Legal Division (202/452–3789), Frederick M. Struble, Associate Director, Division of Banking Supervision and Regulation (202/452–3794) or Rhoger H Pugh, Manager, Policy Development Section, Division of Banking Supervision and Regulation (202/728–5883); or for the hearing impaired *only:* Telecommunication Device for the Deaf, Earnestine Hill or Dorothea Thompson (202/452–3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: The proposed amendment to Regulation H would require state member banks to make available annually specified financial information to shareholders and members of the public, upon request.

The Federal Deposit Insurance Corporation, on December 17, 1987, adopted a final regulation requiring state-chartered banks that are not members of the Federal Reserve System to prepare annual disclosure statements that are to be made available to the public upon request. The Office of the Comptroller of the Currency adopted a final regulation similar to the FDIC's but applicable to national banks on February 10, 1988. The regulations of both Agencies also apply to U.S. branches and agencies of foreign banks that are regulated by those Agencies.

The Board's proposed regulation would require state member banks to make available each year the most recent year-end Report of Condition and Income ("Call Report") together with the Call Report for the prior year-end. Alternatively, a state member bank could fulfill the disclosure requirement of the proposed regulation by making available: (1) Certain specified schedules from the Call Reports; (2) annual reports to shareholders; (3) independently audited financial statements; or (4) in the case of a state member bank that is the only bank subsidiary of a bank holding company, is majority owned by that bank holding company, and has assets equal to 95 percent or more of the bank holding company's consolidated total assets, the bank holding company's annual reports filed with the SEC or its consolidated financial statements filed with the Board pursuant to Regulation Y.

The Board's proposed regulation would also require state licensed agencies of foreign banks and state licensed branches of such banks that are not insured by the Federal Deposit Insurance Corporation to make available, upon request, Call Report Schedules RAL (Assets and Liabilities), E (Deposit Liabilities and Credit Balances), and P (Other Borrowed Money).

The purpose of the proposed regulation is to make available to the public information regarding the financial condition of state member banks and U.S. branches and agencies of foreign banks. The information made available pursuant to this regulation will most likely be of particular interest to shareholders and to persons doing business with such institutions. The regulation is not intended to affect the legal rights of shareholders and other persons under state and federal laws or contractural obligations between banks and other persons.

The information required to be disclosed under the proposed regulation is information that is publicly available and that is routinely disclosed upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Board's regulations implementing that Act. The proposed regulation does not address the disclosure obligations of banks and bank holding companies under federal and state securities laws. The proposed regulation is structured to facilitate the disclosure of information that is properly in the public domain in a manner that imposes the least possible burden on state member banks and other covered institutions. Banks and other institutions would not be required to prepare new reports, but would be required only to make available upon request reports or other financial information that they already prepare. The regulation also would require banks and other covered institutions to notify shareholders and the public of the availability of these reports. In the case of shareholders, the proposed regulation specifies that notification be made in the form of a written announcement that may be included with the notice of the annual shareholders meeting. In the case of the public the regulation does not specify the means to be used to provide notification. The Board notes, in this regard, that state member banks presently are required to publish the balance sheet portion of their call reports pursuant to § 208.10 of Regulation H.

State member banks, and Board-regulated U.S. branches and agencies of foreign banks would also be required to inform persons receiving information pursuant to the proposed regulation that the Board is not responsible for its accuracy or completeness. The Board notes, however, that such state member banks are required to prepare the Call Reports by 12 U.S.C. 324 and § 208.10 of Regulation H (12 CFR 208.10), that U.S. branches and agencies of foreign banks are subject to the reporting requirements of 12 U.S.C. 3105(b), and that the filing of false reports with an agency of the United States is a federal crime (18 U.S.C. 1001, 1005). In addition, the content and accuracy of reports to shareholders and of audited financial statements are adequately addressed by other Federal and state laws.

The proposed regulation addresses only the disclosure to the public of the documents identified in proposed § 208.17(d)).

Comment is requested on all matters associated with the proposed regulation including, but not limited to, the need for the proposal, any burden associated with the proposal, and any possible modifications to the proposal that may facilitate the achievement of its purpose.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 5 U.S.C. 601 *et seq.*), the Board certifies that the proposed regulation will not have a significant economic impact on a substantial number of small entities. The proposed regulation merely requires state member banks to make available to the public copies of reports that they already prepare.

The proposed amendment would not result in the creation of any new "collection of information requirement" within the meaning of the Paperwork Reduction Act (44 U.S.C. 3502) or OMB regulations on controlling paperwork burdens (5 CFR 1320.7(c)). The proposal would not require the creation of any new reports, only the wider dissemination of reports that state member banks are already required to prepare and that have already received OMB approval. The only additional requirement proposed is that state member banks make these reports available to shareholders and members of the public, and that they inform members of the public and shareholders that the information is publicly available. Thus, the proposal does not require state member banks to "obtain or compile information for the purpose of disclosure to members of the public or to the public at large * * *." (5 CFR 1320.7(c)(2)).

List of Subjects in 12 CFR Part 208

Membership, Banks, Accounting, Confidential business information, Federal Reserve System, Reporting and recordkeeping requirements, Securities, Disclosures of financial information.

For the reasons set out in this notice, and pursuant to the Board's authority under section 11 of the Federal Reserve Act of 1913, as amended (12 U.S.C. 248), and section 7 of the International Banking Act of 1978 (12 U.S.C. 3105(b)) the Board proposes to amend 12 CFR Part 208 as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM

1. The authority citation for Part 208 is revised to read as follows:

Authority: 12 U.S.C. 248, 321–338, 486, 1814, 3105(b), 3907, 3909 and 15 U.S.C. 781(i).

2. Section 208.17 is added to read as follows:

§ 208.17 Disclosure of financial information by State member banks.

(a) *Purpose and scope.* The purpose of this section is to facilitate the dissemination of publicly available information regarding the financial condition of State member banks, State licensed agencies of foreign banks, and State licensed branches, of foreign banks, that are not insured by the Federal Deposit Insurance Corporation. This section requires all state-chartered banks that are members of the Federal Reserve System and all other covered institutions: to make year-end Call Reports or Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks or, in the case of state member banks, other alternative financial information available to shareholders, customers, and the general public upon request; and to advise shareholders and the public of the availability of this information. This section does not amend or modify the publication requirements for section 208.10, or any other section of this regulation.

(b) *Definitions.* For the purposes of this section, the following definitions apply:

(1) "Call Report" means the Consolidated Reports of Condition and Income (OMB No. 7100–0036) filed pursuant to 12 U.S.C. 324 and 208.10 of this regulation (12 CFR 208.10).

(2) "State member bank" means a bank that is chartered by a State and is a member of the Federal Reserve System.

(3) "Other covered institutions" means state licensed agencies of foreign banks, or state licensed branches of foreign banks that are not insured by the Federal Deposit Insurance Corporation.

(c) *Availability of financial information*—(1) *Shareholders.* Each state member bank shall advise its shareholders, by a written announcement, which may be included in the notice of the annual shareholder's meeting, that certain financial information is available upon request. The announcement shall include, at a minimum, an address or telephone number to which requests may be directed.

(2) *General public.* State member banks and other covered institutions shall use other reasonable means at their disposal to advise the public of the availability of information pursuant to this section.

(d) *Financial information to be provided by state member banks.* State member banks may fulfill the requirements of this section by providing, upon request, the following information as soon as it becomes available:

(1) Copies of their entire Call Reports for the most recent year end and the prior year end, excluding any information for which confidential treatment is permitted pursuant to the Call Report instructions; or

(2) Copies of only the following schedules from their Call Reports for the most current year end and the prior year end, excluding any information for which confidential treatment is permitted pursuant to the Call Report instructions:

(i) Schedule RC (Balance Sheet);

(ii) Schedule RC–N (Past Due and Nonaccrual Loans and Leases);

(iii) Schedule RI (Income Statement);

(iv) Schedule RI–A (Changes in Equity Capital);

(v) Schedule RI–B (Charge-offs and Recoveries and Changes in Allowance for Loan and Lease Losses)—Part I may be omitted; or

(3) In the case of a bank required to file statements and reports pursuant to the Board's Regulation H, 12 CFR Part 208), a copy of the bank's annual report to shareholders for meetings at which directors are to be elected or the bank's annual report; or

(4) In the case of a bank with independently audited financial statements copies of the audited financial statements, and the certificate or report of the independent accountant if such statements contain information comparable to that specified in subsection (d)(2); or

(5) In the case of a bank that is the only bank subsidiary of a bank holding company, is majority owned by that bank holding company, and has assets equal to 95 percent or more of the bank holding company's consolidated total assets, a copy of either:

(i) The annual report of the bank holding company prepared in conformity with the regulations of the Security and Exchange Commission, 17 CFR 240.13a–1; or

(ii) The sections in the bank holding company's consolidated financial statements on Form FR–Y–9C ("Consolidated Financial Statements for Bank Holding Companies With Total Consolidated Assets of $150 Million or More, or With More Than One Subsidiary Bank" (OMB No. 7100–0128)) prepared pursuant to the Board's Regulation Y, 12 CFR Part 225, and comparable to the Call Report schedules enumerated in paragraph (d)(2) of this section.

(e) *Financial information to be provided by other covered institutions.* Other covered institutions may fulfill the requirements of this section by providing, upon request, as soon as it becomes available, the following schedules from the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (OMB No. 7100–0032) for the most recent year end and the prior year end:

(1) Schedule RAL (Assets and Liabilities);

(2) Schedule E (Deposit Liabilities and Credit Balances);

(3) Schedule P (Other Borrowed Money).

(f) *Disclaimer.* The following legend shall be included with any financial information provided pursuant to this section: "This financial information has not been reviewed, or confirmed for accuracy or relevance, by the Board of Governors of the Federal Reserve System."

Board of Governors of the Federal Reserve System, May 19, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88–11782 Filed 5–26–88; 8:45 am]

BILLING CODE 6210–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88–AGL–8]

Transition Area Revocation; Petersburg, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to revoke the transition area currently designated for Petersburg, MI, by returning the airspace to a non-controlled status for use by the aviation flying public.

DATE: Comments must be received on or before July 5, 1988.

ADDRESS: Send comments on the proposal in triplicate to: Federal Aviation Administration, Regional Counsel, AGL–7, Attn: Rules Docket No. 88–AGL–8, 2300 East Devon Avenue, Des Plaines, Illionis 60018.

The official docket may be examined in the Office of the Regional Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

An informal docket may also be examined during normal business hours at the Air Traffic Division, Airspace Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Harold G. Hale, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694–7360.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88–AGL–8." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA–430, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 426–8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2, which describes the application procedure.

The Proposal

The FAA is considering an amendment to § 71.181 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to revoke the designated transition area for Petersburg, MI.

The Petersburg, MI, transition area airspace was established to accommodate a VOR–A Standard Instrument Approach Procedure (SIAP) to Lada Airport, Petersburg, MI. The transition area was necessary to ensure the segregation of aircraft utilizing the SIAP from other aircraft operating under Visual Flight Rules (VFR) while in controlled airspace.

The VOR–A SIAP will be cancelled effective June 2, 1988. Notification of this cancellation was made to the public under separate docket action. The Federal Aviation Administration believes that since the SIAP is being cancelled the transition area is no longer necessary or warranted.

Aeronautical maps and charts will reflect the area returned to a non-controlled status.

Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Petersburg, MI [Removed]

Issued in Des Plaines, Illinois, on May 13, 1988.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 88–11945 Filed 5–26–88; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[LR–102–86]

Cooperative Housing Corporations; Proposed Rulemaking

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the Income Tax Regulations under section 216 of the Internal Revenue Code of 1986, relating to cooperative housing corporations. Section 216 of the Code was amended by the Tax Reform Act of 1986. The regulations would provide cooperative housing corporations and tenant-stockholders with guidance needed to comply with the law.

DATE:

Proposed Effective Date: The regulations are proposed to be effective for taxable years beginning after December 31, 1986

Date for Comments and Request for a Public Hearing: Written comments and requests for a public hearing must be delivered or mailed by July 26, 1988.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR–102–86), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Joel S. Rutstein of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention: CC:LR:T) (202–556–3297, not a toll-free call).

SUPPLEMENTARY INFORMATION: This document contains proposed amendments to the Income Tax Regulations under section 216 of the Internal Revenue Code of 1986 relating to cooperative housing corporations. Section 216 was amended by section 644 of the Tax Reform Act of 1986 (100 Stat. 2285) (the "Act").

The Act expanded the definition of tenant-stockholder under section 216(b)(2) to include persons other than individuals. Prior to its amendment by the Act, section 216(b)(2) restricted the definition of tenant-stockholders generally to individuals.

Section 216(b)(3)(B) provides an elective alternative to the proportionate share rule contained in section 216(b)(3)(A) for determining the amount a tenant-stockholder may deduct on account of real estate taxes and interest. Previously, the proportionate share rule required that a tenant-stockholder's share of the cooperative housing corporation's interest and real estate taxes bear the same ratio to the total amount of the corporation's interest and real estate taxes that the amount of stock held by the tenant-stockholder bore to the total outstanding amount of stock of the corporation.

Under this alternative, for taxable years beginning after 1986, if the corporation allocates to each tenant-stockholder a portion of the interest or real estate taxes or both that reasonably reflects the cost to the corporation of the interest or real estate taxes or both attributable to such tenant-stockholder's dwelling unit (and such unit's share of the common areas), then the corporation may make an election whereby the tenant-stockholder's proportionate share of the corporation's interest or real estate taxes equals the amount or amounts separately allocated. The proposed regulations incorporate the procedure for making this election that was prescribed in the temporary regulations under § 5h.5 (relating to elections under the Tax Reform Act of 1986). Those temporary regulations will be superseded with respect to this election when this notice of proposed rulemaking is adopted.

Section 216(b)(5) as amended provides that in certain circumstances a person may be eligible for tenant-stockholder status despite the person's agreement with the cooperative housing corporation that such person or such person's nominee may not occupy the house or apartment without the prior approval of the cooperative corporation. The proposed regulations reflect this change for taxable years beginning after 1986, but no inference is to be drawn as to the effect of such agreements in prior years on the eligibility of a person as a tenant-stockholder.

Section 216(c) was amended by the Act to provide that for taxable years beginning after 1986 any amounts disallowed as a deduction for depreciation because such amounts exceeded the tenant-stockholder's adjusted basis in his stock in the cooperative housing corporation may be carried forward to the succeeding taxable year.

Section 216(d) was added by the Act to clarify that amounts paid or incurred by a cooperative housing corporation which are chargeable to such corporation's capital account may not be deducted by a stockholder. Such amounts, however, are to be added to the adjusted basis of the stockholder's stock in the cooperative housing corporation. The proposed regulations reflect this clarification. No inference is to be drawn, however, as to the treatment of such amounts in a taxable years beginning prior to 1987.

Comments and Public Hearing

Before adoption of these proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register.**

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act. Comments on those regulations should be sent to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Internal Revenue Service, New Exective Office Building, Washington, DC 20503. The Internal Revenue Service requests that persons submitting comments on those requirements to OMB also send copies of those comments to the Service.

Special Analyses

The Commissoner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required.

Although this document is a notice of proposed rulemaking which solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein are

interpretative and that the notice and public comment requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Drafting Information

The principal author of these proposed regulations is Joel S. Rutstein of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations both on matters of substance and style.

List of Subjects in 26 CFR 1.61–1—1.281–4

Income taxes, Taxable income, Deductions, Exemptions.

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR Part 1 are as follows:

PART 1—[AMENDED]

Paragraph 1. The authority for Part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805. * * * Section 1.216–2 also issued under 26 U.S.C. 216 (d).

§ 1.216–1 [Amended]

Par. 2. Section 1.216–1 is amended as follows:

1. In paragraph (a) introductory text, the first sentence is amended by removing the words "An individual who qualifies as a" and by adding in their place the word "A".

2. In paragraph (c)(1), the second sentence is amended by removing the language "paragraph (f)" and adding in its place the language "paragraph (g)". Paragraph (c)(2) is redesignated as paragraph (c)(3) and is amended by adding at the end thereof two new examples to read as set forth below.

3. New paragraph (c)(2) is added immediately preceding newly redesignated paragraph (c)(3) to read as set forth below.

4. In paragraph (d)(1), the last sentence is amended by removing the language "paragraph (f)" and by adding in its place the language "paragraph (g)". Paragraph (d)(2) is revised to read as set forth below.

5. Paragraph (e) is revised to read as set forth below.

6. Paragraphs (c), (d), (e), (f) and (g) are redesignated as paragraphs (d), (e), (f), (g) and (h) respectively.

7. New paragraph (c) is added immediately preceding newly redesignated paragraph (d) to read as set forth below.

§ 1.216–1 Amounts representing taxes and interest paid to cooperative housing corporation.

* * * * *

(c) *Disallowance of deduction for certain payments to the corporation.* For taxable years beginning after December 31, 1986, no deduction shall be allowed to a stockholder during any taxable year for any amount paid or accrued to a cooperative housing corporation (in excess of the stockholder's proportionate share of the items described in paragraph (a) (1) and (2) of this section) allocable to amounts that are paid or incurred at any time by the cooperative housing corporation and are chargeable to such corporation's capital account. The adjusted basis of the stockholder's stock in such corporation shall be increased by the amount of such disallowance. For example, a special assessment with respect to the repaving of a community parking lot would not be deductible by the stockholders but would increase the stockholders' adjusted basis in the stock of the corporation.

(d) *Tenant-stockholder's proportionate share* * * *

(2) *Special rule*—(i) *In general.* For taxable years beginning after December 31, 1986, if a cooperative housing corporation allocates to each tenant-stockholder a portion of the real estate taxes or interest (or both) that reasonably reflects the cost to the corporation of such taxes or of such interest attributable to such tenant-stockholder's dwelling unit (and the unit's share of the common areas), the cooperative housing corporation may elect to treat the amounts so allocated as the tenant-stockholder's proportionate share.

(ii) *Time and manner of making election.* The election referred to in paragraph (d)(2)(i) of this section is effective only if, by January 31 of the year following the first calendar year that includes any period to which the election applies, the cooperative housing corporation furnishes to each person that is a tenant-stockholder during that period a written statement showing the amount of real estate taxes or interest (or both) allocated to such tenant-stockholder with respect to such tenant-stockholder's dwelling unit or units and share of common areas for that period. The election shall be made by attaching a statement to the corporation's timely filed tax return (taking extensions into account) for the first taxable year for which the election is to be effective. The statement shall contain the name, address, and taxpayer identification number of the cooperative housing corporation, identify the election as an election under section 216(b)(3)(B)(ii) of the Code, and indicate whether the election is being made with respect to the allocation of real estate taxes or interest (or both). The election applies for the taxable year and succeeding taxable years. It is revocable only with the consent of the Commissioner and will be binding on all tenant-stockholders.

(iii) *Reasonable allocation.* An allocation whereby each tenant-stockholder is allocated a portion of the real estate taxes or interest (or both) that bears the same ratio to the cooperative housing corporation's total interest or real estate taxes as the fair market value of the dwelling unit (including the unit's share of the common areas) bears to the fair market value of all the dwelling units with respect to which stock is outstanding (including stock held by the corporation) at the time of allocation is reasonable. If, however, real estate taxes are separately assessed on each dwelling unit by the relevant taxing authority, the tenant-stockholder's allocation of such taxes is reasonable if it is based on such assessment. If one or more of the tenant-stockholders prepays any portion of the principal of the indebtedness that gives rise to interest, any allocation of interest to those tenant-stockholders will be reasonable if the allocation is reduced to reflect the reduction in the debt service attributable to such prepayment. In addition, similar kinds of allocations may also be reasonable, depending on the facts and circumstances.

(3) *Examples.* * * *

Example (3). The X Corporation is a cooperative housing corporation within the meaning of section 216. In 1987, it acquires for $1,000,000 a building containing 10 category A apartments, 10 category B apartments, and 10 category C apartments. The value of each category A apartment is $20,000, of each category B apartment is $30,000, and of each category C apartment is $50,000. X issues 1 share of stock to each of the 30 tenant-stockholders, each share carrying the right to occupy one of the apartments. X allocates the real estate taxes and interest to the tenant-stockholders on the basis of the fair market value of their respective apartments. Since the fair market value of all of the apartments is $1,000,000, the allocation of taxes and interest to each tenant-stockholder that has a right to occupy a category A apartment is 1/50 ($20,000/$1,000,000). Similarly, the allocation of taxes and interest to each tenant-stockholder who has a right to occupy a category B apartment is 3/100 ($30,000/$1,000,000) and of a category C apartment is 1/20 ($50,000/$1,000,000). X may elect in accordance with the rules described in

paragraph (d)(2) of this section to treat the amounts so allocated as each tenant-stockholder's proportionate share of real estate taxes and interest.

Example (4). The X Corporation is a cooperative housing corporation within the meaning of section 216. In 1987, it acquires a housing development containing 5 detached houses for $1,100,000, incurring an indebtedness of $1,000,000 for the purchase of the property. Each house is valued at $220,000. X issues one share of stock to each of the five tenant-stockholders, each share carrying the right to occupy one of the houses. A, a tenant-stockholder prepays all of the corporation's indebtedness allocable to his house. The periodic charges payable to X by A are reduced commensurately with the reduction in X's debt service. Because no part of the indebtedness remains outstanding with respect to A's house, A's share of the interest expense is $0. The other four tenant-stockholders do not prepay their share of the indebtedness. Accordingly, 1/4 of the interest is allocated to each of the tenant-stockholders other than A. X may elect in accordance with the rules described in paragraph (d)(2) of this section to treat the amounts so allocated as each tenant-stockholder's proportionate share of interest.

(e) *Cooperative housing corporation.*

* * *

(2) *Right of occupancy.* Each stockholder of the corporation, whether or not the stockholder qualifies as a tenant-stockholder under section 216(b)(2) and paragraph (f), of this section, must be entitled to occupy for dwelling purposes an apartment in a building or a unit in a housing development owned or leased by such corporation. The stockholder is not required to occupy the premises. The right as against the corporation to occupy the premises is sufficient. Such right must be conferred on each stockholder solely by reason of his ownership of stock in the corporation. That is, the stock must entitle the owner thereof either to occupy the premises or to a lease of the premises. The fact that the right to continue to occupy the premises is dependent upon the payment of charges to the corporation in the nature of rentals or assessments is immaterial. For taxable years beginning after December 31, 1986, there shall not be taken into account for purposes of this paragraph the fact that, by agreement with the cooperative housing corporation, a person or his nominee may not occupy the house or apartment without the prior approval of such corporation:

(i) In any case where a person acquires stock of the cooperative housing corporation by operation of law, by inheritance, or by foreclosure (or by instrument in lieu of foreclosure),

(ii) In any case where a person other than an individual acquires stock in the cooperative housing corporation, and

(iii) In any case where the person from whom the corporation has acquired the apartments or houses (or leaseholds therein) acquires any stock of the cooperative housing corporation from the corporation not later than one year after the date on which the apartments or houses (or leaseholds therein) are transferred to the corporation by such person.

For purposes of the preceding sentence, paragraph (e)(2) (i) and (ii) of this section shall not apply to acquisitions of stock by foreclosure by the person from whom the corporation has acquired the apartments or houses (or leaseholds therein).

* * * * *

(f) *Tenant-stockholder.* The term "tenant-stockholder" means a person that is a stockholder in a cooperative housing corporation, as defined in section 216(b)(1) and paragraph (e) of this section, and whose stock is fully paid up in an amount at least equal to an amount shown to the satisfaction of the district director as bearing a reasonable relationship to the portion of the fair market value, as of the date of the original issuance of the stock, of the corporation's equity in the building and the land on which it is situated that is attributable to the apartment or housing unit which such person is entitled to occupy (within the meaning of paragraph (e)(2) of this section). Notwithstanding the preceding sentence, for taxable years beginning before January 1, 1987, only individuals, certain lending institutions, and certain original sellers can be tenant-stockholders.

* * * * *

Par. 3. Section 1.216–2 is amended by revising paragraph (c) to read as follows:

§ 1.216–2 Treatment as property subject to depreciation.

* * * * *

(c) *Limitation.* If the allowance for depreciation for the taxable year determined in accordance with the provisions of paragraph (b) of this section exceeds the adjusted basis (provided in section 1011) of the stock described in paragraph (a) of this section allocable to the tenant-stockholder's proprietary lease or right of tenancy used in a trade or business or for the production of income, such excess is not allowable as a deduction. For taxable years beginning after December 31, 1986, such excess, subject to the provisions of paragraph (b) of this section, shall be allowable as a deduction for depreciation in the succeeding taxable year. To determine the portion of the adjusted basis of such stock which is allocable to such proprietary lease or right of tenancy, the adjusted basis shall be reduced by taking into account the same factors as are taken into account under paragraph (b)(1) of this section in determining the allowance for depreciation.

* * * * *

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 88–11970 Filed 5–26–88; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Ch. I

Hazard Communication

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Advance notice of proposed rulemaking; extension of comment period.

SUMMARY: The Mine Safety and Health Administration (MSHA) is extending the period for public comment on its advance notice of proposed rulemaking for hazard communication in 30 CFR Chapter I due to requests from the public.

DATES: Written comments on the advance notice of proposed rulemaking for hazard communication should be received on or before June 30, 1988.

ADDRESSES: Comments should be sent to the Mine Safety and Health Administration, Office of Standards, Regulations and Variances, Room 631, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, (703) 235–1910.

SUPPLEMENTARY INFORMATION: On March 30, 1988, MSHA published an advance notice of proposed rulemaking (53 FR 10258) which would require employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets and training programs.

The comment period was scheduled to close on May 31, 1988. Due to requests from the public, MSHA is extending the comment period to June 30, 1988. All interested parties are encouraged to

submit comments, and comments must be received on or prior to that date.

Date: May 24, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-11952 Filed 5-26-88; 8:45 am]

BILLING CODE 4510-43-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 799

[OPTS-42084D; FRL-3387-8]

Commercial Hexane; Proposed Definition of Test Substance and Effective Date

AGENCY: Evironmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the final test rule in 40 CFR 799.2155 on commercial hexane which was published in the **Federal Register** of February 5, 1988 (53 FR 3382). The rule was issued under section 4(a) of the Toxic Substance Control Act (TSCA). This document proposes to redefine the percentage of *n*-hexane in the test substance and to extend the deadlines for submission of notices of intent to test, exemption applications, and test results.

DATES: Submit written comments on or before June 27, 1988. If persons request an opportunity to submit oral comments by June 27, 1988, EPA will hold a public meeting on this proposed rule in Washington, DC. For further information on arranging to speak at the meeting, see Unit V of this preamable.

ADDRESS: Submit written comments, identified by the document control number (OPTS-42084D) in triplicate to: TSCA Public Docket Office (TS-793), Office of Toxic Substances, Evironmental Protection Agency, Room NE-G004, 401 M Street SW., Washington, DC 20460. (202) 554-1404.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Acting Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Room EB-55, 401 M Street SW., Washington, DC 20460. (202) 554-1404.

SUPPLEMENTARY INFORMATION: The Agency proposes to amend the final rule on commercial hexane by changing the specification of the test substance and the effective date.

I. Background

EPA issued a final rule under TSCA section 4(a)(1)(B), published in the **Federal Register** of February 5, 1988 (53 FR 3382) that established health effects testing requirements for commercial hexane. It specified that the test substance conform to ASTM D1836 specifications and contain no more than 40 liquid volume percent *n*-hexane and no less than 10 liquid volume percent methylcyclopentane (MCP). It also established the effective date of the rule as March 21, 1988.

On March 25, 1988 the American Petroleum Institute (API) notified EPA that the composition of *n*-hexane in the commercial hexane currently being manufactured did not meet the specifications of the test substance as promulgated (Ref. 1). On April 13, 1988, API (Ref. 3) requested that EPA modify the definition of the test substance and extend the reporting deadlines in the rule accordingly.

In the final rule, EPA stated that it wanted to test a commercial hexane that contained the smallest fraction of *n*-hexane so that the *n*-hexane would not mask the effects of MCP and other six carbon (C_6) isomers found in commercial hexane products. The Agency plans to retain this approach and is only proposing the revised definition because commercial hexanes are currently not being produced with a *n*-hexane composition low enough to meet the criteria EPA originally promulgated.

II. Proposed Test Substance Definition

Based on newly submitted confidential business information (CBI) on the *n*-hexane composition of currently available commercial hexane, EPA proposes to redefine the commercial hexane test substance as a mixture that contains at least 40 liquid volume percent but no more than 55 liquid volume percent *n*-hexane, and no less than 10 liquid volume percent MCP. According to API, the version of commercial hexane with the lowest percentage of *n*-hexane that is currently available in the market and that has potential for work place and consumer exposure contains about 55 liquid volume percent *n*-hexane (Ref. 1). From this new data and the CBI, the Agency has concluded that a range of between 51 to 55 pecent *n*-hexane formulation now represents the minimum *n*-hexane content of a currently available commercial hexane product. Therefore, the change in the definition of the test substance requested by API is warranted.

III. Effective Date of the Rule

The effective date of the final rule (53 FR 3382) was March 21, 1988. The time required to issue this proposal, to allow for public comment, and to promulgate the changes, if appropriate, will necessitate an extension of the dates for completion of testing (Ref. 2) and for other submission requirements specified in 40 CFR 790.45 which are calculated from the effective date of the rule. The EPA is proposing that the new effective date will be 44 days after publication of the final amendment. The Agency anticipates that the effective date would thus be moved a minimum of 3 months from March 21, 1988 to July 1988.

IV. Economic Analysis

A change in the test substance definition will not significantly alter the cost of testing. Thus, the economic analysis for the final test rule for commercial hexane is unchanged.

V. Pubic Meetings

If persons indicate to EPA that they wish to present oral comments on this proposed amendment to Agency officials who are directly responsible for developing the amendment and supporting analyses, EPA will hold a public meeting after the close of the public comment period in Washington, DC. Persons who wish to attend or to present comments at the meeting should call the TSCA Assistance Office (TAO): (202) 554-1404, by June 27, 1988. A meeting will not be held if members of the public do not indicate that they wish to make oral presentations. While the meeting will be open to the public, active participation will be limited to those persons who arrange to present comments and to designated EPA participants. Persons wishing to attend should call the TAO before making travel plans to verify whether a meeting will be held.

Should a meeting be held, the Agency would transcribe the meeting and include the written transcript in the rulemaking record. Participants are invited, but not required, to submit copies of their statements prior to or on the day of the meeting. All such written materials will become part of EPA's record for this rulemaking.

VI. Rulemaking Record

EPA has established a record for this rulemaking (docket number OPTS-42084D). This record includes information considered by the EPA in developing this proposed amendment and appropriate **Federal Register** notices.

This record includes the following information:

A. Supporting Documentation

(1) **Federal Register** notices consisting of:

(a) Notice of proposed test rule on MCP and commercial hexane (51 FR 17854; May 15, 1986).

(b) Notice of final test rule for commercial hexane and methylcyclopentane (53 FR 3382; February 5, 1988).

(2) Communications consisting of:

(a) Written public comments and letters.

(b) Contract reports of telephone conversations.

B. References

(1) American Petroleum Institute (API) Letter from Martha A. Beauchamp, Director of Health & Environmental Affairs Department, to Charles Elkins, Director, Office of Toxic Substances, USEPA. (March 25, 1988).

(2) USEPA, Letter from Susan F. Vogt, Deputy Director, Office of Toxic Substances, to Martha A. Beauchamp, API. (April 8, 1988).

(3) API, Letter from Martha Beauchamp to A. E. Conroy, Director, Office of Compliance Monitoring, Office of Pesticides and Toxic Substances and to Susan F. Vogt, USEPA. (April 13, 1988).

Confidential Business Information (CBI), while part of the record, is not available for public review. A public version of the record, from which CBI has been deleted, is available for inspection in the TSCA Public Docket Office, Rm. NE–G004, 401 M St. SW., from 8 a.m. to 4 p.m., Monday through Friday, except on legal holidays.

VII. Other Regulatory Requirements

A. Executive Order 12291

EPA judged that the final test rule was not subject to the requirement of a Regulatory Impact Analysis under Executive Order 12291. EPA has determined that the proposed modifications to the rule do not alter this determination.

This proposed amendment was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB to EPA, and any EPA response to those comments, are included in the rulemaking record.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, (5 U.S.C. 601 *et seq.*, Pub. L. 96–354, September 19, 1980), EPA certified that the final test rule would not have a significant impact on a substantial number of small businesses. The proposed changes to the final rule will not change this determination.

C. Paperwork Reduction Act

OMB has approved the information collection requirements contained in the final rule for commercial hexane under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*, Pub. L. 96–511, December 11, 1980), and has assigned OMB control number 2070–0033. The proposed changes in the definition of the test substance and the effective date will not alter information collection requirements.

List of Subjects in 40 CFR Part 799

Chemicals, Environmental protection, Hazardous substances, Laboratories, Recordkeeping and reporting requirements, Testing.

Dated: May 20, 1988.

J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR Part 799 be amended as follows:

PART 799—[AMENDED]

1. The authority citation for Part 799 continues to read as follows:

Authority: 15 U.S.C. 2063, 2611, 2625.

2. By revising § 799.2155 (a)(2) and (d) to read as follows:

§ 799.2155 Commercial hexane.

(a) * * *

(2) The commercial hexane test substance, for purposes of this section, is a product which conforms to the specifications of ASTM D1836 and contains at least 40 liquid volume percent but no more than 55 liquid volume percnet *n*-hexane and no less than 10 liquid volume percent MCP.

* * * * *

(d) *Effective date.* The effective date of § 799.2155 will be 44 days after publication of the final rule incorporating this amendment.

[FR Doc. 88–11981 Filed 5–26–88; 8:45 am]

BILLING CODE 6560–50–M

Notices

Federal Register
Vol. 53, No. 103
Friday, May 27, 1988

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Targeted Export Assistance Program, Fiscal Year 1989

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice.

SUMMARY: This notice announces the conduct of the Targeted Export Assistance Program for fiscal year 1989.

FOR FURTHER INFORMATION CONTACT: Richard E. Passig, Director, Marketing Programs Division, Commodity and Marketing Programs, Foreign Agricultural Service, U.S. Department of Agriculture, Washington, DC 20250–1000 Telephone: (202) 447–5521.

Targeted Export Assistance (TEA) Program for FY 1989

Section 1124 of the Food Security Act of 1985, as amended (7 U.S.C. 1736s) (the Act), provides that, for fiscal years 1986 through 1990, the Secretary of Agriculture shall use a specified amount of funds of, or commodities owned by, the Commodity Credit Corporation (CCC) to counter or offset the adverse effect on the export of a U.S. agricultural commodity, or the product thereof, of a subsidy, import quota, or other unfair trade practice of a foreign country. Such funds or commodities must be used for export activities authorized to be carried out by the Secretary of Agriculture or CCC.

Section 1124 of the Act requires the Secretary to provide export assistance on a priority basis in the case of agricultural commodities and products thereof with respect to which there has been a favorable decision under section 301 of the Trade Act of 1974 or for which exports have been adversely affected, as defined by the Secretary, by retaliatory actions related to a favorable decision under section 301 of the Trade Act of 1974.

For each of the fiscal years 1989 and 1990, the minimum amount of funds or value of commodities required to be used is not less than $325,000,000. However, the Administration has submitted a proposal to Congress to reduce by $30,000,000 the minimum level of funding for targeted export assistance in each of the fiscal years 1989 and 1990.

It is currently intended that targeted export assistance will be provided in a Targeted Export Assistance Program conducted as follows: Project agreements will be entered into by CCC with nonprofit agricultural trade associations, regional state sponsored organizations or private U.S. firms. These project agreements will provide for the issuance by CCC of generic commodity certificates to partially reimburse participants for authorized promotional activities to increase the export of specific agricultural commodities. At the option of CCC reimbursement may be made in CCC funds. Agreements are signed by the Vice President, CCC, who is the Administrator, Foreign Agricultural Service (FAS).

Promotional activities will be undertaken with respect to those countries that offer a reasonable possibility for increased exports to counter or offset unfair trade practices of foreign countries including countries that (1) maintain such practices, or (2) represent markets in which the export of U.S. agricultural commodities is adversely affected by such practices.

Persons desiring to participate in the program must be able to provide substantial cost sharing (contributions) for export promotional activities, adequate administrative support and a commitment to promotional activities. Project agreements will also provide for control and review via activity plans, reporting requirements, program evaluation, and the conduct of compliance audits. In addition, each TEA project will be subject to audit and evaluation factors to be determined by USDA. Contributions to cost sharing for export promotional activities must be in addition to what would have been spent on such activities had there been no program.

The criteria upon which CCC will base its allocation of fiscal year 1989 resources will include: (1) A review of the commodity or product to be promoted and the degree to which the organization represents U.S. producer interests on a commodity or nationwide basis; (2) the degree to which exports of the commodity or product may benefit from promotional activities; (3) the dollar amount of assistance requested; (4) the identification of an unfair foreign trade practice and the extent to which it has adversely affected exports of the commodity; (5) the extent to which the applicant organization is willing to contribute resources to the joint project, including the identification of the source of contributions projected that may be provided by the applicant and third parties; (6) the organization's prior export development experience and the adequacy of its administrative and personnel resources for the purposes of planning and managing the requested program level; (7) the historical export levels of the commodity or product; (8) the anticipated likelihood of success of the proposed project in terms of increasing U.S. exports or mitigating the unfair trade practice or its effects; (9) whether or not the commodity or product is in adequate supply; and (10) the extent to which the composition of the commodity or product is U.S. origin. Products whose composition is less than 50 percent U.S. origin, computed on a volume or value basis, will not be considered.

The deadline for submitting applications for consideration for participation in the program for fiscal year 1989 is 45 days from the date of publication of this notice. Applications for participation in the allocation of fiscal year 1989 TEA resources should address the above criteria and any other factors the applicant deems appropriate. CCC may change the terms and conditions under which it will provide targeted export assistance or the structure of the Targeted Export Assistance (TEA) Program at any time.

For further information regarding application procedures and the TEA program, contact the Marketing Program Division, Foreign Agricultural Service, U.S. Department of Agriculture, Washington DC 20250–1000, telephone (202) 447–5521.

Thomas O. Kay,

Administrator, Foreign Agricultural Service and Vice President, Commodity Credit Corporation.

[FR Doc. 88–12016 Filed 5–26–88; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of the Census
Title: Applicant Background Questionnaire
Form Number: Agency—BC–1431; OMB—0607–0494
Type of Request: Revision of a currently approved collection
Burden: 92,300 respondents; 7,636 reporting hours
Needs and Uses: The information collected on this revised questionnaire will be used by Census to strengthen its affirmative action plan. This questionnaire is given to applicants for noncompetitive positions, along with the Census Employment Inquiry, when they report to apply and be tested.
Affected Public: Individuals or households
Frequency: One time
Respondent's Obligation: Voluntary
OMB Desk Officer: Francine Picoult, 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377–3271, Department of Commerce, Room H6622, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208 New Executive Office Building, Washington, DC 20503.

Dated: May 23, 1988.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 88–11989 Filed 5–26–88; 8:45 am]

BILLING CODE 3510–07–M

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Economic Analysis
Title: Foreign Ocean Carriers' Expenses in the United States
Form Number: Agency—BE–29; OMB—0608–0012
Type of Request: Revision of a currently approved collection
Burden: 130 respondents; 520 reporting hours
Needs and Uses: The purpose of this survey is to obtain data for the preparation of U.S. international transportation accounts of the U.S. balance of payments
Affected Public: Businesses or other for-profit institutions
Frequency: Annually
Respondent's Obligation: Mandatory
OMB Desk Officer: John Griffen, 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377–3271, Department of Commerce, Room H6622, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to John Griffen, OMB Desk Officer, Room 3208 New Executive Office Building, Washington, DC 20503.

Dated: May 23, 1988.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 88–11990 Filed 5–26–88; 8:45 am]

BILLING CODE 3510–CW–M

International Trade Administration

[A–588–405]

Cellular Mobile Telephones and Subassemblies From Japan; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to requests by three respondents and the petitioner, the Department of Commerce has conducted an administrative review of the antidumping duty order on cellular mobile telephones and subassemblies from Japan. The review covers four manufacturers and/or exporters of this merchandise to the United States, and the period June 11, 1985 through November 30, 1986. The review indicates the existence of dumping margins during the period.

As a result of the review, the Department has preliminarily determined to assess dumping duties equal to the calculated differences between United States price and foreign market value. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: May 27, 1988.

FOR FURTHER INFORMATION CONTACT: Anne D'Alauro or Maureen Flannery, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–2923/5255.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 1985, the Department of Commerce ("the Department") published in the Federal Register (50 FR 51724) an antidumping duty order on cellular mobile telephones and subassemblies from Japan. Three respondents, Mitsubishi Electric Corporation, Nihon Dengyo and Japan Radio Company, and the petitioner, Motorola, requested in accordance with § 353.53a(a) of the Commerce Regulations that we conduct an administrative review. We published a notice of initiation of the antidumping duty administrative review on January 20, 1987 (52 FR 2123). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by this review are cellular mobile telephones ("CMTs"), CMT transceivers, CMT control units, and certain subassemblies thereof, which meet the tests set forth below. CMTs are radio-telephone equipment designed to operate in a cellular radio-telephone system, i.e., a system that permits mobile telephones to communicate with traditional land-line telephones via a base station, and that permits multiple simultaneous use of particular radio frequencies through the division of the system into independent cells, each of which has its own transceiving base station. Each CMT generally consists of (1) a transceiver, i.e., a box of electronic subassemblies which receives and tramsmits calls; and (2) a control unit, i.e., a handset and cradle resembling a modern telephone, which permits a motor-vehicle driver or passenger to dial, speak, and hear a call. They are designed to use motor vehicle power sources. Cellular transportable telephones, which are designed to use either motor vehicle power sources or, alternatively, portable power sources, are included in this antidumping duty order.

Subassemblies are any completed or partially completed circuit modules, the value of which is equal to or greater than five dollars and which are dedicated exclusively for use in CMT transceivers or control units. The term "dedicated exclusively for use" only encompasses those subassemblies that are specifically designed for use in CMTs, and could not be used, absent alteration, in a non-CMT device. The Department selected the five dollar value for defining the scope since this is a value that it has determined is equivalent to a "major" subassembly. The Department feels that a dollar cutoff point is a more workable standard than a subjective determination such as whether a circuit module is "substantially complete." Examples of subassemblies which may fall within this definition are circuit modules containing any of the following circuitry or combinations thereof: audio processing, signal processing (logic), RF, IF, synthesizer, duplexer, power supply, power amplification, transmitter and exciter. The presumption is that CMT subassemblies are covered by the order unless an importer can prove otherwise. An importer will have to file a declaration with the Customs Service to the effect that a particular CMT subassembly is not dedicated exclusively for use in CMTs or that the dollar value is less than $5, if he wishes it to be excluded from the order.

The following merchandise has been excluded from this review: pocket-size self-contained portable cellular telephones, cellular base stations or base station apparatus, cellular switches, and mobile telephones designed for operation on other, non-cellular, mobile telephone systems.

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. Congress is considering legislation to convert the United States to this Harmonized System ("HS"). In view of this, we will be providing both the appropriate Tariff Schedules of the United States Annotated ("TSUSA") item numbers and the appropriate HS item numbers with our product descriptions on a test basis, pending Congressional approval. As with the TSUSA, the HS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

We are requesting petitioners to include the appropriate HS item number(s) as well as the TSUSA item number(s) in all new petitions filed with the Department. A reference copy of the proposed Harmonized System schedule is available for consultation at the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. Additionally, all Customs offices have reference copies and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

Cellular mobile telephones and subassemblies are currently classified under TSUSA item numbers 685.28 and 685.33; they are classified under HS item numbers 8525.20.60, 8525.10.80, 8527.90.80, 8529.10.60, 8529.90.50, 8542.20.00 and 8542.80.00.

The review covers four manufacturers and/or exporters of Japanese CMTs and subassemblies and the period June 11, 1985 through November 30, 1986.

Fujitsu Limited ("Fujitsu") failed to respond to the Department's antidumping questionnaire. The Department consequently used the best information available for assessment and antidumping duties cash deposit purposes. The best information available was Fujitsu's cash deposit rate, which is the rate from the fair value investigation.

United States Price

In calculating United States price the Department used purchase price or exporter's sales price ("ESP"), as defined in section 772 of the Tariff Act, as appropriate.

Purchase price was based on the packed f.o.b. price to an unrelated purchaser in the United States or an unrelated Japanese trading company for export to the United States. Exporter's sales price ("ESP") was based on the packed delivered price to the first unrelated purchaser in the United States. Where applicable, we made deductions for foreign inland freight and insurance as well as Japanese brokerage fees. For ESP, we made further adjustments for ocean freight, marine insurance, U.S. brokerage/handling fees, U.S. inland freight, customs duties, discounts, rebates, commissions to unrelated parties, warranties, credit, selling expenses incurred in Japan and in the U.S., and any increased value resulting from further processing in the U.S.

Foreign Market Value

In calculating foreign market value the Department used home market price, third country price or constructed value, as defined in section 773 of the Tariff Act. Home market price was used when sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. Third country price was used when insufficient quantities of such or similar merchandise were sold in the home market to provide a basis of comparison. When insufficient quantities of such or similar merchandise were sold in either the home market or third countries, we used constructed value.

Home market and third country prices were based on the packed delivered price to unrelated purchasers, with adjustments, where applicable, for inland freight and insurance, warranties and technical services, differences in the physical characteristics of the merchandise credit, and differences in the cost of packing. No other adjustments were claimed or allowed. Constructed value consisted of the sum of the cost of materials, fabrication, general expenses, profit and the cost of packing. The amount added for general expenses was the statutory minimum of ten percent of the sum of materials and fabrication costs when actual costs for general expenses were less than that amount; the actual amount for general expenses was used in those instances where actual expenses exceeded the ten percent statutory minimum Actual profit was used when the actual profit on sales of the same class or kind of merchandise exceeded the statutory minimum of eight percent of the sum of the cost of materials, fabrication and general expenses; the profit rate used was the statutory minimum of eight percent when profit was below that amount. To constructed value we made adjustments, where applicable, for warranty expenses, indirect selling expenses, and credit.

Preliminary Results of the Review

As a result of our comparison of United States price to foreign market value, we preliminarily determine that the following margins exist for the period June 11, 1985 through November 30, 1986:

Manufacturer	Margin (percent)
Mitsubishi Electric Corporation	12.21
Nihon Dengyo	3.24
Japan Radio	17.71
Fujitsu	57.81

Interested parties may request disclosure and/or an administrative protective order within 5 days of the date of publication of this notice and may request a hearing within 8 days of publication. Any hearing, if requested, will be held 35 days after the date of publication, or the first workday

thereafter. Pre-hearing briefs and/or written comments from interested parties may be submitted not later than 25 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in those comments, may be filed not later than 32 days after the date of publication. The Department will publish the final results of the administrative review including the results of its analysis of any such comments or hearing.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for by 19 CFR 353.48(b), a cash deposit of estimated antidumping duties based on the above margins shall be required for these firms. For any further entries of this merchandise from a new exporter not covered in this or prior reviews, whose first shipments occurred after November 30, 1986 and who is unrelated to any reviewed firm, a cash deposit of 17.71 percent shall be required. These deposit requirements are effective for all shipments of Japanese cellular mobile telephones and subassemblies entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act of 1930 (19 U.S.C. 1675(a)(1)) and 19 CFR 353.53a.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

Date: May 21, 1988.

[FR Doc. 88-12015 Filed 5-26-88; 8:45 am]

BILLING CODE 3510-DS-M

Importers and Retailers' Textile Advisory Committee; Partially Closed Meeting

A meeting of the Importers and Retailers' Textile Advisory committee will be held on Tuesday, June 21, 1988, Herbert C. Hoover Building, Room H3407, 14th Street and Constitution Avenue NW., Washington, DC 20230. (The Committee was established by the Secretary of Commerce on August 13, 1963 to advise Department officials of the effects on import markets and retailing of cotton, wool, and man-made fiber, silk blend and other vegetable fiber textiles.)

General Session: 10:30 a.m. Review of import trends, international activities, report on conditions in the market, and other business.

Executive Session: 11:00 a.m. Discussion of matters properly classifed under Executive Order 12356 (3 CFR, 1982 Comp. p. 166) and listed in 5 U.S.C. 552b(c)(1).

The general session will be open to the public with a limited number of seats available. A Notice of Determination to close meetings or portions of meetings to the public on the basis of 5 U.S.C. 552b(c)(1) has been approved in accordance with the Federal Advisory Committee Act. A copy of the notice is available for public inspection and copying in the Central Facility Room H6628, U.S. Department of Commerce, (202) 377-3031.

For further information or copies of the minutes, contact Alfreda Burton (202) 377-5761.

Dated: May 24, 1988.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-11987 Filed 5-26-88; 8:45 am]

BILLING CODE 3510-DR-M

Management-Labor Textile Advisory Committee; Partially Closed Meeting

A meeting of the Management-Labor Textile Advisory Committee will be held on Wednesday, June 22, 1988, Herbert C. Hoover Building, Room H3407, 14th Street and Constitution Avenue NW., Washington, DC 20230. (The Committee was established by the Secretary of Commerce on October 18, 1961 to advise officials of problems and conditions in the textile and apparel industry.)

General Session: 1:30 p.m. Review of import trends, report on conditions in the domestic market, and other business.

Executive Session: 2:00 p.m. Discussion of matters properly classified under Executive Order 12356 (3 CFR, 1982 Comp. p. 166) and listed in 5 U.S.C. 552b(c)(1).

The general session will be open to the public with a limited number of seats available. A Notice of Determination to close meetings or portions of meetings to the public on the basis of 5 U.S.C. 552b(c)(1) has been approved in accordance with the Federal Advisory Committee Act. A copy of the notice is available for public inspection and copying in the Central Facility Room H6628, U.S. Department of Commerce, (202) 377-3031.

For further information or copies of the minutes, contact Alfreda Burton (202) 377-5761.

Dated: May 24, 1988.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-11988 Filed 5-26-88; 8:45 am]

BILLING CODE 3510-DR-M

National Technical Information Service

Government-Owned Inventions; Availability for Licensing

The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

Technical and licensing information on specific inventions may be obtained by writing to: Office of Federal Patent Licensing, U.S. Department of Commerce, P.O. Box 1423, Springfield, Virginia 22151.

Please cite the number and title of inventions of interest.

Douglas J. Campion,

Associate Director, Office of Federal Patent Licensing, National Technical Information Service, U.S. Department of Commerce.

Department of Agriculture

SN 6-635,945 (4,737,371)
Process for Stabilizing Whole Cereal Grains

SN 7-133,477
Roller Drafter, Process of Use, and Products Produced Thereby

SN 7-155,442
Production of High Yields of Glycolic and Oxalic Acids from Polysaccharide-Containing Materials

Department of Health and Human Services

SN E-592-87
Vector for Secretion of Proteins Directly Into Periplasm or Culture Medium

SN E-452-87
Cell Lines Secreting Uteroglobin in Vitro

SN 6-410,965 (4,520,031)
Method for Reducing Toxic Effects of Methyl-Glyoxal

SN 6-920,780
Isolation and Purification of the R Gene of HTLV-III

SN 6-927,002
An Envelope Cassette of HTLV-III

SN 7-168,486

Yeast RNA Vector for Efficient Production of a Desired Protein
SN 7–169,033
Novel Neutrophil Chemotactic Factor, Cloned cDNA and Monoclonal Antibodies Thereto
SN 7–178,153
Phosphoramidite Reagent for Chemical Synthesis of Modified DNA
SN 7–178,736
High Speed Adaptive Ultrasonic Phased Array Imaging System
SN 7–191,067
Method for Treating Autoimmune Disease Using Succinylacetone

Department of the Air Force

SN 6–743,845 (4,723,075)
Translational Mount For Large Optical Elements
SN 6–807,154 (4,733,236)
Space Target With Multi-Spectral Energy Reflectivity
SN 6–867,728
Trephine Assembly
SN 6–938,109 (4,726,507)
Cryogenic Glass-To-Metal Seal
SN 6–936,678 (4,730,535)
Extendable Rail Weapon Launcher
SN 7–056,034
Flow-Through Cell Cultivation System
SN 7–084,342
Uniform Excitation Apparatus by a Single Power Supply of Two Dimensional Arrays of Waveguide Gas Lasers
SN 7–107,185
Command Operated Liquid Metal Opening Switch
SN 7–110,808
Compact Device for Continuous Removal of Water from an Airstream-Cascade Screen
SN 7–112,162
Anti-Rotation Locking Device for Fasteners
SN 7–125,633
Stimulator for Eye Tracking Oculometer
SN 7–128,006
Detection Apparatus for BI-Phase Signals
SN 7–132,497
An Improved Resolution Delta Gun Color Monitor System Apparatus
SN 7–137,541
Dielectric Ridge Waveguide Gas Laser Apparatus
SN 7–142,472
Electrodepostion Without Internal Deposit Stress

Department of the Army

SN 7–153,611
Electrolyte Additive for Lithium Rechargeable Organic Electrolyte Battery
SN 7–166,336
Method and Apparatus for Optical Fiber Transmission in a Utility Conduit Containing a Hostile Fluid

Department of Transportation

SN 7–163,578
Energy Efficient Asymmetric Pre-Swirl Vane and Twisted Propeller Propulsion System

[FR Doc. 88–11968 Filed 5–26–88; 8:45 am]
BILLING CODE 3510–04–M

Intent To Grant Exclusive Patent License; Ecogen, Inc.

The National Technical Information Service (NTIS), U.S. Department of Commerce, intends to grant to Ecogen, Inc., having a place of business in Langhorne, PA, an exclusive right in the United States under the patent rights which have been assigned to the United States of America, as represented by the Secretary of Agriculture, to manufacture, use, and sell products embodied in the invention entitled "Novel Phenazine Antibiotic From Pseudomonas Fluorescens", U.S. Patent Application 6–817,374.

The proposed license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The proposed license may be granted unless, within sixty days from the date of this published Notice, NTIS receives written evidence and argument which establishes that the grant of the proposed license would not serve the public interest.

Inquiries, comments and other materials relating to the intended license must be admitted to Douglas J. Campion, Office of Federal Patent Licensing, NTIS, Box 1423, Springfield, VA 22151.

Douglas J. Campion,

Office of Federal Patent Licensing, National Technical Information Service, U.S. Department of Commerce.

[FR Doc. 88–11961 Filed 5–26–88; 8:45 am]
BILLING CODE 3510–04–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Thailand

May 24, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: May 31, 1988.

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854)

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4214. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 343–6581. For information on embargoes and quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION: The current limits for certain cotton, wool and man-made fiber textile products in Groups II and III and sublevels in Groups I and II are being adjusted, variously, for carryover and carryforward used.

A description of the textile categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated (see **Federal Register** notice 52 FR 47745, dated December 11, 1987). Also see 53 FR 60, published in the **Federal Register** on January 4, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

James A. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

May 24, 1988.

Commissioner of Customs,
Department of the Treasury, Washington, D.C. 20229

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive of December 29, 1987, concerning imports into the United States of certain cotton, wool and man-made fiber textile products, produced or manufactured in Thailand and exported during the twelve-month period which began on January 1, 1988 and extends through December 31, 1988.

Effective on May 31, 1988, the directive of December 29, 1987 is amended to include adjustments to the previously established restraint limits for cotton, wool and man-made fiber textile products in the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and Thailand:

Category	Adjusted 12-mo. limit [1]
Sublevel within Group I	
200	859,965 pounds.
219	7,743,974 square yards.
226/613/614/615	19,000,942 square yards.
300	5,454,601 pounds.
301–P [2]	5,300,000 pounds.
301–O [3]	1,067,600 pounds.
313	13,934,484 square yards.
314	29,248,791 square yards.
315	18,512,729 square yards.
317/326	7,496,206 square yards.
604	937,101 pounds of which not more than 544,337 pounds shall be in Category 604–A.
611	4,349,781 square yards.
669–P	2,488,116 pounds.
Group II	
239, 330–354, 359, 630–654 and 659, as a group.	83,431,328 square yards equivalent.
Sublevels in Group II	
334/335	76,134 dozen.
338/339	785,141 dozen.
340	146,837 dozen.
341	152,921 dozen.
342/642	282,571 dozen.
347/348	247,530 dozen.
Group III	
410, 414, 431–448 and 459, as a group.	3,069,248 square yards equivalent.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1987.
[2] In Category 301–P, not wholly cotton, in TSUSA numbers 300.6025, 300.6027 and 300.6028.
[3] In Category 301–0, wholly cotton in TSUSA numbers 302.—26 and 302.—28.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88–11986 Filed 5–26–88; 8:45am]

BILLING CODE 3510–DR–M

COMMODITY FUTURES TRADING COMMISSION

Chicago Mercantile Exchange Proposed Futures Contract

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability of the terms and conditions of proposed commodity futures contract.

SUMMARY: The Commodity Futures Trading Commission ("Commission") previously published in the **Federal Register** a proposal of the Chicago Mercantile Exchange ("CME") for designation as a futures contract market in the Morgan Stanley Capital International EAFE (Europe, Australia and Far East) stock index. The Director of the Division of Economic Analysis ("Division") of the Commodity Futures Trading Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that, in this instance, an additional period for public comment is warranted.

DATE: Comments must be received on or before June 27, 1988.

ADDRESS: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Reference should be made to the CME EAFE Stock Index futures contract.

FOR FURTHER INFORMATION CONTACT: Naomi Jafee, Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581, (202) 254–7227.

SUPPLEMENTARY INFORMATION: On September 11, 1987, the Commission published in the **Federal Register**, for a 60-day comment period, a notice of availability of the CME's proposed terms and conditions for the EAFE Stock Index futures contract (52 FR 34404). On January 4, and March 25, 1988, the Commission republished in the **Federal Register**, for 30-day and 15-day comment periods, respectively, notices of availability of this contract's proposed terms and conditions (53 FR 64 and 53 FR 9798). In a May 20, 1988 later to the Commission, the CME requested that the Commission republish the terms and conditions of the proposed contract "so that the public and other interested parties may have a further opportunity to comment on the application." As noted, the Director of the Division has determined that, for this proposed contract, an additional comment period is warranted.

Copies of the terms and conditions of the proposed futures contract will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Copies of the terms and conditions can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 254–6314.

Other materials submitted by the CME in support of the application for contract market designation may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 CFR Part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 CFR 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Acts Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views or arguments on the terms and conditions of the proposed futures contract, or with respect to other materials submitted by the CME in support of the application, should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581, by the specified date.

Issued in Washington, DC on May 24, 1988.

Paula A. Tosini,

Director, Division of Economic Analysis.

[FR Doc. 88–12010 Filed 5–26–88; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Corporate Aircraft Costs.

ADDRESS: Send comments to Mr Ed Springer, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Office of Federal Acquisition and Regulatory Policy, (202) 523–3781.

SUPPLEMENTARY INFORMATION:

a. *Purpose:* Government contractors that use company aircraft must maintain logs of flights containing specified information to ensure that costs are properly charged against Government contracts and that directly associated costs of unallowable activities are not charged to such contracts.

b. *Annual recordkeeping burden:* The annual recordkeeping burden is estimated as follows: Recordkeepers, 3,000; hours per recordkeeper, 6; and total recordkeeping hours, 18,000.

Obtaining Copies of Proposals: Requester may obtain copies from General Services Administration, FAR Secretariat (VRS), Room 4041, Washingotn, DC 20405, telephone (202) 523–4755. Please cite OMB Control No. 9000–0079, Corporate Aircraft Costs.

Dated: May 19, 1988.

Margaret A. Willis,

FAR Secretariat.

[FR Doc. 88–11967 Filed 5–26–88; 8:45 am]

BILLING CODE 6820–61–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)

AGENCY: Office of the Secretary, DOD.

ACTION: Notice of the Fiscal Intermediary Preferred Provider Organization Demonstration Project.

SUMMARY: The Assistant Secretary of Defense for Health Affairs has made arrangements for a Fiscal Intermediary Preferred Provider Organization demonstration project in Florida and Georgia, beginning July 1, 1988. This two-year project will test the feasibility of having CHAMPUS' fiscal intermediary (FI) contractors establish preferred provider organization (PPO) arrangements to improve the delivery of cost-effective health care services. Under this project, Blue Cross and Blue Shield of South Carolina, the CHAMPUS FI for the Southeastern Region, will establish a PPO program called "CHAMPUS Preferred," which will feature: (1) An extensive network of providers throughout most of Florida and Georgia that will reduce normal beneficiary outpatient services coinsurance payments from 20% to 15% for dependents of active duty members and from 25% to 20% for other beneficiaries, reduce their billed charges for CHAMPUS beneficiaries, and handle all claims filing requirements; (2) new utilization review procedures applicable to preferred providers to avoid unnecessary health care services; and (3) reduced CHAMPUS costs.

This notice, published in accordance with 32 CFR § 199.1(o), informs the public of the changes in normally applicable requirements and procedures relating to this demonstration project, including those regarding beneficiary coinsurance, utilization review activities and calculation of prevailing charge profiles. The FI–PPO demonstration project is being conducted pursuant to section 731(c)(2)(E) of the National Defense Authorization Act for Fiscal Years 1988 and 1989.

DATES: Implementation starting date of this demonstration is July 1, 1988.

ADDRESS: Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Office of Program Development, Aurora, CO 80045–6900.

FOR FURTHER INFORMATION CONTACT: Tanya Agee, Office of Program Development, OCHAMPUS, telephone (303) 361–3586, or Steve Lillie, Office of the Assistant Secretary of Defense for Health Affairs (Health Program Management/OCHAMPUS), (202) 697–8975.

SUPPLEMENTARY INFORMATION: At the direction of William Mayer, M.D., Assistant Secretary of Defense for Health Affairs, this notice describes the Fiscal Intermediary Preferred Provider Organization demonstration project.

A. Background

Section 731(c)(2)(E) of the National Defense Authorization Act for Fiscal Years 1988 and 1989 (Pub. L. 100–180, December 4, 1987) directs DoD to conduct:

> A fiscal intermediary demonstration project, to be implemented by amending one or more existing Department of Defense contracts with fiscal intermediaries in a State or region to require the intermediary to demonstrate a managed health care network with cost-containment initiatives, such as utilization review, pre-admission screening, second surgical opinions, contracting for care on a discounted basis, and other methods.

In anticipation of the enactment of this provision, in September 1987 the Director of OCHAMPUS invited each CHAMPUS fiscal intermediary to develop a proposal to implement such a demonstration project. DoD sought to award two contract modifications under this project, but after review of proposals from several FIs, only one proposal, that submitted by the fiscal intermediary for the Southeast Region (Blue Cross and Blue Shield of South Carolina, or BCBSSC) was considered to be viable. The detailed development of this proposal has produced the project described in this notice.

B. The "CHAMPUS Preferred" Provider Network

The operation of this demonstration project centers on the establishment by BCBSSC of a preferred provider organization (PPO) program called "CHAMPUS Preferred." PPOs have become a popular option in many civilian health care programs. PPOs are modifications to typical fee-for-service provider reimbursement under which beneficiaries are offered financial incentives to use network providers. Both the beneficiary and the program sponsor can save because of discounts offered by the providers. Providers stand to benefit by increasing their market share. Controls on excessive utilization are usually a part of PPO arrangements.

CHAMPUS Preferred has the major features of standard PPOs. It involves a network of health care providers throughout Florida and Georgia. More specifically, it is composed of one established PPO in Georgia and two in Florida.

A PPO network will cover the entire state of Georgia, including major metropolitan areas and several Military Treatment Facility (MTF) catchment areas. This network is the VIP Plan, operated by Blue Cross and Blue Shield of Georgia. This plan currently includes over 5,100 providers across the state, and has been in operation since 1984.

In Florida, PPO providers initially will be available in the following metropolitan areas: Jacksonville, Melbourne, Miami, Orlando, Pensacola, and Tampa-St. Petersburg. The MTF catchment areas covered are: Naval Hospital Jacksonville, USAF Hospital Patrick Air Force Base, USAF Hospital Homestead Air Force Base, Naval Hospital Orlando, Naval Hospital Pensacola, and MacDill Regional Hospital (MacDill Air Force Base).

In Florida, the CHAMPUS Preferred network is made up of two existing PPOs. Most of the state, except the panhandle area, will be covered by Healthwin, a division of Lincoln National Life Insurance. Healthwin is a national organization, with a large provider base in Florida population centers.

In Pensacola, Florida, the CHAMPUS Preferred network will be the providers of the Medical Center Clinic, P.C., a large multi-specialty clinic. No PPOs are operational at this time in Ft. Walton Beach or Panama City, Florida, so the CHAMPUS Preferred Network will not be readily accessible to beneficiaries in those population centers at the outset of the demonstration.

Nearly 90 percent of CHAMPUS beneficiaries in the two states are expected to have ready access to PPO providers. Other PPOs may be added during the course of the demonstration.

Agreements with the contracted PPO networks will be entered into for reimbursement discounts below current allowable charges for professional services. BCBSSC estimates that up to

40 percent of CHAMPUS beneficiaries who have access to the PPO will use it.

C. Benefits Under "CHAMPUS Preferred"

Use of the "CHAMPUS Preferred" network providers is entirely voluntary for the beneficiary; beneficiaries will continue to have the freedom of choice of their civilian provider. There is no enrollment required. However, in accordance with standard PPO arrangements, there are incentives for beneficiaries to use PPO providers. Beneficiaries who opt to use a network provider will reap significant benefits. First, beneficiary cost shares for outpatient professional services will be reduced from 20 percent to 15 percent for active duty dependents and from 25 percent to 20 percent for all other beneficiaries (for all professional services). The demonstration alters the normally applicable cost-sharing requirements in the CHAMPUS Regulation, DoD 6010.8–R, Chapter 4, Section F.

In addition to reduced cost-share requirements, the discounts which have been negotiated with the provider networks will result in a lower overall charge, so the cost-share percentage will be taken from a smaller base.

All network providers will accept the discounted CHAMPUS-determined allowable charge as payment in full, so that the beneficiary's financial responsibility will be limited to the copayment.

CHAMPUS Preferred not only reduces out-of-pocket costs; it also relieves a significant paperwork burden, since all network providers will file claims on behalf of the beneficiary.

Beneficiaries residing within the target areas will be given more information about CHAMPUS Preferred and its providers through various media as well as through mass mailing of information packages to known CHAMPUS users. The decision to use a network provider can be made on a case-by-case basis. No enrollment is involved, and there is no requirement to continue using a network provider.

Beneficiaries will be able to locate network providers in several ways. Each family in the target areas will be mailed a directory of network providers, and local health benefits advisors will also have directories. Also, a special toll-free Health Care Finder Service will be operated by the fiscal intermediary from which beneficiaries may obtain the names of network providers in their locality.

D. Utilization Review Under CHAMPUS Preferred

In order to assure quality and necessity of care, the fiscal intermediary will operate an enhanced utilization review (UR) program for network providers. Responsibility for obtaining any needed clearances or certifications will rest with the network provider, not the beneficiary. The UR program imposes no additional requirements on beneficiaries. The new procedures apply only to network providers; they do not apply to non-network providers.

The PPO utilization review program has three components: (1) Preadmission review of all non-emergency hospitalizations; (2) continued stay reviews of psychiatric hospitalizations; and (3) individual case management of selected high cost diagnoses.

The Preadmission Review program will require the PPO provider to contact the fiscal intermediary prior to a non-emergency hospital admission. The PPO provider will describe the reasons for the admission; fiscal intermediary staff will certify the necessity of the admission. In the case of psychiatric admissions, an initial length of stay will be certified, and the case will be reviewed periodically to determine continued medical necessity and appropriateness of the hospital stay, in consultation with the admitting provider. The CHAMPUS 60-day limitation on psychiatric hospitalizations will continue in effect.

In high-cost cases where other treatment methods may be more effective than long hospitalizations, Individual Case Management will be used to make the health care system work more effectively for the patient. In order for ICM to apply, alternatives to the hospitalization must be less costly, and there must be no degradation of the required care level for the patient. Cases where ICM may be considered include, for example, cerebral vascular accidents, severe head traumas, high risk neonates, severe burns, and ventilator-dependent patients. The case manager will assist in obtaining alternative services, such as home nursing care, and will monitor the case on an ongoing basis.

Existing CHAMPUS procedures, such as non-availability statement requirements, medical necessity reviews of certain claims, and other requirements of CHAMPUS payment for medical services will continue to apply in the demonstration states.

E. Program Savings Under the FI–PPO Demonstration

DoD anticipates that this demonstration will produce program savings. Estimates of the amount of likely savings are extremely difficult because CHAMPUS has limited experience with this type of program. Savings depend, for example, on the percentages of beneficiaries who will use CHAMPUS Preferred for some or all of their civilian-provided care and the effectiveness of the utilization review programs in eliminating unnecessary hospital admissions and controlling lengths of stay; these factors are difficult to predict with assurance.

Nonetheless, some projections of costs and savings under this demonstration project are possible. BCBSSC estimates potential total savings of about $7.7 million in the first year of operation. To achieve these savings, start-up and operational costs of about $2.1 million will be incurred. Additionally, about $1 million of the savings will be passed directly to beneficiaries who use the PPOs in the form of reductions in the copayment percentage.

The majority of savings of the demonstration arise from the impact of the utilization review program in avoiding unnecessary inpatient care. When considered in relation to inpatient hospital costs in the PPO, the net savings anticipated are about 5 percent.

It is possible that additional savings may result from non-network providers reducing fees to remain competitive with CHAMPUS Preferred providers and from including the discounted payment rates for CHAMPUS Preferred providers in the calculation of new CHAMPUS prevailing charge profiles for these states, beginning with the update for fiscal year 1990.

F. Other Information

To avoid confusion, it should be noted that this demonstration project is entirely separate from the CHAMPUS Reform Initiative (CRI) demonstration project, for which a contract was recently awarded for health care coverage for beneficiaries residing in California and Hawaii. The FI–PPO demonstration project has some similarities with the CRI demonstration. Notably similar are features of CHAMPUS Preferred and the PPO-like option under CRI known as "CHAMPUS Extra." CRI, however, includes many additional health care delivery and financing aspects, including a Health Maintenance Organization (HMO)-like enrollment program called CHAMPUS

Prime, resource sharing agreements with military hospitals, an overall fixed-price contract (subject to modifications), and other features.

Florida and Georgia are excellent states for the demonstration of CHAMPUS improvements. Overall, these two states represent about 11 percent of CHAMPUS beneficiaries in the United States, and about 14 percent of CHAMPUS costs.

The FI–PPO demonstration project will be evaluated by the Office of the Assistant Secretary for Health Affairs in accordance with requirements of the National Defense Authorization Act for Fiscal Years 1988 and 1989. Details of the evaluation plan will be provided to Congress as required by that Act, as will interim and final evaluation reports concerning the project.

As noted above in the background discussion, DoD originally sought to establish, as contemplated in the statute, two FI–PPO demonstration project sites. This Fall, DoD expects to survey the other CHAMPUS fiscal intermediaries in an effort to determine the feasibility of initiating a second FI–PPO demonstration in fiscal year 1989. It may be that some of the circumstances preventing a second project at this time will be sufficiently different next year to permit another contract modification. Conducting a second project through a modification of another fiscal intermediary contract would help produce realistic and accurate findings concerning the feasibility of adopting PPO requirements as standard features in future CHAMPUS FI contracts.

Linda Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense

May 24, 1988.

[FR Doc. 88–12034 Filed 5–26–88; 8:45 am]

BILLING CODE 3810–01–M

Department of the Air Force

Scientific Advisory Board; Meeting

May 19, 1988.

The USAF Scientific Advisory Board Committee on USAF Operations in Chemically Hostile Environments will meet June 14–16, 1988 at the Armstrong Aerospace Medical Research Laboratory, Wright-Patterson AFB, Ohio. The meeting will begin at 8:00 a.m. and end at 5:00 p.m. each day.

The purpose of the meeting is to review the current and anticipated future threat to USAF war-fighting capability and to review current U.S. deterrent and defensive posture and steps being taken to improve USAF capability to meet the threat.

This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and, accordingly will be closed to the public.

For further information, contact the Air Force Scientific Advisory Board Secretariat at (202) 697–4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 88–11950 Filed 5–26–88; 8:45 am]

BILLING CODE 3910–01–M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of Proposed Information Collection Requests.

SUMMARY: The Director, Information Technology Services, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before June 27, 1988.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Jim Houser, Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Margaret B. Webster, Department of Education, 400 Maryland Avenue, SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Margaret B. Webster, (202) 732–3915.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Director, Information Technology Services, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: May 24, 1988.

Carlos U. Rice,

Director for Information Technology Services.

Office of Special Education and Rehabilitative Services

Type of Review: Reinstatement
Title: Report of Handicapped Children and Youth Receiving Special Education and Related Services
Frequency: Annually
Affected Public: State or local governments
Reporting Burden:
Responses: 58
Burden Hours: 8,265
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0

Abstract: This form will be used by States to report the number of handicapped children and youth receiving special education and related services under Part B of the Education of the Handicapped Act, as amended. The Department will use these data for monitoring activities and for distributing Federal funds.

Type of Review: Reinstatement
Title: Report of Special Education and Related Services in Need of Improvement
Frequency: Annually
Affected Public: State and local governments
Reporting Burden:
Responses: 58
Burden Hours: 116
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0

Abstract: This form will collect information from States on the number and type of special education programs and related services in need of improvement. The Department will use the information to assist in establishing programmatic priorities and for reporting purposes.

Type of Review: Extension

Title: Report of: (A) Handicapped Children and Youth Exiting the Educational System and (B) Anticipated Services Needed by Handicapped Children and Youth
Frequency: Annually
Affected Public: State and local governments
Reporting Burden:
Responses: 58
Burden Hours: 13,978
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0
Abstract: This form will be used by States to report the number of handicapped youth exiting the school system and the services needed by these youth in the following year. The Department will use the information to assess progress and effectiveness of State efforts to implement programs under Part B of the Education of the Handicapped Act, as amended.

Office of Postsecondary Education

Type of Review: New
Title: New and Continuation Application for Grants under the School, College, and University Partnerships Program
Frequency: Annually
Affected Public: State or local governments; non-profit institutions
Reporting Burden:
Responses: 100
Burden Hours: 3,500
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0
Abstract: This form will be used by local education agencies and institutions of higher education to apply for funding under the School, College, and University Partnerships Program. The Department will use the information to make grant awards.

Type of Review: New
Title: Application for Grants to Institutions to Encourage Minority Participation in Graduate Education Program
Frequency: Annually
Affected Public: Non-profit institutions
Reporting Burden:
Responses: 200
Burden Hours: 5000
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0
Abstract: This form will be used by institutions of higher education to apply for funding under the Institutions to Encourage Minority Participation in Graduate Education Program. The Department will use the information to make grant awards.

Office of Educational Research and Improvement

Type of Review: Extension
Title: Application for Grants under Library Research and Demonstration Program
Frequency: Annually
Affected Public: State or local governments; non-profit institutions
Reporting Burden:
Responses: 70
Burden Hours: 2,520
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0
Abstract: This form will be used by institutions of higher education and library organizations to apply for funding under the Library Research and Demonstration Program, Title II–B of the Higher Education Act of 1965, as amended. The Department will use the information to make grant awards.

[FR Doc. 88–11966 Filed 5–26–88; 8:45 am]
BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Economic Regulatory Administration

[ERA Docket No. 88–06–NG]

MidCon Sales, Inc.; Order Granting Blanket Authorization To Import Natural Gas

AGENCY: Economic Regulatory Administration, DOE.

ACTION: Notice of order granting blanket authorization to import natural gas.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) gives notice that it has issued an order granting MidCon Sales, Inc. (MidCon Sales), blanket authorization to import natural gas. The order issued in ERA Docket No. 88–06–NG authorizes MidCon Sales to import up to 200 Bcf of natural gas over a two-year period beginning on the date of first delivery.

A copy of this order is available for inspection and copying in the Natural Gas Division Docket Room, GA–076, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, May 16, 1988.

Constance L. Buckley,

Director, Natural Gas Division, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 88–11949 Filed 5–26–88; 8:45 a.m.]
BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket Nos. ER88–398–000, et al.]

Louisiana Power and Light Co., et al; Electric Rate, Small Power Production, and Interlocking Directorate Filings

May 23, 1988.

Take notice that the following filings have been made with the Commission:

1. Louisiana Power and Light Company

[Docket No. ER88–398–000]

Take notice that on May 16, 1988, Louisiana Power & Light Company (LP&L) tendered for filing revised rate schedules for sale of electricity to the City of Winnfield, Louisiana under LP&L Schedule FERC No. 70 and to the Town of Vidalia, Louisiana under LP&L Rate Schedule FERC No. 75. LP&L states that the revision is necessary to permit the cost of test energy from its Waterford No. 3 nuclear generating plant generated during the period June through September 1985 to be recognized in its wholesale fuel cost adjustment clause on the basis of the displacement cost of such energy. LP&L has requested waiver of Part 35 of the Commission's regulations to the extent necessary to permit the revision to be effective during that period.

Comment date: June 6, 1988, in accordance with Standard Paragraph E at the end of this notice.

2. Southwestern Public Service Company

[Docket Nos. ER84–604–010 and ER85–477–003]

Take notice that on May 18, 1988, Southwestern Public Service Company (Southwestern) tendered for filing a compliance interim refund report. Southwestern states that it issued net refund on May 6, 1988 by offsetting the principal amount, without interest, of fuel cost under-recoveries from the total interim refund computed in each docket.

Southwestern states that section 1 of the compliance interim refund report shows the fuel cost under-recovery offset calculations by customers. Sections 2 and 3 show the interim base rate refund calculations, including compound interest, for Docket Nos. ER84–604–009 and ER85–477–002, respectively.

Comment date: June 6, 1988, in accordance with Standard Paragraph E at the end of this notice.

3. Puget Sound Power & Light Company

[Docket No. ER88-401-000]

Take notice that on May 17, 1988, Puget Sound Power & Light Company (Puget) tendered for filing, pursuant to 18 CFR 35.30(c), documents relating to the calculation of Average System Cost (ASC) for the exchange period effective October 1, 1987, through January 31, 1988. Puget states that it is filing pursuant to the revised ASC methodology which was approved by the Federal Energy Regulatory Commission effective October 1, 1984.

Comment date: June 6, 1988, in accordance with Standard Paragraph E at the end of this notice.

4. Blackstone Valley Electric Company

[Docket No. ER88-400-000]

Take notice that on May 17, 1988, Blackstone Valley Electric Company (Blackstone) tendered for filing three related agreements concerning Blackstone's service to meet Narragansett Electric Company's (Narragansett's) load in Franklin, Massachusetts. The first is a facilities support contract between Blackstone and Narragansett for the use of Blackstone's Riverside substation by Narragansett to support that load. This agreement is effective as of April 1, 1988 and supersedes the Franklin-Plainsville Operating Agreement dated June 27, 1949. The new agreement provides that Narragansett will pay 18% of the yearly cost of service for the 13.8kV portion of the substation and 100% of the yearly cost of service of the 25kV portion.

The second is an amendment to the 1973 Agreement for Sharing Cost of Certain Transmission Facilities in Northern Rhode Island between Blackstone and Narragansett (designated Rate Schedule FERC No. 20). Narragansett has agreed to pay 8⅓% of the yearly cost of service for use of Blackstone's H-17 line to support Narragansett's load in Franklin.

The third is an amendment to a 1973 agreement under which Blackstone leases facilities in northern Rhode Island to Montaup Electric Company (Montaup), Blackstone's bulk power supply affiliate (FERC Rate Schedule No. 19). Since the portion of the H-17 line not used by Narragansett is leased by Blackstone to Montaup it was necessary to amend the Blackstone/Montaup agreement in order to adjust the percentage by Montaup.

Blackstone requests waiver of the 60 days notice requirements in order to place the three agreements in effect on April 1, 1988. Negotiations took longer than expected due to uncertainty of the final support percentages. The agreements should be placed in effect as of April 1, 1988 in order to reflect Narragansett's current use of facility beginning then. If waiver is granted, there would be no effect on purchasers under any other rate schedule.

Comment date: June 6, 1988, in accordance with Standard Paragraph E at the end of this notice.

5. Kentucky Utilities Company

[Docket No. EC88-19-000]

Take notice that on May 16, 1988, Kentucky Utilities Company (KU) tendered for filing an application pursuant to section 203 of the Federal Power Act for authorization to acquire from Old Dominion Power Company (Old Dominion) certain of the latter's securities. Old Dominion is the wholly-owned subsidiary of KU.

KU states that it is applying for authority to acquire from Old Dominion unsecured promissory notes of Old Dominion from time to time.

KU states that the proposed transaction will enable Old Dominion to obtain needed funds at a cost which it is believed will be not greater than the cost of money which would be incurred by Old Dominion were it to seek to obtain such funds through the issuance of its securities otherwise than to KU.

Comment date: June 6, 1988, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-12025 Filed 5-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP88-393-000, et al.]

Gateway Pipeline Co., et al.; Natural Gas Certificate Filings

May 23, 1988.

Take notice that the following filings have been made with the Commission:

1. Gateway Pipeline Company

[Docket No. CP88-393-000]

Take notice that on May 13, 1988, Gateway Pipeline Company (Gateway), 600 Travis, Houston, Texas 77002, filed an application in Docket No. CP88-393-000 pursuant to section 7(c) of the Natural Gas Act requesting authorization to construct and operate a total of approximately 25.75 miles of 30-inch and 20-inch diameter pipeline in Mobile County, Alabama. Gateway states that the purpose of this proposed pipeline is to transport natural gas produced in the Mobile Bay Area from three gas treatment plants to United Gas Pipe Line Company's (United) interstate pipeline system, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Gateway proposes to construct the pipeline and related facilities in order to provide open-access transportation service for all potential shippers of Mobile Bay Area gas. Gateway states that the proposed pipeline would connect three natural gas treatment plants in Mobile County, Alabama, with United's existing Lirette, Louisiana, to Mobile, Alabama, 30-inch pipeline at a point in Mobile County. It is stated that the estimated cost of construction of these facilities is $18,875,000. Gateway states that compression facilities are not anticipated as the expected pressures from each of the three treatment plants would be sufficient to deliver gas into United's system.

Gateway further states that the instant proposal would provide the most efficient and flexible means of transportation for potential shippers of Mobile Bay Area gas to markets in the United States. Gateway states that another proposed Mobile Bay Area pipeline is pending before the Commission. Gateway states that United's interconnections with other major pipeline systems provide the most cost-effective and flexible transportation options for Mobile Bay Area gas into the nation's pipeline grid.

Gateway states that the construction of its proposed pipeline would not harm environmentally-sensitive areas, and that any environmental impact the project may have would only occur during the construction phase.

Moreover, Gateway certifies that the proposed facilities will be designed, installed, and operated in accordance with all Federal and State safety standards.

In addition to the proposals set forth above Gateway states that in order to provide all potential shippers an opportunity to obtain initial transportation services from Gateway, Gateway proposes: (1) To accept requests for both firm and interruptible transportation services on a first-come, first-served basis for 75 days after the date the notice of this application is published in the **Federal Register** (Request Period) and (2) to request any necessary authorization to transport gas for shippers requesting services and to executing a precedent agreement within that time, and to file all executed precedent agreements within 15 days of the end of the Request Period. Gateway further states that for any shippers requiring downstream transportation services, it anticipates that any required applications for authorization to render such services for these shippers would be filed with the Commission.

Comment date: June 13, 1988, in accordance with Standard Paragraph F at the end of this notice.

2. Gateway Pipeline Company

[Docket No. CP88-394-000]

Take notice that on May 13, 1988, Gateway Pipeline Company (Gateway), 600 Travis, Houston, Texas 77002, filed in Docket No. CP88-393-000 an application pursuant to section 7(c) of the Natural Gas Act and Section 284.221 of the Commission's Regulations for a blanket certificate of public convenience and necessity authorizing Gateway to transport natural gas on behalf of others, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Gateway states that it will comply with the terms and conditions set forth in Subpart A of Part 284 of the Commission's regulations.

Comment date: June 13, 1988, in accordance with Standard Paragraph F at the end of this notice.

3. Northern Natural Gas Company, Division of Enron Corporation

[Docket No. CP88-386-000]

Take notice that on May 9, 1988, Northern Natural Gas Company, Division of Enron Corporation (Northern), 2223 Dodge Street, Omaha, Nebraska 68102, filed in Docket No. CP88-386-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) to construct one delivery point and appurtenant facilities to effect the delivery of natural gas to Iowa Public Service Company (IPSC) under the authorization issued in Docket No. CP82-401-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Northern proposes to construct one large-volume delivery point to accommodate natural gas deliveries to the community of Zimmerman, Minnesota to be served by IPSC. In addition, Northern requests authorization to realign the firm entitlement of IPSC.

Northern avers that the total estimated cost to construct the proposed facilities is $167,000. It is stated that IPSC would not be required to contribute to the cost of construction.

Comment date: July 7, 1988, in accordance with Standard Paragraph G at the end of this notice.

4. Williams Natural Gas Company

[Docket No. CP62-82-000]

Take notice that on May 12, 1988, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74102, filed in Docket No. CP62-82-000 a petition to amend requesting the elimination of the equivalent inlet/outlet Btu requirement of volumes of gas delivered to a processing plant owned and operated by Cities Service Helex, Inc. (Helex), in Grant County, Kansas, all as more fully set forth in the application that is on file with the Commission and open to public inspection.

WNG states that its existing agreement, dated November 23, 1986, with Helex requires Helex to return processed gas with a Btu content equivalent to that received by Helex. WNG proposes to delete the equivalent inlet/outlet Btu requirement of the agreement. Further, WNG proposes to replace the equivalent Btu content requirement with a requirement that Helex maintain a Btu level no lower than 925 at the outlet of the plant, in accordance with a January 12, 1988, letter agreeemnt. WNG explains that as a result of the issuance of FERC Order Nos. 436, 451 and 500 the heat content of gas being delivered to Helex will be increased. WNG states that its proposal would not affect WNG's sales to Helex or Helex's operation of its facilities.

Comment date: June 13, 1988, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

5. LaSER Marketing Company, a Division of LaSalle Energy Corp.

[Docket No. CI85-521-001, et al.]

Take notice that on May 12, 1988, LaSER Marketing Company, a Division of LaSalle Energy Corp., P.O. Box 1478, Houston, Texas 77251-1478, filed an application pursuant to the provisions of Section 16 of the Natural Gas Act, 15 U.S.C. 717(o) (1982) and the Rules and Regulations of the Federal Energy Regulatory Commission (Commission) issued thereunder, petitioning the Commission to redesignate all certificates issued by the Commission in the name of UER Marketing Company to LaSER Marketing Company, a Division of LaSalle Energy Corp., as shown on the attached Exhibit and substitute LaSER Marketing Company, a Division of LaSalle Energy Corp., in place of UER Marketing Company in any other proceedings pending before the Commission. This application is on file with the Commission and open to public inspection.

Effective June 30, 1987, UER Marketing Company was acquired by LaSalle Energy Corp. UER Marketing Company's name was subsequently changed, effective April 1, 1988, to LaSER Marketing Company, a Division of La Salle Energy Corp.

Comment date: June 3, 1988, in accordance with Standard Paragraph J at the end of this notice.

Exhibit

List of Federal Energy Regulatory Commission's Proceedings.

CI-85-521	ST86-465
ST85-1598	ST86-1317
ST85-1784	ST86-1375
ST85-1782	ST87-172
ST86-128	ST87-175
ST86-617	ST87-469
ST86-391	ST85-1415
ST86-1305	ST85-1783
ST86-1374	ST85-1823
ST87-171	ST86-092
ST87-174	ST86-139
ST87-468	ST86-403
CI85-673	ST86-1247
ST85-1781	ST86-1361
ST85-1819	ST86-1638
ST86-091	ST87-173
ST86-149	ST87-221
ST86-393	ST87-1006

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural

Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission's, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

J. Any person desiring to be heard or make any protest with reference to said filings should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-12026 Filed 5-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. G-3966-002, et al.]

Sun Exploration and Production Co., et al.; Applications for Certificates, Abandonment of Service and Amendment of Certificates [1]

May 24, 1988.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to sell natural gas in interstate commerce, to abandon service or to amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before June 7, 1988, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Acting Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No. and date filed	Applicant	Purchaser and location	Description
G-3966-002, D, 5/6/88	Sun Exploration & Production Co., P.O. Box 2880, Dallas, TX 75221-2880.	Texas Gas Pipeline Co., Nome Field, Jefferson County, TX.	(1)
G-7496-001 D, 5/9/88	Amoco Production Co., P.O. Box 3092, Houston, TX 77253.	Northern Natural Gas Co., Division of Enron Corp., Eumont Field, Lea County, NM.	(2)
CI61-1429-019, D, 5/9/88	Sun Exploration and Production Co	El Paso Natural Gas Co., Jalmat Field, Lea County, NM.	(3)
CI62-1237-001, D, 5/6/88	do	do	(4)
CI70-654-003, D, 5/9/88	do	Transcontinental Gas Pipe Line Corp., Various Fields, Jim Hogg County, TX.	(5)
CI76-691-003, D, 5/9/88	Amoco Production Co	El Paso Natural Gas Co., Carlsbad Field, Eddy County, NM.	(2)
CI77-114-003, D, 5/9/88	Sun Exploration & Production Co	El Paso Natural Gas Co., Jalmat, *et al* Fields, Lea County, NM.	(6)
CI88-429-000 (CI64-999), B, 4/21/88	Tenneco Oil Co., P.O. Box 2511, Houston, TX 77252.	El Paso Natural Gas Co., South Fullerton Field, Andrews County, TX.	(7)
CI88-439-000, F, 5/3/88	Texaco Production Inc., P.O. Box 52332, Houston, TX 77052.	Colorado Interstate Gas Co., Greenwood Field, Morton County, KS.	(8)
CI88-440-000, B, 5/5/88	Hamon Operating Co., Republic Bank Tower, 325 No. St. Paul, Suite 3900, Dallas, TX 75201-3902.	El Paso Natural Gas Co., Ramp Field, Hemphill County, TX.	(9)
CI88-441-000, B, 5/5/88	do	Northern Natural Gas Co., Division of Enron Corp., Mocane-Laverne Field, Beaver County, OK.	(10)

Docket No. and date filed	Applicant	Purchaser and location	Description
CI88-442-000, B, 5/5/88	....do	Tennessee Gas Pipeline Co., a Division of Tenneco Inc., King's Bayou Field, Cameron Parish, LA.	(10)
CI88-443-000, B, 5/5/88	....do	Williams Natural Gas Co., Hugoton-Anadarko Field, Hemphill County, TX.	(10)
CI88-444-000 (CI79-459), 5/5/88	Phillips Petroleum Co., 990-G Plaza Office Bldg., Bartlesville, OK 74004.	Natural Gas Pipeline Co. of America, West Gruver Field, OCS-G-2398, High Island Block A-273, Offshore Texas.	(11)
CI88-445-000 (CI81-356), B, 5/5/88	....do	ANR Pipeline Co., OCS-G-2398 High Island Block A-273, Offshore Texas.	(11)
CI88-446-000 (CI76-226), B, 5/6/88	ARCO Oil & Gas Company, a Division of Atlantic Richfield Co., P.O. Box 2819, Dallas, TX 75221.	El Paso Natural Gas Co., Cinta Roja Field, Lea County, NM.	(12)
CI88-448-000 (CI63-1344), B, 5/9/88	Sun Exploration & Production Co.	El Paso Natural Gas Co., Langlie Mattix Field, Lea County, NM.	(13)
CI88-449-000 (CI78-1213), B, 5/9/88	....do	El Paso Natural Gas Co., Jalmat Field, Lea County, NM.	(14)
CI88-450-000 (CI77-63), B, 5/9/88	Amoco Production Co.	El Paso Natural Gas Co., Brunson Field, Lea County, NM.	(15)
CI88-451-000 (G-3711), B, 5/9/88	Union Exploration Partners, Ltd., P.O. Box 7600, Los Angeles, CA 90051.	Transcontinental Gas Pipe Line Corp., Vinton Field, Calcasieu Parish, LA.	(16)
CI88-453-000 (CI63-429), D, 1/4/88	Maxus Exploration Co., LTV Center, 2001 Ross Ave., Dallas, TX 75201.	Natural Gas Pipeline Co. of America, Certain acreage in Beaver County, OK.	(17)

[1] Effective 12-1-85, Sun assigned its interest in Property No. 435000, J. E. Burrows (all wells and equipment located on various deeds covering up to 214.44 acres, M/1, out of John Blair League A-4, from surface to 8000 ft, and Sun's interest in Minerals from surface to 8000 ft.), to King Sherwood Oil Co. Sun retained depths below 800 ft., and surface of Fee Deed 2729.

[2] Effective 8-1-87, Amoco Production Company assigned certain acreage to ENAQ, Inc.

[3] Effective 1-2-86, Sun assigned its interest in Property No. 639882, South Langlie Jal (formerly Van Zandt #4), to Doyle Hartman, James A. Davidson, Michael L. Klein, and John H. Hendrix Corporation.

[4] Effective 1-2-86, Sun assigned its interest in Property No. 746055, Watkins, and Property No. 761805, Woolworth (partial interest) to Doyle Hartman, James A. Davidson, Michael L. Klein, and John H. Hendrix Corporation.

[5] Effective 11-25-86, Sun released its interest in Property No. 748676, Lease No. 23597, Weil Bros. Lease to the heirs of John Weil.

[6] Effective 1-2-86, Sun assigned its interest in Property No. 437463, S. R. Cooper, and Property No. 437464, S. R. Cooper 'A' to Doyle Hartman, James A. Davidson, Michael L. Klein, and John H. Hendrix Corporation.

[7] Effective 7-1-87, Tenneco assigned certain acreage to Amoco Production Company.

[8] Effective 11-1-87, CNG Production Company assigned certain acreage to TPI.

[9] Reserves depleted and well plugged and abandoned 4-5-83.

[10] Reserves depleted and all wells plugged and abandoned.

[11] Production from High Island Block A-273 has ceased, all wells have been plugged and abandoned and the lease terminated in December, 1986.

[12] Effective 1-1-87, ARCO assigned its interest in certain acreage to Hondo Oil and Gas Company.

[13] Effective 1-2-86, Sun assigned its interest in Property No. 456583, Eaton B. AC #1; Property No. 456584, Eaton, N.W.; and Property No. 456585, Eaton N.W.; to Doyle Hartman, James A. Davidson, Michael L. Klein, and John H. Hendrix Corporation.

[14] Effective 1-2-86, Sun assigned its interest in Property No. 520785, J. W. Cooper, to Doyle Hartman, James A. Davidson, Michael L. Klein, and John H. Hendrix Corporation.

[15] Effective 8-1-87, all the acreage dedicated to El Paso under the related gas contracts dated 8-23-76 (basic) and 9-1-85 (rollover) comprising Gas Rate Schedule No. 729, was assigned to ENAQ, Inc.

[16] Effective 2-1-83, UXP assigned certain leases to The Exploration Company of Louisiana, Inc., and UXP no longer has any remaining properties subject to Gas Rate Schedule No. 4.

[17] Diamond Shamrock Exploration Company (now Maxus) assigned all of its interest in the well and leases covered by Gas Rate Schedule No. 17 to Cabot Petroleum Corporation and Anadarko Petroleum Corporation effective 11-1-86.

Filing Code: A—Initial Service; B—Abandonment; C—Amendment to add acreage; D—Amendment to delete acreage; E—Total Succession; F—Partial Succession.

[FR Doc. 88-12024 Filed 5-26-88: 8:45am]
BILLING CODE 6717-01-M

[Docket No. OR88-3-000]

Air Transport Association of America v. Buckeye Pipe Line Co., L.P.; Filing of Complaint

May 23, 1988.

Take notice that on April 29, 1988, Air Transport Association of America (ATA or complainant) filed a complaint pursuant 18 CFR 385.206 against Buckeye Pipe Line Company (Buckeye). It requests the Commission to prescribe just and reasonable rates for Buckeye and order reparations under sections 13(1), 15(1), and 16(1) of the Interstate Commerce Act (ICA). Complainant, a non-profit trade association of air passenger and freight carriers that directly and indirectly ship aviation jet fuel on the Buckeye system, alleges that its member air carriers are currently being charged unjust and unreasonable tariff rates by Buckeye. ATA asserts that testimony and data submitted in a current investigation of Buckeye's tariff rates in *Buckeye Pipe Line Co., L.P., et al.*, Docket Nos. IS87-14-000, *et al.*[1] demonstrate that Buckeye's current revenues far exceed its costs and that its tariff rates are excessive and unlawful under the ICA. By this complaint, ATA seeks to utilize the record established in *Buckeye* to obtain relief under sections 15(1) and 16(1) of the ICA. ATA requests that the Commission expand the scope of that proceeding to ensure that the issues to be resolved include: (1) The justness and reasonableness of all of Buckeye's tariff rates for the transportation of aviation jet fuel, whether or not an increase to any such rate has been proposed; (2) the just and reasonable rate to be thereafter observed to the extent that any of Buckeye's tariff rates for the transportation of aviation jet fuel are found to be unjust and unreasonable; and (3) the appropriate measure of reparations, with interest, to be made to ATA's member air carriers as relief for unjust and unreasonable tariff rates charged for the transportation of aviation jet fuel for the period from January 1, 1987 to the date that the prescribed just and reasonable rates became effective.

ATA asserts that once the hearing is held in *Buckeye* the Commission will have a full record upon which to prescribe the just and reasonable rate to be thereafter observed with respect to each Buckeye tariff rate found to be unjust and unreasonable. ATA emphasizes that although proceedings in

[1] Buckeye filed increased rates of approximately $6 million. This general rate increase was suspended for one day by Oil Pipeline Board order issued March 13, 1987, 38 FERC 62,256 (1987).

Buckeye will involve all of Buckeye's tariff rates, ATA is requesting relief in this complaint only with respect to tariff rates for the transportation of aviation jet fuel. With respect to reparations, ATA is not seeking relief on behalf of other parties. ATA requests the Commission to order reparations with respect to all shipments of aviation jet fuel on or after January 1, 1987 for which one of the ATA member air carriers was a direct or indirect shipper. Finally, ATA requests that the Commission consolidate the instant complaint with the ongoing proceedings in *Buckeye*.

Any person desiring to be heard or to protest the instant complaint should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before June 22, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. Answers to this complaint shall be due on or before June 22, 1988.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-12033 Filed 5-26-88;8:45am]

BILLING CODE 6717-01-M

[Docket No. TM88-2-20-000]

Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

May 24, 1988.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on May 17, 1988, tendered for filing to its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets:

Proposed to be Effective June 1, 1988

Twenty-seventh Revised Sheet No. 203

Eighteenth Revised Sheet No. 204

Algonquin states that Twenty-seventh Revised Sheet No. 203 and Eighteenth Revised Sheet No. 204 are being filed pursuant to section 7 of its Rate Schedules F-2 and F-3, to reflect changes in the underlying rates by its pipeline suppliers, CNG Transmission Corporation ("CNGT") and National Fuel Gas Supply Corporation ("National"), respectively. Algonquin states that, Twenty-seventh Revised Sheet No. 203 and Eighteenth Revised Sheet No. 204 are proposed to be effective June 1, 1988 to coincide with the proposed effective date of CNGT's and National's filings.

Algonquin states that the proposed changes would increase revenues from Rate Schedule F-2 by $74,000 and decrease revenues from Rate Schedule F-3 by $1,167,000, based on actuals for the 12 month period ended March 31, 1988.

Algonquin notes that a copy of this filing is being served upon each affected party and interested state commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before June 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-12027, Filed 5-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-173-000]

Northern Border Pipeline Co.; Proposed Changes in F.E.R.C. Gas Tariff

May 24, 1988

Take notice that on May 18, 1988, Northern Border Pipeline Company (Northern Border) tendered for filing to become a part of Northern Border Pipeline Company's F.E.R.C. Gas Tariff, Original Volumes Nos. 1 and 2 the following tariff sheets:

Original Volume No. 1

Fourth Revised Sheet No. 157
Second Revised Sheet No. 158

Original Volume No. 2

First Revised Sheet No. 40
First Revised Sheet No. 147

These tariff sheets were filed to reflect a revised Maximum Rate and Minimum Revenue Credit under Rate Schedule IT-1, to modify the Delinquency Charge provision in Section 6.4 of the General Terms and Conditions of Original Volume No. 2, and to eliminate Rate Schedule X-8 through X-11 which were the Interruptible Transportation Service For System Supply contracts Northern Border had with ANR Pipeline Company Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company and Transcontinental Gas Pipe Line Corporation collectively referred to as the "Great Plains Shippers". The temporary certificate authority for Rate Schedules X-8 through X-11 authorized in Docket Nos. CP83-263-002, 004, and 006, expired thirty days after the Commission's acceptance and approval of Northern Border's revised tariff sheets and pro-forma service agreement in Docket Nos. CP86-395-000 and 001. Northern Border has requested that these revised tariff sheets be effective on July 1, 1988. Copies of this filing have been sent to all of Northern Border's customers.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before June 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene.

Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-12028 Filed 5-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP88-154-001 and TQ88-1-37-001]

Northwest Pipeline Corp., Proposed Change in FERC Gas Tariff

May 27, 1988.

Take notice that on May 16, 1988, Northwest Pipeline Corporation ("Northwest") filed the following tariff sheets to supplement its May 2, 1988 filing in the above dockets:

First Revised Volume No. 1

Substitute Eighth Revised Sheet No. 127-A

Substitute Fourth Revised Sheet No. 128-A

Substitute Fifth Revised Sheet No. 129

Northwest states that the purpose of Sheet No. 127-A is to provide for the

distribution or collection of any portion of the December 31, 1987 Commodity Deferral Subaccount Balance which remains unamortized as of March 31, 1989. The allocation is to be based upon the ratio of each jurisdictional customer's total purchases from Seller to Seller's total jurisdictional sales for the twelve months ended March 31, 1989. Sheet Nos. 128–A and 129 are tendered to clarify the mechanics of the calculation of the demand gas cost deferral.

Additionally, Northwest tenders the following alternate tariff sheets in the instant filing:

Alternate Tariff Sheets

Alternate Fourth Amended Thirty Ninth Revised Sheet No. 10
Alternate First Amended First Revised Sheet No. 301
Alternate First Amended Original Sheet No. 303

Northwest states that it is filing the alternate tariff sheets listed above to reflect the requested conversion of Northwest Natural Gas Co. of 15 percent of its sales contract demand to firm transportation pursuant to § 284.10 of the Commission's regulations. Sheet No. 10 reflects a change in the demand charge rates based upon Northwest Natural's revised billing determinants, while Sheet Nos. 301 and 303 reflect the conversion in the Index of Purchases. In the event that the conversion is effectuated on or before June 1, 1988, Northwest requests that these alternate sheets be accepted by the Commission to be effective June 1, 1988.

A copy of the filing has been mailed to Northwest's jurisdictional customers and affected state commissions.

Any person desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before June 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–12029 Filed 5–26–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. TQ88–1–28–001 and RP88–133–000]

Panhandle Eastern Pipe Line Co.; Filing

May 24, 1988.

Take notice that on May 16, 1988, Panhandle Eastern Pipe Line Company (Panhandle) filed First Substitute Sixty-Fourth Revised Revised Sheet No. 3–A and First Substitute Forty-First Revised Sheet No. 3–B to its FERC Gas Tariff, Original Volume No. 1, proposed to be effective June 1, 1988.

Panhandle states that the above-listed revised tariff sheets reflect a decrease of ($0.10) for its Demand (D1) component, from those tariff sheets filed on April 29, 1988 to reflect a revision in the computation of its Section 18.4 pipeline supplier tracker.

Panhandle respectfully requests that the Commission accept these substitue tariff sheets in lieu of the original sheets filed on April 29, 1988, and requests that the Commission grant such waivers as may be necessary for the acceptance of these substitute tariff sheets.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1987)). All such motions or protests should be filed on or before June 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–12030 Filed 5–26–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP88–67–003]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

May 24, 1988.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on May 16, 1988 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1 and Original Volume No. 2 certain tariff sheets.

Texas Eastern states that in compliance with Commission orders issued March 31, 1988 and April 21, 1988, the tariff sheets reflect: (1) The D–2 nominations made by Texas Eastern's customers and revisions to Texas Eastern's tariff to establish charges for gas taken in excess of a Buyer's D–2 nomination; (2) an updated capitalization structure reflecting the actual cost of debt incurred; and (3) the reallocation of volumes and costs to establish projected units of service consistent with § 284.7 of the Commission's regulations.

Texas Eastern states that it is proposing in this filing to eliminate the mileage rate for transportation within Zone A under Rate Schedules TS–1, TS–2, and IT–1 and in lieu thereof is proposing a single commodity rate for transportation originating and delivered within Zone A under these rate schedules, regardless of the distance of haul.

Texas Eastern states that the Commission's orders also required Texas Eastern to reflect in the allocation of D–1 costs on a three-day peak basis and the elimination of the standby component. It submits that the original filing by Texas Eastern did allocate D–1 costs on a three-day peak basis and includes in its filing a schedule supporting the use of a three-day peak. Furthermore, the sales and storage commodity rates for all Rate Schedules in Texas Eastern's March 1, 1988 filing did not include a standby component. Columns 5, 6, and 7 of Schedule J–1 Page 1, Columns 6, 7, and 8 of Schedule K–1 Page 1 and Columns 15, 16, and 17 of Schedule K–1 Page 1 detailing components of Texas Eastern's commodity cost of service and associated commodity rates were labeled "Other", "Gas", and "Standby", respectively. These columns should have been labeled "Transmission", "Gas", and "Production and Storage".

Texas Eastern requests the Commission accept and suspend these tariff sheets until September 1, 1988, the end of the suspension period for tariff sheets originally filed on March 1, 1988 in this proceeding.

Texas Eastern states that further revisions in the tariff sheets filed herewith may be required at the time Texas Eastern moves to place these rates into effect on September 1, 1988 to reflect gas plant in service and an updated capitalization structure and also to reflect tariff changes approved by the Commission in the interim period prior to September 1, 1988. Texas Eastern intends at that time to supplement its Statement P to reflect these finally revised tariff sheets and intends to provide revised statements and schedules to the extent necessary.

Texas Eastern states that as required by the Commission's March 31 order

supporting workpapers detailing PCB-related costs included in each cost of service and rate base account are attached.

Texas Eastern is providing workpapers respecting the revised tariff sheets to the Staff for informational purposes.

Copies of this filing are being served upon all parties of record in Docket No. RP88-67 *et al.*

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before June 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-12031 Filed 5-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-172-000]

Northwest Alaskan Pipeline Co.; Tariff Changes

May 24, 1988.

Take notice that on May 16, 1988, Northwest Alaskan Pipeline Company ("Northwest Alaskan"), 295 Chipeta Way, Salt Lake City, Utah 84108-0899, tendered for filing in Docket No. RP88-172-000, Twenty-Second Revised Sheet No. 5 to its FERC Gas Tariff Original Volume No. 2.

Northwest Alaskan states that it is submitting Twenty-Second Revised Sheet No. 5 reflecting a decrease in total demand charges for Canadian gas purchased by Northwest Alaskan from Pan-Alberta Gas Ltd. ("Pan-Alberta") and resold to three of Northwest Alaskan's four U.S. purchasers, Panhandle Eastern Pipe Line Company ("Panhandle"), United Gas Pipe Line Company ("United") and Pacific Interstate Transmission Company ("PIT"), under Rate Schedules X-2, X-3 and X-4 respectively, and a small increase in total demand charges for Northwest Alaskan's fourth U.S. purchaser, Northern Natural Gas Company, Division of Enron Corp. ("Northern") under Rate Schedule X-1.

Northwest Alaskan states that it is submitting Twenty-Second Revised Sheet No. 5 pursuant to the provisions of the amended purchase agreements between Northwest Alaskan and Northern, Panhandle, United and PIT, and pursuant to Rate Schedules X-1, X-2, X-3, and X-4, which provide for Northwest Alaskan to file 45 days prior to the commencement of the next demand charge period (July 1, 1988 through December 31, 1988) the demand charges and demand charge adjustments which Northwest Alaskan will charge during that period.

Northwest Alaskan requests that Twenty-Second Revised Sheet No. 5 become effective July 1, 1988.

Northwest Alaskan states that a copy of this filing has been served on Northwest Alaskan's customers.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before June 1, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 12032 Filed 5-26-88; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3387-4]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared May 9, 1988 through May 13, 1988 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5074.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 22, 1988 (53 FR 13318).

Draft EISs

ERP No. D-AFS-L65125-OR, Rating E02, Silver Fire Recovery Project Area, August thru November 1987 Silver Complex Fire Land Management Plan, Implementation, Siskiyou National Forest, Josephine and Curry Counties, OR.

Summary: EPA believes this document represents a conscientious effort to accurately disclose the environmental effects of salvage logging in the project area. However, this document indicates that temperature standards and anti-degradation provisions of Oregon State Water Quality Standards may be exceeded by the project. Additional information is needed to support the final EIS, including a detailed water quality/fishery monitoring plan, and a critical assessment of the uncertainty in the cumulative effects model is needed, and the way in which this uncertainty would affect the EIS conclusions on water quality/fishery effects.

ERP No. D-BLM-K65115-AZ, Rating EC2, Phoenix Resource Area Management Plan, Implementation, Apache, Navajo, Gila Maricopa, Pima, Pinal, Santa Cruz and Yavapai Counties, AZ.

Summary: EPA expressed environmental concerns with project impacts to existing watershed and riparian habitat conditions as well as with related water quality impacts.

ERP No. D-BOP-E81028-KY, Rating EC1, Manchester Federal Correctional Institution Complex, Construction and Operation, Clay County, KY.

Summary: EPA has reviewed this document and requested that additional information on air quality and the water management plan needs to be addressed in the final EIS.

ERP No. D-FHW-E40714-GA, Rating EC2, US 411 Relocation, US 411/GA-20 Interchange with US 41 to US 411 Interchange with I-75, Funding and 404 Permit, Bartow County, GA.

Summary: EPA is concerned with stream crossing and noise impacts and the lack of detailed mitigation proposals to offset or minimize these losses.

ERP No. DS-FHW-K40158-CA, Rating EC2, I-5/Santa Ana Freeway Widening and Interchanges Reconstruction, CA-22/57 Interchange to CA-55, Additional Transitway Construction Alternative, CA-55 to CA-22, Funding and 404 Permit, Orange County, CA.

Summary: EPA expressed environmental concerns because of potential adverse air quality impacts. EPA asked that the final EIS address the potential cumulative impacts of all I-5

improvements in the Santa Ana Corridor, the project's compliance with the State Implementation Plan and mitigation measures to offset adverse air quality impacts.

Final EISs

ERP No. F-AFS-K65089-CA., Sequoia National Forest, Land and Resource Management Plan, Implementation, Tulare, Kern and Fresno Counties, CA.

Summary: EPA requested that additional baseline information on soil tolerance and water quality be gathered and analyzed before the preferred alternative is implemented due to the proposed increases in Sequoia National Forest resource outputs. EPA also requested that amendments to the forest plan discuss potential reforestation backlogs.

ERP No. F-COE-H36098-00, Coldwater Creek Watershed Flood Damage Reduction and Related Improvement Plan, Implementation, St. Louis County, MO.

Summary: EPA's concern with the draft EIS were adequately responded to in this document.

Dated: May 24, 1988.

William D. Franklin,

Acting Director, Office of Federal Activities.

[FR Doc. 88-12006 Filed 5-26-88; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3387-2]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5075.

Availability of Environmental Impact Statements Filed May 16, 1988 Through May 27, 1988 Purusant to 40 CFR 1506.9.

EIS No. 880157, Draft, NPS, AK, Cape Krusenstern National Monument, Wilderness Recommendations, Designation or Nondesignation, AK, Due: August 29, 1988, Contract: Linda Nebel (907) 257-2654.

EIS No. 880158, Draft, SCS, CO, McElmo Creek Unit Salinity Control Study, Onfarm Irrigation Improvements, Funding and Implementation, Montezuma County, CO. Due: July 11, 1988, Contact: Sheldon G. Boone (303) 964-0295.

EIS No. 880159, Draft, FHW, OR, Tualatin-Sherwood/Edy Road Improvements, I-5 to OR-99W, Funding and 404 Permit, Washington County, OR, Due: July 18, 1988, Contact: Dale Wilken (503) 399-5749.

EIS No. 880160, FSuppl, FAA, NH, Lebanon Muncipal Airport Runway 18 Extension, Outer Marker and Compass Locator Facility Installation, Approval, W. Peter Kochis (617) 273-7157.

EIS No. 880161, Final, FHW, IN, Keystone-Rural Corridor Improvement, Pleasant Run Parkway North Drive to IN-37/Fall Creek Boulevard, Funding, Marion County, IN, Due: June 27, 1988, Contact: L.D. Tucker (317) 269-7481.

EIS No. 880162, Draft, CDB, MI, Ambassador Bridge Border Station Expansion and Hubbard-Richard Housing Project Development, Urban Development Action and Community Development Block Grants, Wayne County, MI, Due: July 11, 1988, Contact: Robert Davenport (313) 224-0343.

EIS No. 880163, Final, EPA, PR, Arecibo, Maqaquez, Ponce and Yabocoa Harbors, Ocean Dredged Material Disposal Site, Designation, PR, Due: July 11, 1988, Contact: Robert Witte (212) 264-6681.

Amended Notice

EIS No. 880082, Final, COE, CO, Metropolitan Denver Water Supply Project, Two Forks Dam and Reservoir and Williams Fork Gravity Collection System Construction, 404 Permit and Approvals, Douglas, Jefferson and Grand Counties, CO, Due: June 10, 1988, Contact: Steven G. West (402) 221-3900. Published FR 3-25-88—Review period extended.

Dated: May 24, 1988.

William D. Franklin,

Acting Director, Office of Federal Activities.

[FR Doc. 88-12007 Filed 5-26-88; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3386-9]

Office of Policy, Planning and Evaluation Workshop; Toxic Sediments—Approaches to Management; Meeting

The following meeting will be sponsored by the U.S. Environmental Protection Agency (US EPA), Office of Policy, Planning and Evaluation (OPPE) and will be open to the public for observation limited by the space available:

Date: June 15-17, 1988

Time: 8:30-4:30 pm, June 15; 8:30-5 pm, June 16; 8:30-12 noon June 17.

Place: American Management Systems, 1777 North Kent Street, 14th Floor, Penthouse Room 314, Arlington, Virginia 22209

Purpose: The workshop will focus on EPA, state and other federal agencies experiences in managing toxic sediments. The goal is to develop general guidance on the best approaches to toxic sediment management. Interested members of the public are invited to attend.

Additional information may be obtained from: Sally Valdes-Cogliano, OPPE, US EPA, 401 M St., SW., Washington, DC 20460. Telephones: FTS: 382-5871; Commercial: 202-382-5871.

Sally J. Valdes-Cogliano,

Ecologist, Science-Policy Integration Branch, Office of Policy, Planning and Evaluation.

[FR Doc. 88-11985 Filed 5-26-88; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-44507; FRL 3386-6]

TSCA Chemical Testing; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the receipt of test data on diethylenetriamine (CAS No. 111-40-0), tetrafluoroethylene (CAS No. 116-14-3) and hexafluoropropene (CAS No. 116-15-4) submitted pursuant to final test rules under the Toxic Substances Control Act (TSCA). Publication of this notice is in compliance with section 4(d) of TSCA.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Acting Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. EB-44, 401 M St., SW., Washington, DC 20460, (202) 554-1404.

SUPPLEMENTARY INFORMATION: Section 4 (d) of TSCA requires EPA to publish a notice in the **Federal Register** reporting the receipt of test data submitted pursuant to test rules promulgated under section 4 (a) within 15 days after it is received.

I. Test Data Submissions

A. Diethylenetriamine

Test data for diethylenetriamine (DETA) was submitted by The Dow Chemical Company pursuant to a test rule at 40 CFR 799.1575. It was received by EPA on May 12, 1988. The submission describes two tests: (1) A *Drosophila* sex-linked recessive lethal (SLRL) assay; and (2) an *in vivo* cytogenetics test (mouse bone marrow micronucleus test). Mutagenic effects testing is required by this test rule.

DETA is used primarily for production of paper wet-strength resins, epoxy-curing agents, chelating agents,

lubricating oil and fuel additives, surfactants and corrosion inhibitors.

B. Fluoroalkenes

Test data for two fluoroalkenes, tetrafluoroethylene (TFE) and hexafluoropropene (HFP), were submitted by E. I. du Pont de Nemours and Company, Inc. pursuant to a test rule at 40 CFR 799.1700. The data was received by EPA on May 16, 1988. Two final study reports were received: (1) A mutagenicity evaluation of tetrafluoroethylene in the CHO/HPRT assay; and (2) a mutagenicity evaluation of hexafluoropropene in the CHO/HPRT assay. Gene mutation in somatic cells studies are required by this test rule.

These fluoroalkenes are used as precursors in the manufacture of highly specialized polymers and elastomers.

EPA has initiated its review and evaluation process for these data submissions. At this time, the Agency is unable to provide any determination as to their completeness.

II. Public Record

EPA has established a public record for this TSCA section 4(d) receipt of data notice (docket number OPTS-44507). This record includes copies of all studies reported in this notice. The record is available for inspection from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays, in the TSCA Public Docket Office, Rm. NE-G004, 401 M St., SW., Washington, DC 20460.

Authority: 15 U.S.C. 2603.

Dated: May 18, 1988.

J. Merenda,

Director, Existing Chemical Assessment Division, Office of Toxic Substances.

[FR Doc. 88-11840 Filed 5-26-88; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-140096; FRL-3387-6]

Access to Confidential Business Information by ABT Associates, Inc.; Dynamac Corp. and Meta Co.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, ABT Associates, Inc. (ABT) of Cambridge, MA and its subcontractors, Dynamac Corporation (DYN) of Rockville, MD and the Meta Company (MET) of Cambridge, MA access to information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATE: Access to the confidential data submitted to EPA will occur no sooner than June 13, 1988.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Acting Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. EB-44, 401 M Street SW., Washington, DC 20460, (202-554-1404).

SUPPLEMENTARY INFORMATION: Under TSCA, EPA must determine whether the manufacture, processing, distribution in commerce, use, or disposal of certain chemical substances or chemical mixtures may present an unreasonable risk of injury to human health or the environment. New chemical substances, i.e., those not listed on the TSCA Chemical Substances Inventory, are evaluated by EPA under section 5 of TSCA. Existing chemical substances, i.e., those listed on the TSCA Inventory, are evaluated by the Agency under section 4, 6, and 8 of TSCA. Certain existing chemical substances intended to be exported to foreign countries are required to be reported to EPA under section 12 of TSCA. New and existing chemical substances intended to be imported into the United States are evaluated by EPA under section 13 of TSCA. Petitions received by EPA to initiate a proceeding for the issuance, amendment, or repeal of a rule under section 4, 6, or 8 or an order under section 5(e) or 6(b)(2) are evaluated by EPA under section 21 of TSCA.

Under contract no. 68-01-4283, EPA's contractor ABT, 55 Wheeler Street, Cambridge, MA and its subcontactors DYN, 11140 Rockville Pike, Rockville, MD and MET, 10 Holworthy Street, Cambridge, MA will assist the Office of Toxic Substances' (OTS) Economics and Technology Division by providing aid in performing chemistry, chemical engineering, economic, and regulatory impact analyses. Primarily these analyses will address the costs, economic impacts, benefits, and regulatory impacts of actions proposed or taken under TSCA as well as chemical and engineering assessments supporting TSCA actions. They may involve the regulation of chemicals under any section of TSCA. Also, under contract no. 68-02-4283, EPA's subcontactor DYN will assist OTS's Information Management Division by providing consultation and assistance on safe and appropriate storage and access of CBI on various computer systems.

In accordance with 40 CFR 2.306(j), EPA has determined that under contract no. 68-02-4283, ABT, DYN, and MET will require access to CBI submitted to EPA under TSCA to perform successfully the duties specified under the contract. ABT, DYN, and MET personnel will be given access to all information submitted under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide ABT, DYN, and MET access to these CBI materials on a need-to-know basis. All access to TSCA CBI under this contract will take place at EPA Headquarters facilities.

Clearance for access to TSCA CBI under this contract is scheduled to expire on September 30, 1990.

ABT, DYN, and MET personnel will be required to sign nondisclosure agreements, will be briefed on appropriate security procedures and must pass a test on those security procedures before they are permitted access to TSCA CBI.

Dated: May 17, 1988.

Charles L. Elkins,

Director, Office of Toxic Substances.

[FR Doc. 88-11982 Filed 5-26-88; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Grants; Hazardous Materials Training Program

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given that FEMA is accepting grant applications to develop a training program in Hazardous Materials under SARA Title III. These applications will be limited to federally recognized Indian Tribes.

DATE: Grant applications must be requested from FEMA, National Emergency Training Center by June 1, 1988.

ADDRESS: Requests should be submitted to: Federal Emergency Management Agency, National Emergency Training Center, Attention: Procurement Branch, E-115, 16825 South Seton Avenue, Emmitsburg, Maryland 21727.

FOR FURTHER INFORMATION CONTACT: Estelle F. Marr at (301) 447-1077 (FTS 652-1077).

Estelle F. Marr,

Chief, Procurement Branch.

[FR Doc. 88-11953 Filed 5-26-88; 8:45 am]

BILLING CODE 6718-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224–002605–003.
Title: Port of Oakland Preferential Assignment Agreement.
Parties:
City of Oakland
American President Lines, Ltd.

Synopsis: The proposed agreement is amended to provide for two seven-year renewal terms of the basic assignment.

Agreement No.: 224–200096–001.
Title: North Carolina Terminal Agreement.
Parties:
North Carolina State Ports Authority
Senator Linie

Synopsis: The agreement is amended to provide that no option to renew the term of this agreement shall be implemented until filed with this Commission and effective pursuant to the Shipping Act of 1984.

Agreement No.: 224–200120.
Title: Port of Houston Terminal Agreement.
Parties:
Cavalair Corp. (CC)
ITO Corp. (ITO)
Kerr Steamship Co., Inc. (KSC)

Synopsis: The proposed agreement provides for CC, ITO and KSC, as shareholders of Fairway Terminal Corporation, to furnish stevedore services at Barbours Cut Terminal in the Port of Houston.

Agreement No.: 224–003975–004.
Title: Port of Longview, Washington Lease Agreement.
Parties:
Port of Longview
Continental Grain Company

Synopsis: The proposed agreement is amended to provide for seven additional one-year renewal terms of the basic lease.

By Order of the Federal Maritime Commission.
Dated: May 24, 1988.

Joseph C. Polking,
Secretary.

[FR Doc. 88–12020 Filed 5–26–88; 8:45 am]
BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 213–010885–002.
Title: Mitsui O.S.K. Lines, Ltd. and Kawasaki Kisen Kaisha, Ltd. Space Charter and Sailing Agreement in the Far East-U.S. Pacific Coast Trades.
Parties:
Mitsui O.S.K. Lines, Ltd.
Kawasaki Kisen Kaisha, Ltd.

Synopsis: The proposed amendment would delete EAC Transpacific Service, Ltd. as a party to the agreemet.

By Order of the Federal Maritime Commission.
Dated: May 24, 1988.

Joseph C. Polking,
Secretary.

[FR Doc. 88–12021 Filed 5–26–88; 8:45 am]
BILLING CODE 6730–01–M

[Fact Finding Investigation No. 17]

Rates, Charges and Services Provided at Marine Terminal Facilities; Order Extending Investigation

May 24, 1988.

The Commission instituted this nonadjudicatory investigation on May 14, 1987, to examine the furnishing of marine terminal facilities and services in connection with the transfer of cargo between an ocean common carrier, on the one hand, and a shipper or consignee or other means of transportation, on the other. The Commission directed the Investigative Officer to provide a final report of findings and recommendations no later than one year after publication of the Order in the **Federal Register** (52 FR 18743, May 19, 1987). The Investigative Officer has now advised that an additional sixty days will be needed for submission of a final report.

Therefore, it is ordered. That the Investigative Officer shall issue to the Commission a final report of findings and recommendations on or before July 18, 1988.

By the Commission.

Joseph C. Polking,
Secretary.

[FR Doc. 88–12022 Filed 5–26–88; 8:45 am]
BILLING CODE 6730–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those packages submitted to OMB since the last list was published on May 20, 1988.

Health Care Financing Administration

(Call Reports Clearance Officer on 301–594–1238 for copies of package)

1. Licensure Forms for the Clinical Laboratory Improvement Act (CLIA)—0938–0151—The CLIA of 1967 requires that clinical laboratories soliciting or accepting specimens in interstate commerce hold a valid license or letter of exemption for licensure issued by the Secretary of Health and Human Services. Respondents: Businesses or other for-profit, Small businesses or organizations. Number of Respondents: 6,359; Frequency of Response: Annually; Estimated Annual Burden: 1,851 hours.

2. Comprehensive Outpatient Rehabilitation Facility Survey Forms and Information Collection Requirements—0938–0267—In order to participate in the Medicare, Medicaid Program as a CORF providers most meet Federal conditions of participation.

These forms are used to record compliance with the conditions and report it to HCFA. Respondents: State or local governments. Number of Respondents: 54; Frequency of Response: Annually; Estimated Annual Burden: 526.5 hours.

OMB Desk Officer: Allison Herron.

Office of Human Development Services

(Call Reports Clearance Officer on 202–472–4415 for copies of package)

1. State Program Report, Title III of the Older Americans Act, Grants for State and Community Programs on Aging—0980–0004—and—0980–0120—Comply with statutory requirements relative to annual reporting on Title III services and programs for the aged, monitor Program operations, respond to Congress, OMB, GAO and others. Respondents: State or local governments. Number of Respondents: 59; Frequency of Response: One-time; Estimated Burden: 1,033 hours.

OMB Desk Officer: Shannah Koss-McCallum.

Public Health Services

(Call Reports Clearance Officer on 202–245–2100 for copies of package)

National Institutes of Health

1. Primary Prevention (Smoking) of Cancer in Black Populations: Physican Delivered Intervention—NEW—A Physician delivered smoking cessation program will be assessed using in-person interviews and telephone surveys along with chemical validation of smoking cessation. The data will help guide NCI's National Cancer Prevention and Control program and provide needed information to assess the effectiveness of a physician delivered smoking cessation program in the black population which is disproportionately effected by cancer mortality. Respondents: Individuals or households. Number of Respondents: 1,372; Frequency of Response: Single-time; Estimated Annual Burden: 201 hours.

OMB Desk Officer: Shannah Koss-McCallum.

As mentioned above, copies of the information collection clearance packages can be obtained by calling the Reports Clearance Officer, on one of the following numbers:

PHS: 202–245–2100
HCFA: 301–594–1238
OHDS: 202–472–4415

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503, ATTN: (name of OMB Desk Officer).

Date: May 23, 1988.

James F. Trickett,

Deputy Assistant Secretary, Administrative and Management Services.

[FR Doc. 88–11951 Filed 5–26–88; 8:45 am]

BILLING CODE 4150–04–M

Agency for Toxic Substances and Disease Registry

Pilot and Epidemiologic Studies To Determine the Relationship Between Human Exposure to Hazardous Substances and Adverse Health Outcomes; Program Announcement and Notice of Availability of Funds for Fiscal Year 1988

The Agency for Toxic Substances and Disease Registry (ATSDR) announces that competitive Grant and Cooperative Agreement applications are being accepted to provide financial assistance for States to conduct Pilot and Epidemiologic studies to determine the relationship between human exposure to hazardous substances in the environment and adverse health outcomes. The Catolog of Federal Domestic Assistance number is 13.161.

Program Objective

The objective of this program is to assist the recipients' capability to characterize the relationship between exposure to hazardous substances and adverse health outcomes through the development and use of site-specific health study protocols, studies at multiple sites with similar hazardous substances, and the implementation of site-specific or multiple-site health investigations.

Project Types

Financial and technical assistance will be provided to the recipients for conducting the following types of projects:

A. Pilot Studies

1. Symptom/disease prevalence studies—Symptom and disease prevalence studies consist of a measurement of self-reported disease occurrence which may be validated through medical records, if available. This study will collect citizens' health concerns in a standardized manner and determine if a health problem may exist in the community which requires further investigation. If unusual disease occurrence is discovered, additional investigations to determine etiologic factors may be undertaken. Recommendations will be developed for identified health problems which may include public education, additional environmental sampling, biological exposure studies, epidemiologic studies, registries, surveillance projects, or remedial actions.

2. Exposure studies—Biological sampling of persons at potentially high risk of exposure will be performed to determine if exposure can be verified. Test results will be compared to published normal values or compared with unexposed reference populations. The biological tests may include direct assay of chemicals or their metabolites or an indirect assay testing for other biological markers of exposure. If exposure to hazardous substances can be verified, additional investigations to determine if adverse health effects are occurring may be recommended. Follow-up recommendations may include public education, additional environmental sampling, additional biological exposure studies, epidemiologic studies, registries, surveillance projects, and/or remedial actions.

3. Cluster investigation studies—Investigations of putative disease clusters will be conducted to determine if the cases do represent an unexpected excess in the number of cases present in the concerned community. Investigations will consist of confirmation of the case reports; determine if they represent an unusual disease occurrence; and, if possible, investigate possible etiologic and environmental factors. Follow-up recommendations may include public education, additional environmental sampling, additional biological exposure studies, epidemiologic studies, registries, surveillance projects, and/or remedial actions.

B. Epidemiologic Studies

Analytic investigations evaluate the possible causal relationships between exposure to hazardous substances and disease outcome by testing a scientific hypothesis. Information such as the strength of the association between two factors and biological plausibility of the outcome is to be considered. Case-control, cohort, cross-sectional, survival, or other scientifically valid study designs may be considered. Recommendations may include public education, additional environmental sampling, registries, surveillance projects or remedial actions.

Type of Assistance

Awards resulting from this announcement will be either Grants or

Cooperative Agreements. Up to 20 awards will be made.

Determination of Which Instrument to Use

Applicants must specify the type of award for which they are applying, either grant or cooperative agreement. The funding agency will review the applications in accordance with the appropriate criteria. Projects funded through a cooperative agreement that involves collection of information from 10 or more individuals will be subject to review under the Paperwork Reduction Act.

Program Requirements

A. Cooperative Agreements

In a Cooperative Agreement, the funding agency will assist the collaborator in conducting the studies to determine the relationship between exposure to hazardous substances and illness. The application should be presented in a manner that demonstrates the applicant's ability to address the health problem in a collaborative manner with the funding agency.

The Cooperative Activities of the recipient agency and the funding agency are as follows:

1. Recipient Activities

a. Background review—Review environmental sampling information, human disease surveillance information, and other appropriate information to identify populations potentially exposed to hazardous substances.

b. Study design and implementation—Design, develop, and implement a protocol to conduct the necessary pilot or epidemiologic study. The protocol will cover all aspects of the project.

c. Peer review—Recipient, with assistance from the funding agency, will conduct a peer review of the proposed study protocol prior to implementation of the pilot or epidemiologic study and at the completion of the study prior to submission to the funding agency. The peer review should be conducted by a scientific committee with appropriate representation to objectively evaluate the study findings.

d. Recipient is expected to maintain accurate and timely accounting records with proper classification of expenditures in order to allow a full cost recovery of funds awarded under the Grant or cooperative agreement.

e. Recipient is required to provide proof by way of citation to state code or regulation or other state pronouncement given the authority of law, that medical information obtained pursuant to the agreement, pertaining to an individual, and therefore considered confidential, will be protected from disclosure when the consent of the individual to release identifying information is not obtained.

2. ATSDR Activities

a. Assist in the development of the pilot or epidemiologic study.

b. Assist in the analysis of information on background morbidity and mortality rates for the study area.

c. Provide epidemiologic and other technical assistance in both the planning and implementation phases of the field work called for under the study protocol.

d. Consult with and assist in monitoring the collection and handling of information and the sampling and testing activities.

e. Participate in the statistical and epidemiologic analysis.

f. Collaborate in the interpretation of the study findings.

g. Collaborate with recipient in organizing and conducting a peer review of study protocol and the results of the study prior to publication and submission of the final report.

B. Grants

A grant application should be presented in a manner that demonstrates the applicant's ability to address the environmental health problem. In addition to financial support requested, the application should include a protocol to conduct the pilot or epidemiologic study for the problems identified in the Pre-Application (see Applications A). The protocol should contain consent forms and questionnaires, baseline morbidity and mortality information, the procedure to collect biologic and environmental specimens, laboratory analysis and medical evaluation of test results of biologic specimens, statistical and epidemiologic analysis of study information, and a description of the safeguards to protect the confidentiality of individuals on whom data is collected.

The applicant must conduct a peer review of the pilot or epidemiologic study as described under Cooperative Agreements A.1(c) above.

Availability of Funds

It is anticipated that awards will be for a 12-month budget period with a proposed project period ranging from 1 to 5 years. Approximately $3,000,000 will be available in Fiscal Year 1988. It is anticipated that up to 20 cooperative agreements/grants will be funded. ATSDR anticipates that funds will be available to expand the number of cooperative agreements/grants in future years to all States and Territories, depending upon the needs in these jurisdictions.

Authority

ATSDR's authority to enter into cooperative agreements and/or grants with States to conduct health studies is set forth in section 104(i)(15) of the Comprehensive Environmental Response, Compensation, and Liability Act as amended by the Superfund Amendments and Reauthorization Act (42 U.S.C. 9604(i)(15)).

Eligible Applicants

The only eligible applicants are the official health agencies of the States, including the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Federated State of Micronesia, the Republic of the Marshall Islands, the Republic of Palau, the Northern Mariana Islands, and American Samoa. Local health jurisdictions may apply with the concurrence of the State Health Officer.

Application Submission and Deadline Dates

The original and two copies of the application (PHS Form 5161–1 revised 3–86) must be submitted to Chief, Grants Management Branch; Procurement and Grants Office; Centers for Disease Control; 255 East Paces Ferry Road NE., Room 321; Atlanta, Georgia 30305. Applications will be accepted throughout the fiscal year only after the applicant has been informed in writing by the Grants Office that the pre-application has been reviewed and ATSDR will consider a formal application.

Formal Application Content

In a narrative format, the applicant should include a discussion of those areas listed under "Program Requirements" as they relate to this proposed program. Since these criteria serve as the basis for evaluating the application, omissions or incomplete information may affect the rating of the application.

Other Submission and Review Information

Applications are not subject to review as governed by Executive Order 12372 entitled "Intergovernmental Review of Federal Programs."

Scheduling and Reporting

The length of time the program will continue in any State will depend upon the complexity of these problems

associated with any particular hazardous substance site.

Annual performance and financial status reports are required no later than 90 days after the end of each budget period. Final financial status and performance reports are requested 90 days after the end of each project period.

At a minimum, an annual meeting will be held between the recipients and ATSDR staff to discuss program progress, problems, etc.

Methods and Criteria for review

A. Review Procedure

Applications will be reviewed by an ad hoc review group established in accordance with the Public Health Service Grants Administration Manual, Part 134.

B. Competitive Funding

Competing activities, including the initial application for a new project period, will be reviewed and evaluated according to the following criteria:

1. Scientific and Technical Review Criteria of New Applications

a. Relevance of the proposal to the objective of this program.

b. Demonstrated experience in evaluating human exposures to hazardous substances in the environment through multi-media exposure pathways.

c. Training and experience of staff to be assigned to and/or hired for the project.

d. Suitability of facilities and equipment available or to be purchased for the project.

e. Appropriateness of the requested budget relative to the work proposed.

f. Capability of the applicant and its consultants to carry out the tasks involved in the project.

g. Soundness and innovation of the proposed approach to the range of activities presented in the project.

h. Capability of the applicant's administrative structure to foster successful scientific and administrative management of a study as described in the application.

i. Adequacy of the proposed time frame for completion of studies.

2. Review of Continuation Applications

Continuation awards within the project period will be made on the basis of the following criteria: (1) Satisfactory progress in meeting project objectives; (2) objectives for the new budget period are realistic, specific, and measurable; (3) proposed changes in described long-term objectives, methods of operation, need for grant/cooperative agreement support, and/or evaluation procedures will lead to achievement of project objectives; and (5) the budget request is clearly justified and consistent with the intended use of cooperative agreement/grant funds.

Applications

A. Pre-Applications

Formal applications will be solicited by the Grants Management Officer only after a pre-application is received, reviewed, and approved by ATSDR. The pre-application (two to three pages plus a proposed budget with justification) should be submitted only after the completion of a health assessment or an emergency response report which indicates a potential health problem or after a review of relevant health-related information indentifies the existence of a health problem or potential exposures which require public health investigation actions.

Pre-applications should be submitted using PHS Form 5161–1 (revised 3–86). The original and two copies of the pre-application must be submitted to: Chief, Grants Management Branch; Procurement and Grants Office; Centers for Disease Control; 255 East Paces Ferry Road NE., Room 321; Atlanta, Georgia 30305.

Specific Criteria Necessary to Initiate an Exposure Study

1. Human exposure is believed to be occurring because of direct human interaction with a pathway of exposure, such as direct contact, inhalation, or ingestion, known to be contaminated by a hazardous substance; and

2. People potentially exposed along this pathway can be identified and located for testing; and

3. Adequate quality controlled and sensitive laboratory test is available to detect the presence of the hazardous substance, its metabolite, or other biological market known to be closely associated with exposure which is measurable in some biological tissue or fluid; and

4. Adequate resources and local cooperation are available; and

5. Previous experience and scientific knowledge are inadequate or insufficient to predict if biological uptake of hazardous substances or illness would occur under the environmental conditions present at the site.

Specific Criteria Necessary to Initiate a Symptom/Disease Prevalence Study

1. The presence of a human population in the vicinity of a hazardous substance site; and

2. Exposure of a human population to a hazardous substance(s) has been documented or a reasonable concern for the potential of a yet undefined route of exposure; and

3. Reasonable concern generated by reports of disease occurrences in the community; and

4. Either no available information regarding the potential for exposure observed at other similar sites or previously documented exposures observed occurring at other similar sites; and

5. Adequate resources and local cooperation are available.

Specific Criteria Necessary to Initiate Cluster Investigation Studies

1. The presence of a human population in the vicinity of a hazardous substance site; and

2. Exposure of a human population to a hazardous substance(s) has been documented or a reasonable concern for the potential of a yet undefined route of exposure; and

3. Reasonable concern generated by reports of disease occurrences in the community; and

4. Either no available information regarding the potential for exposure observed at other similar sites or previously documented exposures observed occurring at other similar sites; and

5. Case information can be located or collected to verify the disease and document the geographic and temporal occurrence of the cases; and

6. Biological plausibility between the hazardous substances at the site and the disease cases being reported; and

7. Adequate resources and local cooperation are available.

Specific Criteria Necessary to Initiate Epidemiologic Studies

1. Biological levels indicating the level of exposure are available or can be obtained or when other similarly predictive surrogate measure of exposure can be obtained; and

2. The possible effects of the exposure are known; and

3. The health effect is relatively specific or is caused only by the exposure; and

4. Enough people are exposed to allow statistically valid conclusions for the study; and

5. Adequate resources and local cooperation are available.

Information

Further information on this project may be obtained from:

Jeffrey A. Lybarger, M.D., Chief, Epidemiology and Medicine Branch, Agency for Toxic Substances and Disease Registry, 1600 Clifton Road NE., Mailstop F38, Atlanta, Georgia 30333, 404/488–4600.

and/or

Nealean K. Austin, Grants Management Specialist, Procurement and Grants Office, Centers for Disease Control, 255 East Paces Ferry Road NE., Room 321, Atlanta, Georgia 30305, 404/842–6575.

Dated: May 23, 1988.

Walter R. Dowdle,

Acting Administrator, Agency for Toxic Substances and Disease Registry.

[FR Doc. 88–11948 Filed 5–26–88; 8:45 am]

BILLING CODE 4160–70–M

Food and Drug Administration

[Docket No. 86P–0426/CP]

Protek Inc.; Hip Joint Metal/Ceramic/Polymer Semi-Constrained Cemented or Uncemented Prosthesis; Panel Recommendation on Petition for Reclassification

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment the recommendation of the Orthopedic and Rehabilitation Devices Panel (the Panel). The Panel recommended that FDA reclassify the hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, from class III (premarket approval) into class II (performance standards). The Panel made this recommendation after the review of a reclassification petition filed by PROTEK, Inc., Indianapolis, IN. FDA is also issuing for public comment its tentative findings on the Panel's recommendation. After reviewing any public comments on the recommendation and FDA's tentative findings, FDA will approve or deny the reclassification petition by order in the form of a letter to the petitioner. FDA's decision on the petition will be announced in the **Federal Register**.

DATE: Comments by July 26, 1988.

ADDRESS: Written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Thomas J. Callahan, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7238.

SUPPLEMENTARY INFORMATION: On October 15, 1986, PROTEK, Inc., Indianapolis, IN 46278, submitted to FDA under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(2)) and 21 CFR 860.134 a reclassification petition for a device (Ref. 1). The petitioner requested that the hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, be reclassified from class III into class II. The subject device is automatically classified into class III under section 513(f)(1) of the act because it is not a preamendments device (i.e., a device that was in commercial distribution before May 28, 1976), and it is neither substantially equivalent to a preamendments device nor substantially equivalent to any postamendments device (i.e., a device that has been placed in commercial distribution since May 28, 1976), which has subsequently been classified into class II or class I.

Section 513(f)(2) of the act provides that a manufacturer or importer of a device classified into class III under section 513(f)(1) of the act may file a petition for reclassification of the device into class I or class II. FDA's regulations in 21 CFR 860.134 set forth the procedures for the filing and review of a petition for reclassification of such class III devices. For purposes of reclassification of the hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, it is necessary to show that the proposed new class has sufficient controls to provide reasonable assurance of the safety and effectiveness of the device.

Consistent with the act and the regulations, the agency referred the reclassification petition to the Panel, and on October 31, 1986, during an open public meeting, the Panel recommended that FDA reclassify the generic type of device from class III into class II. The Panel also recommended that FDA assign to this type of device the designation "hip jont metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis."

I. Background

Originally the hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, as a system could have been classified as a class II device, except for the presence of the ceramic head. The system, without the ceramic head, is substantially equivalent to other devices that have been classified by the agency (see the metal/polymer semi-constrained cemented prosthesis (21 CFR 888.3350)). However, the presence of the ceramic head creates a "new device" that has been automatically classified into class III by operation of law (see 21 U.S.C. 360c(f)). DePuy, Inc., submitted a premarket notification for the Mueller femoral stem, ceramic head, and polyethylene acetabular component on June 16, 1977. The device was found not to be substantially equivalent to any device that was in commercial distribution before May 28, 1976, and therefore was deemed to be a class III device under 21 U.S.C. 360c(f). (see the **Federal Register** of February 24, 1978; 43 FR 7709.)

DePuy then submitted a petition to reclassify the device from class III to class II on December 2, 1977. The petition was presented to the Orthopedic Classification Panel, and FDA received their recommendation to reclassify the device into class II on March 27, 1978. FDA disagreed with the Panel and published their denial of the reclassification in the **Federal Register** of June 6, 1978 (43 FR 24601).

Richards Manufacturing Co. submitted a premarket notification for the Autophor/Xenophor femoral stems with ceramic femoral heads articulating with a ceramic acetabular component. On December 12, 1980, this device was also found to be not substantially equivalent to any device that was in commercial distribution before May 28, 1976. On August 21, 1984, a similar not substantially equivalent decision was made for the Kyocera Bioceramic Hip Stem with an interference fit ceramic head and a screw-in (uncemented) ceramic backed ultra high molecular weight polyethylene (UHMWPE) acetabular cup.

The Richards Manufacturing Co. submitted a premarket approval application (PMA) for the OsteoAutophor Ceramic Total Hip Replacement System. On November 5, 1982, FDA approved this device under PMA P810048 (Ref. 2).

Four years later, after reviewing the data in the literature, the agency sent a letter dated May 2, 1986, to manufacturers of orthopedic implants requesting assistance in gathering public information and clinical data to support a reclassification from class III to class II of a total hip prosthesis which included a ceramic femoral head.

The literature indicated that reclassification would benefit both the industry and the agency. The agency received comments, the majority of

which were favorable, with one opposing comment from Richards Manufacturing Co. On October 15, 1986, PROTEK, Inc., submitted a petition for reclassification. The data submitted address the performance of the Feldmuehler ceramic head. The generic type of device subject to reclassification only includes the Feldmuehler ceramic head, and excludes the Kyocera ceramic head because there are insufficient data on the record to support reclassification of the Kyocera type of device.

II. Device Description

A hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis is a device intended to be implanted to replace a hip joint.

The device limits translation and rotation in one or more planes via the geometry of its articulated surfaces. It has no linkage across the joint. The two-part femoral component consists of a femoral stem made of alloys to be fixed in the intramedullary canal of the femur by impaction with or without use of bone cemet. The proximal end of the femoral stem is tapered with a surface that ensures positive locking with the spherical ceramic (aluminum oxide, Al_2O_3) head of the femoral component. The acetabular component is made of UHMWPE, or UHMWPE reinforced with metal alloys, and used with or without bone cement.

A reclassification of the metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis will allow all marketed metal femoral stems, the self-locking spherical ceramic head and an UHMWPE acetabular cup and all substantially equivalent components to be reviewed under section 510(k) (21 U.S.C. 360(k)) of the act.

III. Recommendation of the Orthopedic and Rehabilitation Devices Panel

The Panel met on October 31, 1986, in an open public meeting to discuss the subject device. The Panel recommended that the hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, for use in the reconstruction of the hip to restore function, stability and motion be reclassified from class III into class II and that FDA assign a low priority for the development of a performance standard. The Panel also recommended that the labeling for the device include a comprehensive description of the risks presented by the device and identify the various kinds of biocompatible metal and polymer components that must be used with the ceramic femoral head. Additionally, the Panel recommended that the primary properties of the ceramic material should comply with a voluntary material standard prepared by the International Standards Organization (ISO–6474) (Ref. 5).

IV. Summary of the Reasons for the Recommendation

The Panel gave the following summary of reasons for recommending that the metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, be reclassified from class III to class II:

1. General controls by themselves are insufficient to provide reasonable assurance of the safety and effectiveness of the device.

2. There is sufficient publicly available information to demonstrate that risks to health have been characterized for the device and that the relationships have been established between these risks and the performance parameters of the device. Weighing the benefits derived from implantation of the device (reduction in pain, improvement in quality of life, and improvement in mobility) against the risks presented by use of the device (adverse tissue reaction, loosening, pain, infection, structural failure of the device, mechanical wear debris produced by articulating components, and possible reoperation for removal of device), the Panel believes that the benefits to be obtained outweigh the risks presented. For these reasons, the Panel recommended that the device be reclassified from class III to class II.

3. A performance standard is necessary to control the design, material composition, and mechanical properties of the device, such as its flexibility, rigidity, strength, and surface finish, in order to prevent loss or reduction of limb function. Sufficient information is available to establish such a standard. However, development of such a standard is a low priority because the device has such low levels of known risks, such as structural failure, loosening, pain, and loss of function. The comparable safety and effectiveness characteristics of devices found to be substantially equivalent to the proposed reclassified type of device can be assured by the general controls including, of course, the premarket notification process under section 510(k) of the act.

V. Risks to Health

The Panel has determined that the primary foreseeable risks to health associated with the device are related to structural failure of the ceramic femoral head leading to crippling pain and total loss of function; these health risks require surgical intervention for correction. Other reasonably foreseeable risks to health that may be associated with the device are adverse tissue reactions, loosening, infection, migration of the device, loss of function, and pain. It is well established that these additional risks to health may result in the need for additional surgical intervention, possibly including implant revision.

VI. Summary of Data Upon Which the Recommendation is Based

When the hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, that is described under the heading "Device Description" is manufactured in conformance to the specifications presented in the petition, the overall impact of implantation of the device as a total hip replacement can be predicted. Risks to health that have been observed as surgical complications reported during the clinical studies included in support of this petition are few and similar to those reported with respect to implantation of other orthopedic hip joint prostheses now in commercial distribution. (see the final rule classifying preamendments orthopedic devices published in the **Federal Register** of September 4, 1987; 52 FR 33686).

The petition (Ref. 1) and other publicly available data adequately describe the technical features and conditions of use of the device which ensure that it is safe and effective. The Panel based its recommendation on the clinical performance and safety of total hip prostheses which are representative of the generic type of device identified in the petition. The Panel also considered publicly available preclinical experience with aluminum oxide ceramics which have composition and mechanical properties representative of that used in the ceramic femoral head of the device. The femoral stem of the device, manufactured of metal alloys that meet specifications of existing voluntary standards (such as ASTM F75, specifications for cast cobalt-chromium-molybdenum alloy for surgical implant applications; ASTM F90, specifications for cobalt-chromium-nickel-tungsten applications; and ASTM F136, specifications for titanium, 6A1-4V ELI Alloy, or surgical implant applications), provides anchorage for the ceramic femoral head which articulates with the UHMWPE acetabular resurfacing component. The proximal end of the femoral component is machined to a

specific conical taper and may be provided with a structured surface to assure positive locking with the ceramic head. The femoral head is manufactured of aluminum oxide (Al_2O_3) ceramic conforming to the material specifications of existing voluntary standards (Ref. 5). The head is spherical and articulates against an UHMWPE acetabular component of an appropriate interior diameter; the head must also be designed to mechanically interlock with modular stems having a matching tapered cylindrical neck. The acetabular component is manufactured of UHMWPE with a metal or metal alloy support cup. The UHMWPE meets specifications of existing voluntary standards (Ref. 7).

The admiistrative record shows that the three standards (Refs. 5, 6, and 7) applicable to the materials used in the device were referenced in the petition. These standards are currently employed by the orthopedic implant industry in the manufacture of hip prostheses and provide the device with well-defined chemical and physical properties which ensure the strength, and contribute to the performance, safety, and effectiveness of the device.

Structural failure has been identified in earlier clinical literature (Refs. 10 and 11) as a possible cause of risks to health associated with the device. Although infrequent, the incidence of structural failure in these reports was found to be related either to the surgical technique or to the interfaces within the device. Structural failure of the ceramic head may also be caused by manufacturing defects, mishandling, or its use with unsuitable femoral or acetabular components. The Panel considered recent clinical experience from five European clinical studies (Ref. 3) and a retrospective study performed in the United States (Ref. 4) which were presented to it by manufacturers, other than the sponsor of the petition, during the open Panel meeting of October 31, 1986. The clinical data and retrospective study results did not report any structural failures of the ceramic head after 2 to 5 years of followup of patients after implantation (Refs. 3 and 4). Laboratory investigations by Dorre and Dawihl (Refs. 15 and 17) support the recent clinical results and document the service life of the ceramic head of the femoral components when it was used with a friction cone locking element under a variety of laboratory and in vivo (i.e., animal) conditions. Other reports show that when the femoral cone design properly matches that of the internal coupling cone design of the ceramic head, the ceramic head is capable of withstanding 46 kilonewtons (10,326 lbs.) of co-axial load with a probability of fracture of 0.03 percent (Ref. 17). The ceramic head theoretically is capable of withstanding a minimum of 30 years of use (Ref. 16).

The mechanical behavior of aluminum oxide ceramic in both body fluids and simulated body environments have also been studies extensively by Dawihl (Ref. 13), Dalgleish (Ref. 14), and Dorre (Refs. 15, 16, and 17). These reports show that the ceramic material does not undergo significant alteration due to aging and maintains its structural strength under the conditions experienced in the body. The petition referenced three existing material standards (Refs. 5, 6, and 7). Manufacturer's conformance to these voluntary standards during construction of the device assures that the materials of the stem, ceramic head and acetabular cup have well-defined chemical, physical, and mechanical properties.

Adverse tissue reaction has also been identified in earlier reports (Refs. 10 and 11) as a potential risk to health. Laboratory testing confirms that significantly less wear is produced when UHMWPE articulates with a ceramic head than when UHMWPE articulates with a metal head (Refs. 12, 18, and 19). Aluminum oxide ceramics which meet existing voluntary standards of composition have been shown through animal and human experiments to be a biocompatible implant material (Refs. 8 and 9).

Furthermore, the available data and results from European and United States clinical studies of 2 to 5 years of patient followup do not report any cases of adverse tissue reaction from use of the ceramic femoral head (Refs. 3 and 4).

The Panel reviewed the clinical results of the multi-clinic (5 European centers) study (Ref. 3) and the retrospective study done in the United States (Ref. 4). The European series reported no cases of loosening; the study in the United States reported 2 cases of stem loosening, but these were unrelated to the use of the ceramic head component. In the European data, 2 cases (0.8 percent of 253 hip prostheses) of superficial infection which later healed without difficulty were reported. Eleven cases (4.4 percent of 253 prostheses) were reported to have experienced stem migration of 2 millimeters or more. The extent and incidence of infection and migration were not reported in the United States study.

Intraoperative and early postoperative complications were observed; for example, occasional fraction of the trochanter or development of hematomas. These occurences were considered by the Panel to be typical of complications observed with hip prostheses in commercial distribution. The Panel believed that these complications were unrelated to the use of the ceramic head reclassified in the petition, and are typical for the patient populations examined.

The Panel reviewed the clinical results of 245 European patients (Ref. 3) who recieved 253 hip prostheses (8 bilateral replacements). There were 247 cases (239 patients) with a patient followup range after implantation of .75 to 3.58 years (mean followup of 2.3 years and standard deviation of .5 years). Based on the Harris hip evaluation system which includes function and pain assessment, approximately 91 percent of the patients showed excellent/good results. The manufacturer compared the clinical results of the European patients, using the device subject to the petition, with a Zweymuller femoral stem and ceramic head, to results published in the literature of implantation of conventional hip protheses in commercial distribution. The analysis of the study results indicates that the clinical results of these European patients was compared to that of other recipients of conventional hip prostheses. The Panel also reviewed the clinical results of 49 cases in the United States (5 bilateral replacements) (Ref. 4). Thirty of 33 cases (98 percent) with 2 years or more of followup had excellent/good post surgical patient scores using the Harris hip evaluation and scoring system.

In the European studies, no cases of implant failure requiring revision occurred (Ref. 3); in the U.S. study, two patients developed loose femoral stems, and surgical revisions were necessary 4 years post-surgery (Ref. 4). The manufacturer documenting the experience in the United States, also provided the results of a survivorship analysis which compared the performance of the Mueller femoral stem and ceramic head to the performances of metal-on-plastic hip prostheses in commercial distribution. After 5 years post-surgery, 95 percent of 40 of these prostheses remained implanted compared to 94.9 percent of conventional metal-on-plastic prostheses.

The primary risks which are directly attributable to the ceramic femoral head, i.e., structural failure and adverse tissue reaction, can be controlled by a performance standard (class II controls). The risk of adverse tissue reaction is

related to the chemical composition and physical properties of the aluminum oxide ceramic used in the manufacture of the ceramic head and can be controlled by manufacturer's conformance with existing material specifications in voluntary standards for aluminum oxide ceramics. Structural failure is related to: (1) The physical and mechanical properties of the aluminum oxide ceramic; (2) to design/functional parameters of the ceramic femoral head; and (3) to the manufacturing procedure used to fabricate the device. Therefore, structural failure can be controlled through standards applicable to proper material selection and device design and through good manufacturing practices. In addition, proper device labeling will ensure that the surgeon uses the device appropriately. The other foreseeable risks to health attributable to this device have a low probability of occurrence, with a relatively low level of significance, and are known to be associated with prostheses for total hip replacement in commercial distribution.

In summary, the Panel, based on publicly available valid scientific evidence, believes that the hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding ceramic acetabular cups, can be regulated as a class II device to reasonably assure the device's safety and effectiveness, if it is designed with the proper materials and functional specifications, and manufactured under an adequate quality assurance program to ensure critical specifications are met within specified tolerances and proper labeling.

VII. References

The transcript of the panel meeting and the following material are on public file in the Dockets Management Branch (address above) where it may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. PROTEK, Inc., reclassification petition, 86P-0426.

2. Summary of safety and effectiveness for the Osteo Ceramic Hip, 47 FR 55519, December 10, 1982 (Docket No. 82M-0387).

3. Clinical Studies and Results from Five European Centers with the Biolox/Ceramic Head and the Zweymuller System in 245 Patients, Premarket Approval Application P840016, ALLO PRO.

4. A retrospective study of 64 Ceramic Ball Hip Prostheses, September 1986, Depuy.

5. Implants for Surgery—Ceramics Materials Based on Alumina, International Standards Organization, ISO—6474.

6. Implants for Surgery—Metallic Materials, International Standards Organization, ISO—5832.

7. Implants for Surgery—Ultra-high Molecular Weight Polyethylene, International Standards Organizations, ISO—5834.

8. Willert H.G., et al., "The Morphology of the Tissue Reaction to Very Small Al_2O_3—Ceramic Particles", Unpublished, Presented at the 3d Annual Meeting of the Society for Bio-Materials, April 1977, New Orleans, LA.

9. Harms, J., E. Mausle, "Tissue Reaction to Ceramic Implant Material", *Journal of Biomedical Materials Research*, vol. 13, No. 1, January 1979, pp. 67–87.

10. Plitz, W., P. Griss, "Clinical, Histomorphologic and Material-Related Observations on Removed Aluminum Ceramic Hip Joint Components; Implant Retrieval; Material and Biologic Analysis Conference Proceedings", U.S. Department of Commerce, NBS, p. 131, 1981.

11. Griss, P., G. Heimke, "Five Years Experience with Ceramic Metal-Composite Hip Endoprostheses", *Archives of Orthopaedics and Trauma Surgery*, p. 98, 1981.

12. Semlitsch, M., "Improved UHMW Polyethylene Low Friction Hip Endoprosthesis Using Al_2O_3 Ceramic Instead of Metal for the Articulating Ball", Engineering in Medicine, vol. 2, "Advances in Artificial Hip and Knee Joint Technology", Springer-Verlag, Berlin and Heidelberg, 1976, pp. 456–457.

13. Dawihl, W., E. Dorre, "Adsorption Behavior of High Density Aluminum Ceramics Exposed to Fluids", Chapter 20, Evaluation of Biomaterials, (1982), Edited by Winter Leray, de Groot, pp. 239–245.

14. Dalgleish, B.J., and R.D. Rawlings, "A Comparison of the Mechanical Behaviors of Aluminum in Air and Simulated Body Environment", *Journal of Biomedical Materials Research*, vol. 15, 1981, pp. 527–542.

15. Dorre, E., W. Dawihl, "Ceramic Hip Endoprosthesis", Chapter 9, Mechanical Properties of Biomaterials, (1980), edited by Hastings and Williams, pp. 113–127.

16. Dawihl, W., E. Dorre, G. Altmeyer, "Determination of the Services Life of a Friction Cone Locking Fixation Element for Use in Ceramic Total Hips", Biomedical Techniques, vol. 25, 1980, pp. 311–315, (English Translation).

17. Dorre, E., W. Dawihl, V. Krahn, et. al., "Do Ceramic Components of Hip Joints Maintain Their Strength in Human Bodies", Ceramics in Surgery, (1983) Edited by P. Vacenzini, Elserier, Science Publishing Co., pp. 61–72.

18. Niederer, P.G., "Total Hip Arthroplasty with Ceramic Polyethylene Articulation", Scientific Exhibit presented at Sicot 1978, Kyoto, Japan.

19. Zichner, L., M. Starker, U. Paschen, "In Vivo Wear of Total Hip Prostheses with Ceramic/PE Articulation." Unpublished, (Translation 1986).

VIII. FDA's Tentative Findings

FDA believes that the data provided by the petitioner and other persons constitute valid scientific evidence demonstrating that the controls of class II are sufficient to provide reasonable assurance by the safety and effectiveness of the generic type of device as identified in the device description section. Accordingly, the agency believes that premarket approval is unnecessary for this device. FDA tentatively agrees with the recommendation of the Panel that the generic type of device hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding ceramic acetabular cups, be reclassified from class III into class II and that the promulgation of a performance standard for the device be low priority.

IX. Economic Considerations

After considering the economic consequences of approving this reclassification, FDA certifies that this notice requires neither a regulatory impact analysis, as specified in Executive Order 12291, nor a regulatory flexibility analysis, as defined in the Regulatory Flexibility Act (Pub. L. 96–354). Approval of this petition would not have significant economic impact on a substantial number of small entities. The petitioner and all future manufacturers of the device, hip joint metal/ceramic/polymer semi-constrained cemented or uncemented prosthesis, excluding the ceramic acetabular cup, would be relieved of the costs of complying with the premarket approval requirements in section 515 of the Act (21 U.S.C. 360e). There are no off-setting costs that the petitioner would incur from reclassification into class II. The magnitude of the economic savings from approval of this petition depends on the extent of premarket approval studies the petitioner would have conducted and the number of future competitors satisfying the same requirements. Neither of these parameters can be reliably calculated to permit detailed quantification of the economic savings. Because of statutory deadlines (section 513(f)(2) of the act) and requirements in the regulations (21 CFR 860.134(b)(5)), FDA is required to publish this notice in the **Federal Register** as soon as practicable. As authorized by section 8(a)(2) of Executive Order 12291, FDA is publishing in the **Federal Register** this notice without clearance of the Director, Office of Management and Budget. As soon as practicable, FDA will notify that office of the publication of this notice.

Interested persons may, on or before July 26, 1988, submit to the Dockets Management Branch (address above) written comments on the Panel's recommendation or FDA's tentative findings. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the

name of the device and the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: May 18, 1988.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 88-11935 Filed 5-26-88; 8:45am]

BILLING CODE 4160-01-M

Advisory Committees; Meetings; Correction

AGENCY: Food and Drug Administration.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that announced forthcoming advisory committee meetings for veterinary medicine, oncologic drugs, dermatologic drugs, and pulmonary-allergy drugs (53 FR 9148; March 21, 1988). The notice inadvertently stated Adam J. Trujillo's title as "Acting Commissioner for Regulatory Affairs." This document corrects that error.

FOR FURTHER INFORMATION CONTACT: T. Rada Proehl, Regulations Editorial Staff (HFC-222), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-2994.

SUPPLEMENTARY INFORMATION: In FR Doc. 88-6059, appearing at page 9148 in the **Federal Register** of March 21, 1988, the following correction should be made: On page 9149, second column, at the end of the document, Adam J. Trujillo's title is corrected to read "Acting Associate Commissioner for Regulatory Affairs".

Dated: May 20, 1988.

George R. White,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-11934 Filed 5-26-88; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV-930-08-4212-11; Nev-058218]

Realty Action; Order Providing for Opening of Lands; Nevada

May 17, 1988.

AGENCY: Bureau of Land Management, Interior.

ACTION: Opening order.

SUMMARY: This order opens the described lands to the public land laws, including the mining and mineral leasing laws.

EFFECTIVE DATE: June 27, 1988.

FOR FURTHER INFORMATION CONTACT: Ben Collins, District Manager, Bureau of Land Management, 4765 Vegas Drive, P.O. Box 26569, Las Vegas, NV 89126, 702-388-6403.

SUPPLEMENTARY INFORMATION: The reconveyance to the United States of the following described land was published in the **Federal Register** on November 28, 1979 (44 FR 68038) and a correction notice was published on April 9, 1987 (52 FR 11561).

Mount Diablo Meridian, Nevada

T. 22 S., R. 60 E.,
Sec. 1, NE¼SE¼SE¼SE¼.
T. 22 S., R. 61 E.,
Sec. 6, lots 142, 143, 145, 150, 153, 154, 157, 162, 163, and 164.

The lands are located in Clark County, Nevada.

Upon acceptance of title, the subject land became part of the public lands administered by the Bureau of Land Management. At 9:00 a.m. on June 27, 1988, the land described above shall be open to operation of the public land laws generally, subject to valid existing rights and the requirements of applicable laws. All valid applications received prior to 9:00 a.m. on June 27, 1988, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

At 9:00 a.m. on June 27, 1988, the land will be open to location and entry under the United States mining laws and to applications and offers under the mineral leasing and material sale laws. Appropriation of any of the lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Edward F. Spang,

State Director, Nevada.

[FR Doc. 88-11965 Filed 5-26-88; 8:45 am]

BILLING CODE 4310-HC-M

[AZ-050-8-4212-11, A-23226]

Realty Action, Lease of Lands; Mohave County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action—lease of lands, Mohave County, Arizona.

SUMMARY: The following described lands and interests therein have been determined to be suitable to be classified for lease under the provisions of the *Recreation and Public Purposes Act* of June 14, 1926, as amended (43 U.S.C. 869 *et. seq.*) and the regulations established by 43 CFR Part 2740 and 2910, as amended in the Final Rulemaking published in the **Federal Register** on December 10, 1985.

T. 20 N., R. 22 W., Gila and Salt River Meridian, Arizona,
Sec. 20, portion of Lot 2, containing 10 acres more or less.

The City of Bullhead City has applied to lease the above described lands for recreational purposes. The city proposes to use these lands to construct a swimming pool, ball fields, and related recreational facilities.

Subject to all valid existing rights, the lands are hereby segregated from appropriations under any other public land law, including location under the mining laws. This segregation will terminate upon issuance of a lease, publication of a Notice of Termination, or 18 months from the date of this publication, whichever occurs first.

DATES: For a period of 45 days from the date of publication of this Notice, interested parties may submit comments to the District Manager, 3150 Winsor Avenue, Yuma, Arizona 85365. Any objections will be reviewed by the State Director, who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior, effective 60 days from the date of publication in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Mike Ford, Area Manager, Havasu Resource Area, Bureau of Land Management, 3189 Sweetwater Avenue, Lake Havasu City, Arizona 86403, 602-855-8017.

Robert V. Abbey,

Acting District Manager.

Date: May 20, 1988.

[FR Doc. 88-11962 Filed 5-26-88; 8:45 am]

BILLING CODE 4310-32-M

[NV-930-08-4220-10; N-48578]

Proposed Withdrawal and Opportunity for Public Meeting; Nevada

May 17, 1988.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The National Park Service proposes to withdraw 2.5 acres of public land for use as a temporary administrative site for the Great Basin National Park. This notice closes the land for up to 2 years from surface entry and mining. The land will remain open to mineral leasing.

DATE: Comments and requests for a public meeting must be received by August 25, 1988.

ADDRESS: Comments and meeting requests should be sent to the Nevada State Director, BLM, 850 Harvard Way, P.O. Box 12000, Reno, Nevada 89520.

FOR FURTHER INFORMATION CONTACT: Vienna Wolder, BLM Nevada State Office, 702–784–5481.

SUPPLEMENTARY INFORMATION: On April 14, 1988, a petition was approved allowing the National Park Service to file an application to withdraw the following described public land from settlement, sale, location, or entry under the general land laws, including the mining laws, subject to valid existing rights:

Mount Diablo Meridian, Nevada

T. 13 N., R. 70 E.,
Sec. 9, SE¼SE¼SE¼NW¼.

The area described contains 2.5 acres in White Pine County.

The purpose of the proposed withdrawal is to establish and protect a temporary administrative site for the Great Basin National Park. The land is currently withdrawn by the U.S. Forest Service.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the undersigned officer within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR Part 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the land will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary uses which will be permitted during this segregative period are leases, licenses, permits, and rights-of-way.

The temporary segregation of the land in connection with a withdrawal application or proposal shall not affect administrative jurisdiction over the land, and the segregation shall not have the effect of authorizing any use of the land by the National Park Service.

Edward F. Spang,

State Director, Nevada.

[FR Doc. 88–11964 Filed 5–26–88; 8:45 am]

BILLING CODE 4310-HC-M

National Park Service

National Register of Historic Places; Notice on NHL Boundaries

The National Park Service has been working to establish boundaries for all National Historical Landmarks for which no specific boundary was identified at the time of designation and therefore are without a clear delineation of the amount of property involved. The results of such designation make it important that we define specific boundaries for each landmark.

In accordance with the National Historic Landmark program regulations 36 CFR Part 65, the National Park Service notifies owners, public officials and other interested parties and provides them with an opportunity to make comments on the proposed boundaries.

The 60-day comment period on the attached National Historic Landmarks has ended, and the boundaries have been established. Copies of the documentation of the landmark and its boundaries, including maps, may be obtained from Jerry L. Rogers, Associate Director, Cultural Resources, and Keeper of the National Register of Historic Places, National Park Service, P.O. Box 37127, Washington, DC 20013–7127, Attention: Chief of Registration (Phone: 202–343–9536).

Carol D. Shull,

Chief of Registration, National Register of Historic Places, Interagency Resources Division.

City of Rocks National Historic Landmark, Cassia County, Idaho
Fort Concho National Historic Landmark District, San Angelo, Texas (Tom Green County)
Haskell Institute National Historic Landmark, Lawrence, Kansas (Douglas County)
Old Economy National Historic Landmark District, Ambridge, Pennsylvania (Beaver County)
Taos Pueblo National Historic Landmark, Taos vicinity, New Mexico (Taos Country).

[FR Doc. 88–12017 Filed 5–26–88; 8:45 am]

BILLING CODE 4310-70-M

National Register of Historic Places; Notice on Proposed NHL Boundaries

The National Park Service has been working to establish boundaries for all National Historic Landmarks for which no specific boundary was identified at the time of designation, and therefore, we are without a clear delineation of the amount of property involved. The results of such designation make it important that we define specific boundaries for each landmark.

In accordance with the National Historic Landmark program regulations 36 CFR Part 65, the National Park Service notifies owners, public officials and other interested parties and provides them with an opportunity to make comments on the proposed boundaries.

Comments on the proposed boundaries will be received for 60 days after the date of this notice. Please address replies to Jerry L. Rogers, Associate Director, Cultural Resources, and Keeper of the National Register of Historic Places, National Park Service, P.O. Box 37127, Washington, DC 20013–7127, Attention: Chief of Registration (202) 343–9536. Copies of the documentation of the landmarks and their proposed boundaries, including

maps may be obtained from that same office.

Carol D. Shull,

Chief of Registration, National Register of Historic Places, Interagency Resources Division.

Telluride Historic District, Telluride, Colorado (San Miguel County)

The Telluride Historic District is composed of two noncontiguous geographic areas: (1) the Town of Telluride and (2) Lone Tree Cemetery.

Area 1: The Town of Telluride

The point of beginning shall be Point A (the intersection of the east edge of Davis Street and the south bank of Cornet Creek).

Thence proceeding northeast along the south bank of Cornet Creek to its intersection with the southern edge of Galena Avenue; east along West Galena Avenue to its intersection with the west property line of 507 West Galena Avenue; north along the property line to its intersection with the southern edge of the alley north of West Galena Avenue; east along the alley and the alley extended to its intersection with the east property line of 447 West Galena Avenue; south along the property line to its intersection with the southern edge of West Galena Avenue; east along West Galena Avenue to its intersection with the eastern edge of Aspen Street; north along Aspen Street to its intersection with the north property line of 319 West Galena Avenue; east along the property line to its intersection with the eastern edge of the alley just east of Aspen Street; north along the alley to Point B (the intersection of the alley and the north property line of 343 North Oak Street).

Thence proceeding east along the property line to its intersection with the western edge of North Oak Street; south along North Oak Street to its intersection with the southern edge of Mountain Avenue; east along Mountain Avenue to its intersection with the east property line of 109 East Gregory Avenue; south along the property line to its intersection with the southern edge of East Gregory Avenue; east along East Gregory Avenue to its intersection with the western edge of Willow Street; south along Willow Street to its intersection with the southern edge of Galena Avenue; east along East Galena Avenue to its intersection with the western edge of the alley just east of Willow Street; south along the alley to its intersection with the southern edge of Pandora Avenue extended; east along Pandora Avenue extended and Pandora Avenue to Point C (the intersection of Pandora Avenue and the western edge of Maple Street).

Thence proceeding along Maple Street to it intersection with the northern edge of East Columbia Avenue; west along East Columbia Avenue to its intersection with the western edge of Alder Street; south along Alder Street to its intersection with the northern edge of the alley just south of East Columbia Avenue; west along the alley to its intersection with the western edge of Willow Street; south along Willow Street to its intersection with the northern edge of East Pacific Avenue; west along East Pacific Avenue to its intersection with the western edge of the alley just east of Pine Street; south along the alley to its intersection with the northern edge of San Juan Avenue; west along San Juan Avenue to its intersection with the western edge of the alley just west of Fir Street; south along the alley to Point D (the intersection of the alley with a property line just north of the San Juan River).

West along the property line to the eastern edge of Oak Street; north along Oak Street to its intersection with the south property line of 237 South Oak Street; west along the property line to its intersection with the eastern edge of Aspen Street; north along Aspen Street to its intersection with the northern edge of the alley just south of Pacific Avenue; west along the alley to a point approximately 50 feet east of the eastern edge of Townsend Street; south for approximately 250 feet; west for approximately 375 feet; north for approximately 250 feet to the northern edge of the alley just south of Pacific Avenue; west along the alley just south of Pacific Avenue to the eastern edge of Davis Street; and north along Davis Street to Point A (the intersection of the eastern edge of Davis Street and the southern bank of Cornet Creek).

Area 2: Lone Tree Cemetery

The point of beginning shall be Point A (the northwesternmost corner of Lone Tree Cemetery).

Thence proceeding east and south for approximately 875 feet to Point B (the easternmost point of Lone Tree Cemetery).

Thence proceeding west and south for approximately 550 feet to Point C (the southernmost point of Lone Tree Cemetery).

Thence west and north for approximately 375 feet to Point D.

Thence north and east for approximately 375 feet to Point A (the northernwesternmost corner of Lone Tree Cemetery).

Chilkoot Trail and Dyea Site, Taiya River Valley, Alaska (Skagway-Angoon-Yakutat Division)

Verbal Boundary Description

Beginning at Bench Mark "Lame" in T27S, R59E, Copper River Meridian (CRM), thence in a northerly direction along a line one-half mile east of the center of the Taiya River to a point on the U.S. Canadian Border one-half mile southeast of Monument 120 in T25S, R60E, CRM, thence northwest along the the U.S.-Canadian border for a distance of one-half mile, thence in a southerly direction along a line one-half mile west of the center of the Taiya River to a point due east of Bench Mark "Lame," thence due east to Bench Mark "Lame." Where the Taiya River has more than one channel running side-by-side, the "center" of the river is the center of the easternmost channel for purposes of the eastern boundary line of this description and the "center" of the river is the center of the westernmost channel for purposes of the western boundary line of this description.

[FR Doc. 88-12018 Filed 5-26-88; 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

Agricultural Cooperative; Intent To Perform Interstate Transportation for Certain Nonmembers

May 24, 1988.

The following Notices were filed in accordance with section 10526(a)(5) of the Interstate Commerce Act. These rules provide that agricultural cooperatives intending to perform nonmember, nonexempt, interstate transportation must file the Notice, Form BOP 102, with the Commission within 30 days of its annual meetings each year. Any subsequent change concerning officers, directors, and location of transportation records shall require the filing of a supplemental Notice within 30 days of such change.

The name and address of the agricultural cooperative (1) and (2), the location of the records (3), and the name and address of the person to whom inquiries and correspondence should be addressed (4), are published here for interested persons. Submission of information which could have bearing upon the propriety of a filing should be directed to the Commission's Office of Compliance and Consumer Assistance, Washington, DC 20423. The Notices are in a central file, and can be examined at

the Office of the Secretary, Interstate Commerce Commission, Washington, DC.

(1) MFC Services (AAL),

(2) P.O. Box 500, Madison, MS 39110.

(3) U.S. Hwy. 51 North, Madison, MS 39110.

(4) Melba Prince, P.O. Box 500, Madison MS 39110.

Noreta R. McGee,

Secretary.

[FR Doc. 88–11955 Filed 5–26–88; 8:45 am]

BILLING CODE 7035–01–M

Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

A. Parent: (1) Nestle Foods Corporation, 100 Manhatanville Road, Purchase, NY 10577.

Subsidiary Performing Service: (2) Food Ingredient Development Company, Inc., 4 Gannett Drive, White Plains, NY 10604.

B. 1. Parent corporation and address of principal office. Spartan Stores, Inc., 850 76th Street, Grand Rapids, MI 49508.

2. Wholly-owned subsidiaries and divisions which will participate in the operations, and state(s) of incorporation:

(i) Harding's Market, Inc., MI.

(ii) L & L/Jiroh Distributing Company, MI.

(iii) Market Development Corporation, MI.

(iv) Shield Insurance Agency, Inc., MI.

(v) United Wholesale Grocery Corporation, MI.

Noreta R. McGee,

Secretary.

[FR Doc. 88–11956 Filed 5–26–88; 8:45 am]

BILLING CODE 7035–01–M

[Docket No. AB–33 (Sub-No. 52X)]

Union Pacific Railroad Co.; Exemption; Abandonment in Sarpy County, NE

Applicant has filed a notice of exemption under 49 CFR Part 1152, Subpart F—*Exempt Abandonments* to abandon its 4.02-mile line of railroad between milepost 12.23 near Gilmore and milepost 16.25 near Papillion in Sarpy County, NE.

Applicant has certified (1) that no local traffic has moved over the line for at least 2 years and that overhead traffic is not moved over the line or may be rerouted, and (2) that no formal complaint file by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complaint within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of final assistance has been received, this exemption will be effective June 26, 1988 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve enviromental issues [1] and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2)[2] must be filed by June 6, 1988, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by June 16, 1988 with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Joseph D. Anthofer, Law Department—Room 830, 1416 Dodge Street, Omaha, NE 68179.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environemental or energy impacts if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an enviromental assessment (EA). SEE will serve the EA on all parties by June 1, 1988. Other interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275–7316.

A notice to the parties will be issued if use of the exemption is conditioned upon enviromental or public use conditions.

Decided: May 20, 1988.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 88–11958 Filed 5–26–88; 8:45 am]

BILLING CODE 7035–01–M

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See* Ex Parte No. 274 (Sub-No. 8), *Exemption of Out-of-Service Rail Lines*, served March 8, 1988.

[2] *See Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, ___ I.C.C.2d ___, served December 21, 1987, and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440–48446).

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–20, 564A]

Florsheim Shoe Co., South Canal Street, Chicago, IL; Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on March 28, 1988 in response to a worker petition received on March 28, 1988 which was filed by the Amalgamated Clothing & Textile Workers Union on behalf of workers at Florsheim Shoe Company, South Canal Street, Chicago, Illinois.

An active certification covering the petitioning group of workers remains in effect (TA–W–17,442A—impact data of May 5, 1985 and a termination date of October 21, 1988). Consequently, further investigation in this case would serve no purpose; and the investigation has been terminated.

Signed at Washington, DC this 17th of May 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 88–11994 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–30–M

Job Training Partnership Act; Indian and Native American Programs; Final Total Allocations, Allocation Formulas and Formula Rationales for Job Training Partnership Act Program Year 1988 Title IV–A Regular Program and Calendar Year 1988 (Program Year 1987) Summer Youth Employment and Training Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration of the Department of Labor is publishing the final Native American allocations.

allocation formulas and formula rationales for the Program Year 1988 (July 1, 1988–June 30, 1989) Title IV–A regular program funded under the Job Training Partnership Act and for the Calendar Year 1988 Summer Youth Employment and Training Program funded under Title II–B of the Job Training Partnership Act.

FOR FURTHER INFORMATION CONTACT: Mr. William McVeigh, Telephone: (202) 535–0507.

SUPPLEMENTARY INFORMATION: Pursuant to section 162 of the Job Training Partnership Act (JTPA), the Employment and Training Administration (ETA) of the Department of Labor (DOL) publishes the final allocations, allocation formulas and rationales for those formulas for Native American grantees to be funded under JTPA, Title IV–A, Section 401 and JTPA, Title II–B. The total amounts to be allocated are $59,713,000 for the Program Year 1988 JTPA, Title IV–A, section 401 regular program, and $13,639,358 for the Calendar Year 1988 JTPA, Title II–B, Summer Youth Employment and Training Program (SYETP).

This information, along with individual grantee planning estimates, was published in the **Federal Register** as a proposal on February 17, 1988. 53 FR 4749.

Written comments were invited from the public, but none were received. Therefore, the estimates and formulas published in the February 17, 1988, notice are adopted as the final allocations and formulas. Since no changes are made, the amounts are not reprinted herein. They can be read at 53 FR 4750–4787 (February 17, 1988).

The formula for JTPA, Title IV–A, Section 401 provides that 25 percent of the funding will be based on the number of unemployed Native Americans in the grantee's area, and 75 percent will be based on the number of poverty-level Native Americans in the grantee's area.

The formula for allocating JTPA, Title II–B, SYETP funds divides the funds among eligible recipients based on the proportion that the number of youth in a recipient's area bears to the total number of youth in all eligible areas.

The rationale for the above formulas is that the number of povery-level persons, unemployed persons and youth among the Native American population is indicative of the need for training and employment funds.

Statistics on poverty-level persons, unemployed persons and youth among Native Americans used in the above programs are derived from the Decennial Census of the Population, 1980.

Signed at Washington, DC, this 16th day of May 1988.

Roberts T. Jones,

Acting Assistant Secretary of Labor.

[FR Doc. 88–11995 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–30–M

Employment Standards Administration; Wage and Hour Division

Child Labor Advisory Committee; Subcommittee on Child Labor Regulation No. 3

A meeting of the Child Labor Advisory Committee, Subcommittee on Child Labor Regulation No. 3, will be held on June 20, 1988, from 9:00 a.m. to 5:00 p.m., and on June 21, 1988, from 9:00 a.m. to 5:00 p.m. This meeting will be held in Room N2437, Frances Perkins Building, Department of Labor, 200 Constitution Avenue NW., Washington, DC.

The Subcommittee will consider Child Labor Regulation No. 3, Employment Standards for 14- and 15-year-olds, including the permitted hours of work for such youth, and door-to-door sales of candy.

Members of the public are invited to attend these proceedings; however, since these are work sessions, seating is limited. Written data, reviews or arguments pertaining to the business before the Subcommittee must be received by the Committee Coordinator prior to the meeting date. Twenty-six copies are needed for distribution to the members and for inclusion in the meeting minutes.

Telephone inquiries and communications concerning this meeting should be directed to Ms. Nila Stovall, Coordinator for the Child Labor Advisory Committee, Room S–3028, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC 20210; telephone: area code (202) 523–7640.

Signed at Washington, DC, this 24th day of May 1988.

Paula V. Smith,

Administrator.

FR Doc. 88–12004 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–27–M

Mine Safety and Health Administration

Advisory Committee on Standards and Regulations for Diesel-Powered Equipment in Underground Coal Mines; Meeting

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: This notice provides the date, time, place, and agenda summary for the sixth meeting of the Mine Safety and Health Administration Advisory Committee on Standards and Regulations for Diesel-Powered Equipment in Underground Coal Mines.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, Room 631, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Virginia 22203; phone (703) 235–19010.

SUPPLEMENTARY INFORMATION: Pursuant to the authority contained in sections 101 and 102(c) of the Federal Mine Safety and Health Act of 1977, a public meeting of the Advisory Committee on Standards and Regulations for Diesel-Powered Equipment in Underground Coal Mines will be held between the hours of 8:30 a.m. and 5:00 p.m. on June 23 and June 24, 1988, at the Holiday Inn, 4610 N. Fairfax Drive, Arlington, Virginia 22203; (703) 243–9800.

This nine-member advisory committee was formed to advise and make recommendations to the Secretary of Labor on safety and health standards and regulations related to the use of diesel equipment in underground coal mines.

The agenda for his meeting will include a review of the Committee's draft report and recommendations to the Secretary of Labor. Any other safety and health issues which have not been addressed will be discussed at this meeting.

Official records of the meeting will be available for public inspection at the Office of Technical Support, Mine Safety and Health Administration, Room 913A, 4015 Wilson Boulevard, Arlington, Virginia; phone (703) 235–1570.

Signed at Arlington, Virginia this 24th day of May, 1988.

David C. O'Neal,

Deputy Assistant Secretary for Mine Safety and Health.

[FR Doc. 88–12012 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–88–82–C]

A & G Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

A & G Coal Company, General Delivery, Artemus, Kentucky 40903 has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to

its No. 1 Mine (I.D. No. 15–14635) located in Konx County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on any electric face cutting equipment, continuous miner, longwall face equipment and loading machine and is required to be kept operative and properly maintained and frequently tested.

2. Petitioner states that no methane has been detected in the mine. The three wheel tractors are permissible DC powered machines, with no hydraulics. The bucket is a drag type, where approximatley 30–40% of the coal is hand loaded. Approximatley 20% of the time that the tractor is in use, it is used as a man trip and supply vehicle.

3. As an alternate method, petitioner purposes to use hand held continuous oxygen and methane monitors in lieu of methane monitors on tree wheel tractors. In further support of this request, petitioner states that:

(a) Each three wheel tractor will be equipped with a hand held continuous monitoring methane and oxygen detector and all persons will be trained in the use of the detector;

(b) A gas test will be performed, prior to allowing the coal loading tractor in the face area, to determine the methane concentration in the atmosphere. The air quality will be monitored continuously after each trip, provided the elapse time between trips does not exceed 20 minutes. This will provide continous monitoring of the mine atmosphere for methane to assure any undetected methane buildup between trips;

(c) If one percent of methane is detected, the operator will manually deenergize his/her battery tractor immediately. Production will cease and will not resume until the methane level is lower than one percent;

(d) A spare continuous monitor will be available to assure that all coal hauling tractors will be equipped with a continuous monitor;

(e) Each monitor will be removed from the mine at the end of the shift, and will be inspected and charged by a qualified person. The monitor will also be calibrated monthly; and

(f) No alterations or modifications will be made in addition to the manufacturer's specifications.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 19, 1988.

[FR Doc. 88–11996 Filed 5–26–88; 8:45 a.m.]

BILLING CODE 4510–43–M

[Docket No. M–88–56–C]

Black Streak Mining, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Black Streak Mining, Inc., P.O. Box 261, Cawood, Kentucky 40815 has filed a petition to modify the application of 30 CFR 75.206 (conventional roof support) to its No. 1 Mine I.D. No. 15–16166) located in Harlan County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that the width of openings be limited to 20 feet when only using conventional roof support.

2. As an alternate method, petitioner proposes to use a 26-foot width in the belt entry, a 24-foot width in the crosscut and a 20-foot width in the aircourses, with a partial bolt plan, bolting the belt entry and one aircourse.

3. In support of this request, petitioner states that the mining equipment used is an auger-type continuous miner. This system is not designed to operate in 20-foot widths, which does not allow enough space to maneuver in the petitioner's mine. A 20-foot width would also restrict the mobility of the miners.

5. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88–11997 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–88–4–M]

Camp Bird Venture; Petition for Modification of Application of Mandatory Safety Standard

Camp Bird Venture, P.O. Box 1790, Ouray, Colorado 81427 has filed a petition to modify the application of 30 CFR 57.11059 (respirable atmosphere for hoist operators underground) to its Camp Bird Mine (I.D. No. 05–00437) located in Ouray County, Colorado. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that the hoist operator be provided with a respirable atmosphere completely independent of the mine atmosphere. This independent ventilation system should convert without contamination, to an approved and properly maintained 2-hour self-contained breathing apparatus to provide a safe means of escape for the hoist operator after the hoisting duties have been completed.

2. The No. 3 shaft hoist operator is on level 9 and the closest escape routes are either 1000 feet up the shaft or down to the main level and then outside and down the 1410 shaft. It would not be feasible for the hoist operator to climb up or down the shaft carrying a 2-hour self-contained breathing apparatus on his/her back.

3. As an alternate method, petitioner proposes to have only a 1-hour independent air supply with a quick coupler so as to allow the hoist operator plenty of time to reach the refuge area, either on level 9 or on level 14 after all personnel have been removed to their appointed area.

4. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June

27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 19, 1988.

[FR Doc. 88–11998 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–88–91–C]

Krystal Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Krystal Coal Company, Route 2, Box 420, Corbin, Kentucky 40701 has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to its No. 1 Mine (I.D. No. 15–13615) located in Knox County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petition's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on any electric face cutting equipment, continuous miner, longwall face equipment and loading machine and is required to be kept operative and properly maintained and frequently tested.

2. Petitioner states that no methane has been detected in the mine. The three wheel tractors are permissible DC powered machines, with no hydraulics. The bucket is a drag type, where approximately 30–40% of the coal is hand loaded. Approximately 20% of the time that the tractor is in use, it is used as a man trip and supply vehicle.

3. As an alternate method, petitioner proposes to use handheld continuous oxygen and methane monitors in lieu of methane monitors on three wheel tractors. In further support of this request, petitioner states that:

(a) Each three wheel tractor will be equipped with a handheld continuous monitoring methane and oxygen detector and all persons will be trained in the use of the detector;

(b) A gas test will be performed, prior to allowing the coal loading tractor in the face area, to determine the methane concentration in the atmosphere. The air quality will be monitored continuously after each trip, provided the elapse time between trips does not exceed 20 minutes. This will provide continuous monitoring of the mine atmosphere for methane to assure any undetected methane buildup between trips;

(c) If one percent of methane is detected, the operator will manually deenergize his/her battery tractor immediately. Production will cease and will not resume until the methane level is lower than one percent;

(d) A spare continuous monitor will be available to assure that all coal hauling tractors will be equipped with a continuous monitor;

(e) Each monitor will be removed from the mine at the end of the shift, and will be inspected and charged by a qualified person. The monitor will also be calibrated monthly; and

(f) No alterations or modifications will be made in addition to the manufacturer's specifications.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 18, 1988.

[FR Doc. 88–11999 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–88–57–C]

Lisa Anthony Coal Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

Lisa Anthony Coal Co., Inc., P.O. Box 261, Cawood, Kentucky 40815 has filed a petition to modify the application of 30 CFR 75.206 (conventional roof support) to its No. 1 Mine (I.D. No. 15–16019) located in Harlan County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statement follows:

1. The petition concerns the requirement that the width of openings be limited to 20 feet when only using conventional roof support.

2. As an alternate method, petitioner proposes to use a 26-foot width in the belt entry, a 24-foot width in the crosscut and a 20-foot width in the aircourses, with a partial bolt plan, bolting the belt entry and one aircourse.

3. In support of this request, petitioner states that the mining equipment used is an auger-type continuous miner. This system is not designed to operate in 20-foot widths, which do not allow enough space to maneuver in the petitioner's mine. A 20-foot width would also restrict the mobility of the miners.

5. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 19, 1988.

[FR Doc. 88–12000 Filed 5–26–88; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–88–54–C]

Paradox Coal Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

Paradox Coal Company, Inc., P.O. Box 100, Cawood, Kentucky 40815 has filed a petition to modify the application of 30 CFR 75.206 (conventional roof support) to its No. 1 Mine (I.D. No. 15–12471) located in Harlan County, Kentucky. The petition if filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that the width of openings be limited to 20 feet when only using conventional roof support.

2. As an alternate method, a petitioner proposes to use a 26-foot width in the belt entry, and a 24-foot width in the breaks or crosscuts.

3. In support of this request, petitioner states that the mine is using conventional roof control with the specified widths along with spot bolting and cribbing for adverse conditions. Full bolting is highly impractical in the mine's seam which averages 27 inches. In heights of 27 inches, it is difficult to transport miners and supplies. Bolting would take 1½ inches to 2 inches of the available clearance, creating an unsafe condition due to equipment snagging or protruding roof bolts.

4. Petitioner further states that the mining equipment used is an auger type

continuous miner. This system is not designed to operate in 20-foot widths, which does not allow enough space to maneuver in the petitioner's mine. A 20-foot width would also restrict the mobility of the miners on a working section.

5. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 19, 1988.

[FR Doc. 88-12001 Filed 5-26-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-92-C]

Rough Hill Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Rough Hill Coal Company, Route 5, Box 181-A, Williamsburg, Kentucky 40769 has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to its Rough Hill Mine (I.D. No. 15-15828) located in Whitley County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on any electric face cutting equipment, continuous miner, longwall face equipment and loading machine and is required to be kept operative and properly maintained and frequently tested.

2. Petitioner states that no methane has been detected in the mine. The three wheel tractors are permissible DC powered machines, with no hydraulics. The bucket is a drag type, where approximately 30-40% of the coal is hand loaded. Approximately 20% of the time that the tractor is in use, it is used as a man trip and supply vehicle.

3. As an alternate method, petitioner proposes to use hand-held continuous oxygen and methane monitors in lieu of methane monitors on three wheel tractors. In further support of this request, petitioner states that:

(a) Each three wheel tractor will be equipped with a hand-held continuous monitoring methane and oxygen detector and all persons will be trained in the use of the detector;

(b) A gas test will be performed, prior to allowing the coal loading tractor in the face area, to determine the methane concentration in the atomosphere. The air quality will be monitored continuously after each trip, provided the elapse time between trips does not exceed 20 minutes. This will provide continuous monitoring of the mine atmosphere for methane to assure any undetected methane buildup between trips;

(c) If one percent of methane is detected, the operator will manually deenergize his/her battery tractor immediately. Production will cease and will not resume until the methane level is lower than one percent;

(d) A spare continuous monitor will be available to assure that all coal hauling tractors will be equipped with a continuous monitor;

(e) Each monitor will be removed from the mine at the end of the shift, and will be inspected and charged by a qualified person. The monitor will also be calibrated monthly; and

(f) No alterations or modifications will be made in addition to the manufacturer's specifications.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 19, 1988.

[FR Doc. 88-12002 Filed 5-26-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-5-M]

Tg Soda Ash, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Tg Soda Ash, Inc., P.O. Box 100, Granger, Wyoming 82934 has filed a petition to modify the application of 30 CFR 57.22305 (approved equipment) to its Trona Operations (I.D. No. 48-00639) located in Sweetwater County, Wyoming. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that equipment be approved if it is used in or beyond the last open crosscut and or if it is used in areas where methane may enter the air current. The standard prohibits equipment from operating in atmospheres containing 1.0 percent or more methane.

2. As an alternate method, the petitioner proposed to use a nonpermissible HILTI Inc. spad (nail) driver powered by a .27 caliber explosive booster to drive the spads to hang ventilation tubing as the face advances.

3. In support of this request, the petitioner states that—

(a) Trona ore is noncombustible and does not emit methane;

(b) Methane concentrations in the mining faces and all areas of the mining operation are very low, if not undetectable;

(c) An auxiliary fan would be operating if the face has been advanced more than 30 feet beyond the last open crosscut;

(d) All miners at the face would wear eye and ear protection while operating the spad driver;

(e) The atmosphere would be examined for methane before the spad driver is used at the site;

(f) If 1.0 percent or more methane is found, the procedures in 30 CFR 57.22234 would be followed; and

(g) The continuous miner has a methane monitor that continuously samples methane in the immediate areas where the spad driver would be used.

4. For these reasons, the petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All

comments must be postmarked or received in that office on or before June 27, 1988. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 19, 1988.

[FR Doc. 88-12003 Filed 5-26-88; 8:45 am]

BILLING CODE 4510-43-M

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue NW., Room S-3504, Washington, DC 20210.

Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Massachusetts:
- MA88-1 (Jan. 8, 1988) ..... Pp. 376-378.
- MA88-2 (Jan. 8, 1988) ..... Pp. 392-393.
- MA88-3 (Jan. 8, 1988) ..... Pp. 406, 408.

Maryland:
- MD88-2 (Jan. 8, 1988) ..... Pp. 422-423.
- MD88-15 (Jan. 8, 1988) ..... P. 454.

New York:
- NY88-2 (Jan. 8, 1988) ..... Pp. 684-690.
- NY88-12 (Jan. 8, 1988) ..... Pp. 792-799.

Listing by location (index) ..... P. xxxv.

Volume II

Iowa:
- IA88-3 (Jan. 8, 1988) ..... P. 34.

Missouri:
- MO88-9 (Jan. 8, 1988) ..... Pp. 648-653.

Volume III

California:
- CA88-1 (Jan. 8, 1988) ..... Pp. 34-42.
- CA88-2 (Jan. 8, 1988) ..... Pp. 44, 47-48. Pp. 51-53.
- CA88-4 (Jan. 8, 1988) ..... Pp. 70-102b.

Colorado:
- CO88-2 (Jan. 8, 1988) ..... P. 114.

Nevada:
- NV88-1 (Jan. 8, 1988) ..... P. 241.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 20th day of May 1988.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 88-11759 Filed 5-26-88; 8:45 am]

BILLING CODE 4510-27-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (88-53)]

NASA Advisory Council (NAC), Space Applications Advisory Committee (SAAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Space Applications Advisory Committee.

DATE AND TIME: June 7, 1988, 8:30 a.m. to 4:30 p.m., June 8, 1988, 8:30 a.m. to 5:30 p.m., June 9, 1988, 8:30 a.m. to 3:30 p.m.

ADDRESS: As listed below.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph K. Alexander, Code E, National Aeronautics and Space Administration, Washington, DC 20546 (202/453–1656).

SUPPLEMENTARY INFORMATION: The Space Applications Advisory Committee consults with and advises the Council and NASA on plans for and work in progress on, and accomplishments for NASA's Space Applications programs. The group is chaired by Mr. Leonard Jaffe and is composed of 32 members. The Committee operates both through a number of informal subcommittees and as a whole. The agenda which follows includes all Committee and subcommittee sessions. The meeting will be closed on June 9, 1988, from 2:30 p.m. to 3:30 p.m. to discuss and evaluate qualifications of candidates being considered for membership to the new Space Science and Applications Advisory Committee (SSAAC). Such discussions would invade the privacy of the individuals involved. Since this session will be concerned with matters listed in 5 U.S.C. 552(c)(6), it has been determined that the meeting will be closed to the public for this period of time. The remainder of the meeting will be open to the public up to the capacity of the rooms. It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Type of Meeting: Open—except for a closed session as noted in the agenda below.

Agenda:

June 7, 1988

Communications Subcommittee—NASA Headquarters Building, 600 Independence Avenue SW., Room 226A, Washington, DC 20546.

8:30 a.m.—Introductory remarks.
8:45 a.m.—Communications Division goals: organization, budget and plans.
9:15 a.m.—Program activities: status, issues and future plans.
1 p.m.—Advanced communications overview for the Office of Aeronautics and Space Technology.
1:45 p.m.—Advanced communications overview for the Office of Space Operations.
2:40 p.m.—Space Applications Board report.
3:30 p.m.—Committee discussion.
4 p.m.—Adjourn.

Microgravity Subcommittee—Holiday Inn-Capitol, 550 C Street SW., Jupiter Room, Washington, DC 20024.

9 a.m.—Introduction and opening remarks.
9:30 a.m.—Review of committee recommendations: output from Microgravity Science and Applications Division planning meeting.
1 p.m.—Review of current microgravity strategic planning activities.
2 p.m.—Review approach and schedule for Microgravity Science and Applications Division communications plans.
3 p.m.—Review and discuss purpose and composition of the Office of Commercial Programs Industry Advisory Board.
4:30 p.m.—Adjourn.

Information Systems Subcommittee—Holiday Inn-Capitol, Room 943.

9:30 a.m.—Chairman's remarks.
10 a.m.—Report from Office of Space Science and Applications Communications Division on information systems long-range planning.
11 a.m.—Subcommittee response to the Communication Division plans and objectives for information systems.
1 p.m.—Status of information systems five-year plan.
2 p.m.—Information systems objectives identified.
3 p.m.—Discussion of allocated resources past and future to accomplish information systems objectives.
4:30 p.m.—Adjourn.

Remote Sensing Subcommittees—Holiday Inn-Capitol, Clark Room.

9:30 a.m.—Introduction and opening remarks.
10 a.m.—Current status of Landsat Program.
11:30 a.m.—Applications Research Program status.
1:30 p.m.—Congressional view of remote sensing.
2:30 p.m.—Space Policy Study and Commercialization.
3:30 p.m.—Status of the International Consortium on Remote Sensing.
4:30 p.m.—Adjourn.

June 8, 1988

Full Committee—Holiday Inn-Capitol, Columbia South Room.

8:30 a.m.—Chairman's Remarks.
9 a.m.—Office of Space Science and Applications status report.
10 a.m.—Reports from subcommittees.

Microgravity Subcommittee—Holiday Inn-Capitol, Jupiter Room.

1 p.m.—Group discussion and development of recommendations for Microgravity Science and Applications Division.
4 p.m.—Adjourn.

Information Systems Subcommittee—Holiday Inn-Capitol, Room 943.

1:30 p.m.—Formulation of subcommittee statements and recommendations for Communications Division.

Remote Sensing Subcommittee—Holiday Inn-Capitol, Columbia South Room.

1:30 p.m.—Briefing on Earth Science and Applications Division programs and plans.
5:30 p.m.—Adjourn.

Thursday, June 9, 1988

Full Committee—Holiday Inn-Capitol, Clark Room.

8:30 a.m.—Continuation of Subcommittee reports.
11 a.m.—Discussion of final committee actions.
1:30 p.m.—Subcommittee chairmen meet to complete final statements and recommendations to the NASA Advisory Council (NAC).
2:30 p.m.—Closed session.
3:30 p.m.—Adjourn.

May 23, 1988.

Ann Bradley,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 88–11971 Filed 5–26–88; 8:45 am]

BILLING CODE 7510–01–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration, Office of Records Administration.

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Records schedules identif, records of sufficient value to warrant preservation in the National Archives of

the United States. Schedules also authorize agencies after a specified period to dispose of records lacking administrative, legal, research, or other value. Notice is published for records schedules that (1) propose the destruction of records not previously authorized for disposal, or (2) reduce the retention period for records already authorized for disposal. NARA invites public comments on such schedules, as required by 44 U.S.C. 3303a(a).

DATE: Requests for copies must be received in writing on or before July 11, 1988. Once the appraisal of the records is completed, NARA will send a copy of the schedule. The requester will be given 30 days to submit comments.

ADDRESS: Address requests for single copies of schedules identified in this notice to the Records Appraisal and Disposition Division (NIR), National Archives and Records Administration, Washington, DC 20408. Requesters must cite the control number assigned to each schedule when requesting a copy. The control number appears in parentheses immediately after the name of the requesting agency.

SUPPLEMENTARY INFORMATION: Each year U.S. Government agencies create billions of records on paper, film, magnetic tape, and other media. In order to control this accumulation, agency records managers prepare records schedules specifying when the agency no longer needs the records and what happens to the records after this period. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. These comprehensive schedules provide for the eventual transfer to the National Archives of historically valuable records and authorize the disposal of all other records. Most schedules, however, cover records of only one office or program or a few series of records, and many are updates of previously approved schedules. Such schedules also may include records that are designated for permament retention.

Destruction of records requires the approval of the Archivist of the United States. This approval is granted after a thorough study of the records that takes into account their administrative use by the agency of origin, the rights and interests of the Government and of private persons directly affected by the Government's activities, and historical or other value.

This public notice identifies the Federal agencies and their subdivisions requesting disposition authority, includes the control number assigned to each schedule, and briefly describes the records proposed for disposal. The records schedule contains additional information about the records and their disposition. Further information about the disposition process will be furnished to each requester.

Schedules Pending:

1. Department of the Air Force (N1–AFU–88–29). Private commercial solicitation case files.

2. Department of the Air Force (N1–AFU–88–30). Host-tenant, interservice, and other support agreements.

3. Department of the Air Force (N1–AFU–88–32). Records relating to the investigation of fraud, waste, and abuse (files dealing with historically significant cases are permanent).

4. Department of the Air Force (N1–AFU–88–33). Excess/surplus property records.

5. Department of the Air Force (N1–AFU–88–34). Emergency room control registers.

6. Department of Commerce, International Trade Administration (N1–151–88–8). Records relating to Proclaimed Lists of Blocked Nationals.

7. Department of Commerce, Bureau of Economic Analysis (N1–375–88–1). Working papers used by the Bureau in developing estimates for the Personal Consumption Expenditures and Income Size Distribution Programs.

8. Farm Credit Administration, Records and Projects Division (N1–103–88–5). Files of personnel actions relating to chief executive officers of Farm Credit System institutions.

9. Federal Communications Commission, Common Carrier Bureau (N1–173–88–3). Spectrum Studies conducted in 1979.

10. Federal Emergency Management Agency (N1–311–86–1). Comprehensive schedule covering the records of the entire agency.

11. Department of Housing and Urban Development, Public Housing Administration (N1–196–88–1). Contracts of sale and other fiscal records relating to war housing and reuse programs, 1940–1957.

12. National Aeronautics and Space Administration (N1–255–88–2). Public Affairs records relating to the Spacemobile Program.

13. National Security Agency (N1–457–88–1, 2, 3, and 4). These NSA schedules are classified in the interest of national security pursuant to Executive Order 12356 and are further exempt from public disclosure pursuant to the National Security Act of 1947, 50 U.S.C. 403(d)[3], and Public Law 86–36.

14. Department of State (N1–59–88–30). Foreign Service National (FSN) Claims.

15. Tennessee Valley Authority, Office of Agriculture and Chemical Development (N1–142–87–7). Duplicate copies and photographs lacking archival value removed during archival processing from permanently valuable still picture files documenting the activities of the Office of Agricultural and Chemical Development.

16. Department of the Treasury, U.S. Customs Service (N1–36–86–1). Revised comprehensive records schedule.

Dated: May 23, 1988.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 88–11963 Filed 5–26–88; 8:45 am]

BILLING CODE 7515–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Arts in Education Advisory Panel; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Arts in Education Advisory Panel (Special Projects Section) to the National Council on the Arts will be held on June 13, 1988 from 1:30 p.m.–7:30 p.m., on June 14–15, 1988 from 8:00 a.m.–7:30 p.m., on June 16, 1988 from 8:30 a.m.–5:30 p.m., and on June 17, 1988 from 8:30 a.m.–12:30 p.m., in room M–14 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of the meeting will be open to the public on June 13, 1988, from 1:30–2:15 p.m., on June 16, 1988 from 2:00 p.m.–5:30 p.m., and on June 17, 1988 from 8:30 a.m.–12:30 p.m., for an introduction/orientation session and policy issues discussion.

The remaining sessions of this meeting on June 13, 1988 from 2:15 p.m.–7:30 p.m., on June 14–15, 1988 from 8:00 a.m.–7:30 p.m., and on June 16, 1988 from 8:30 a.m.–1:00 p.m., are for the purpose of Panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c) (4), (6) and (9) (b) of section 552b of Title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office for Special Constituencies, National Endowment for the Arts, 1100

Pennsylvania Avenue NW., Washington, DC 20506, 202/682–5532, TTY 202/682–5496 at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5433.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

May 24, 1988.

[FR Doc. 88–11823 Filed 5–26–88; 8:45 am]

BILLING CODE 7537–01–M

NATIONAL TRANSPORTATION SAFETY BOARD

Public Hearing; Miami, Florida; Marine Accident

In connection with its investigation of the accident involving the engineroom fire on board the Passenger Vessel SCANDINANVIAN STAR in the Gulf of Mexico on March 15, 1988, the National Transportation Safety Board will convene a public hearing at 9:00 a.m. (local time), on June 22, 1988, in the Hyatt Regency Miami-Jasmine Room, 400 SE 2nd Avenue, Miami, Florida. For more information contact Alan Pollock, Office of Government and Public Affairs, National Transportation Safety Board, 800 Independence Avenue SW., Washington, DC 20594, telephone (202) 382–6606.

Bea Hardesty,

Federal Register Liaison Officer.

May 23, 1988.

[FR Doc. 88–11969 Filed 5–26–88; 8:45 am]

BILLING CODE 7533–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–413 and 50–414]

Duke Power Co., et al.; Environmental Assessment and Finding of No Significant Impact

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF–35 and NPF–52 issued to Duke Power Company, et al., (the licensee) for operation of the Catawba Nuclear Station, Units 1 and 2, located in York County, South Carolina.

Environmental Assessment

Identification of Proposed Action

The amendments would revise Technical Specification (TS) 3/4.4.5, "Steam Generators" and its bases. The revision would eliminate the requirement for plugging of a steam generator tube if the tube defects are located at least 1.60 inches below the top of the tubesheet. The associated bases 3/4.4.5 would be supplemented to distinguish between defects located at least 1.60 inches below the top of the tube sheet and those located elsewhere in the tubes.

These revisions to the Technical Specifications would be made in response to the licensee's application for amendments dated October 8, 1987, as supplemented December 3, 1987.

The Need for the Proposed Action

The proposed amendments would avoid the plugging of steam generator tubes when the location of defects is such that plugging is unnecessary. The amendments, therefore, preclude the attendant radiation exposure which would otherwise be incurred by plant workers involved with tube plugging operations. The proposed amendments would also maintain operational flexibility by avoiding a loss of margin in reactor coolant system flow and therefore assist in assuring that minimum flow rates are maintained in excess of that required for operation at full power.

Environmental Impacts of the Proposed Action

An evaluation was performed to demonstrate tube integrity under the postulated loss of coolant accident condition of secondary-to-primary differential pressure. Tube collapse strength characteristics indicate that the constraint provided to the tube by the tubesheet gives a significant margin between tube collapse strength and the limiting secondary-to-primary differential pressure condition, even in the presence of circumferential or axial indications.

Primary-to-secondary leakage in a steam generator during normal plant operation is limited by Technical Specifications. This limit, based on plant radiological release considerations, is applicable to a leak source within the tubesheet. Similarly, the evaluation considered accidents such as main steam line and feedwater line breaks which increase tube differential pressure and the driving head for a leak, and which, therefore, represent events with the largest potential for increasing primary-to-secondary leakage. The evaluation shows that, because of the effect of the hardroll, no increase in primary-to-secondary leakage would occur during or after an accident.

The Commission has reviewed these evaluations and test results and finds them acceptable. We find that, based on the operating limits on primary-to-secondary leakage and the results of the analysis of accident conditions, the proposed amendments would not cause any adverse changes in radiological impacts during normal operations as reported in the "Final Environmental Statement Related to Operation of Catawba Nuclear Station, Units 1 and 2," NUREG–0921 (FES) dated January 1983, nor any adverse changes to radiological impacts of postulated accidents as reported in the FES. Therefore, no adverse change in radiological impacts to the environment would result from the proposed amendments.

The proposed amendments involve systems located entirely within the restricted area as defined in 10 CFR Part 20. They do not affect non-radiological plant effluents and have no other environmental impact. Therefore, the Commission concludes that there are no significant non-radiological environmental impacts associated with the proposed amendments.

Alternative to the Proposed Action

Because we have concluded that no adverse environmental effects are associated with the proposed action, any alternatives would have equal or greater environmental impact and need not be selected.

The principal alternative would be to deny the requested amendments. That alternative, in effect, is the same as the "no action" alternative because either case would require the licensee to plug tubes in accordance with existing TS requirements. (As an alternative to plugging, the licensee could request further TS changes to allow repairs of tubes by a tube sleeving technique. Although sleeving would result in less loss of margin in available reactor coolant system flow, it would result in more than twice the dose to workers involved with sleeving installation than the dose resulting from inserting of mechanical, removable plugs. Sleeving within the tubesheet region would also preclude further repairs of the same tube within its remaining tube length without substantial additional workers exposure associated with sleeve removal and replacement.) Neither plugging nor sleeving would reduce environmental impacts associated with correction of steam generator tube imperfections

when compared to the proposed amendments, but both would result in reduced margins in reactor coolant system flow and increased occupational radiological exposure to plant workers.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in connection with the Nuclear Regulatory Commission's "Final Environmental Statement related to the operation of the Catawba Nuclear Plant, Units 1 and 2" NUREG–0921, dated January 1983.

Agencies and Persons Consulted

The NRC staff has reviewed the licensee's request of October 8 and December 3, 1987, and did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed amendments.

Based upon this environmental assessment, we conclude that the proposed action will not have a significant adverse effect on the quality of the human environment.

For further details with respect to this action, see the request for the amendments dated October 8, 1987, and its supplement dated December 3, 1987, which are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC and at the York County Library, 138 East Black Street, Rock Hill, South Carolina 29730.

Dated at Rockville, Maryland, this 23rd day of May 1988.

For the Nuclear Regulatory Commission.

David B. Matthews,

Director, Project Directorate II–3, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88–11975 Filed 5–26–88; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards, Subcommittee on Improved LWRs; Cancellation

The ACRS Subcommittee meeting on Improved LWRs scheduled to be held on June 8, 1988 (53 FR 16800 and 53 FR 17776) has been cancelled.

Date: May 20, 1988.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 88–11902 Filed 5–24–88; 8:45 am]

BILLING CODE 7590–01–M

Issuance and Availability of Draft NUREG–1217, "Evaluation of Safety Implications of Control Systems in LWR Nuclear Power Plants — Technical Findings Related to USI A–47," and Draft NUREG–1218, "Regulatory Analysis for Proposed Resolution of USI A–47"

The U.S. Nuclear Regulatory Commission (NRC) staff is issuing for public comment the proposed resolution of Unresolved Safety Issue (USI) A–47, "Safety Implications of Control Systems." The proposed resolution is documented in two draft reports entitled "Evaluation of Safety Implications of Control Systems in LWR Nuclear Power Plants—Technical Findings Related to USI A–47" (Draft NUREG–1217) and "Regulatory Analysis for Proposed Resolution of USI A–47" (Draft NUREG–1218). Safety Implications of Control Systems was identified as an Unresolved Safety Issue in the NRC 1980 Annual Report to the Congress pursuant to section 210 of the Energy Reorganization Act of 1974 as amended on December 13, 1977.

Nuclear power plant instrumentation and control systems are composed of safety-grade protection systems and non-safety-grade control systems. The safety-grade protection systems are designed to satisfy the General Design Criteria identified in Appendix A to 10 CFR Part 50. They are used in part to trip the reactor when certain plant parameters exceed allowable limits and to protect the core from overheating by actuating emergency core cooling systems. Non-safety-grade control systems are used to maintain the plant within prescribed pressure and temperature limits during shutdown, startup, and normal power operation. The non-safety-grade control systems are not relied on to perform any safety functions during or following postulated transients or accidents. They are used, however, to control plant processes that could have a significant impact on plant dynamics.

The purpose of the USI A–47 study was to perform a review of the non-safety-grade control systems and to assess the effects of control system failures on plant safety. To this end, tasks were established to identify potential control system failures that, either singly or in selected combinations, could cause overpressure, overcooling, overheat, overfill, or reactivity events.

The NRC staff concluded from its A–47 investigations that certain actions should be taken to improve safety in LWR plants. These actions would request that plants (1) upgrade their systems to protect against reactor vessel/steam generator overfill events and to prevent steam generator dryout, (2) modify their technical specifications to periodically verify operability of these systems, and (3) modify selected emergency procedures to ensure safe plant shutdown following a small-break loss-of-coolant accident. Most plants already have sufficient protection against control system failures. The requested safety improvements would only apply to those plants for which enhanced protection is justified. The recommended actions are included in Appendix C of NUREG–1218.

Comments are being solicited from interested organizations, groups, and individuals. It is expected that holders of and applicants for licenses for nuclear power plants will review the proposed resolution of USI A–47 for applicability to their facility and provide comments, if appropriate. The staff is particularly interested in the assessment by each licensee or applicant of the applicability of the staff analyses, assumptions, and conclusions to its plant. The staff will evaluate the comments received and address them as appropriate in the final documents.

Copies of the draft documents will be available after May 29, 1988. Copies will be sent directly to utilities, utility industry groups, and associations. Other copies will be available for inspection or copying in the NRC Public Document Room, 1717 H Street NW., Washington, DC and, upon request, in the Commission's Local Public Document Rooms in the vicinity of nuclear power plants. To request that copies be placed in a local Public Document Room, contact: the Local Public Document Room Program Director, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone toll free (800) 638–8081. Free single copies of the draft documents may be obtained to the extent of supply by writing to the U.S. Nuclear Regulatory Commission, ATTN: Distribution Section, Mail Stop P–522, Washington, DC 20555.

Comments should be forwarded in writing to Mr. Robert Baer, Chief, Engineering Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555 by July 29, 1988.

Dated at Rockville, Maryland, this 16th day of May 1988.

For the Nuclear Regulatory Commission.

Robert J. Bosnak,

Deputy Director, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 88-11979 Filed 5-26-88; 8:45 am]

BILLING CODE 7590-01-M

Availability of Volume 2 of Safety Evaluation Report on Tennessee Valley Authority; Revised Sequoyah Nuclear Performance Plan

The U.S. Nuclear Regulatory Commission (NRC) announced the publication of NUREG-1232, Volume 2 Safety Evaluation Report (SER) on the Tennessee Valley Authority Sequoyah Nuclear Performance Plan—Revised.

On September 17, 1985, NRC issued a letter to the Tennessee Valley Authority (TVA), pursuant to 10 CFR 50.54(F), requesting TVA to submit information on its plans for correcting problems in the overall management of its nuclear program as well as plant-specific problems. In response to this letter, TVA prepared a plan that identifies and proposes corrections to problems with TVA's management of its nuclear program. For corporate management, the plan is documented in revisions of the TVA Corporate Nuclear Performance Plan (CNPP) dated November 1, 1985; March 10, and December 4, 1986; and March 26, 1987 and in its letter dated May 27, 1987. For Sequoyah-specific problems, the plan is documented in revisions of the Sequoyah Nuclear Performance Plan (SNPP) dated November 1, 1985; April 1, and July 2, 1987.

NUREG-1232, Volume 2 presents the NRC staff evaluation of the information submitted in the revised SNPP through Revision 2. In this report the staff concludes (1) that TVA has acceptably addressed the Sequoyah-specific concerns raised by NRC in its 10 CFR 50.54(f) letter dated September 17, 1985; (2) that because much of SNPP is programmatic, the effectiveness depends on its implementation; (The NRC staff has closely monitored this implementation and found it generally effective), and (3) that, at this time, the programmatic improvements in place or underway, are sufficient to resolve the concerns at Sequoyah that led to issuance of the 10 CFR 50.54(f) letter dated September 17, 1985, and to support continuing nuclear activities, including plant operations.

Copies of NUREG-1232, Volume 2 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161. A copy is also available for public inspection and/or copying at the NRC Public Document Room, 1717 H Street NW., Washington, DC.

Dated at Bethesda, Maryland this 17th day of May, 1988.

For the Nuclear Regulatory Commission.

Rajender Auluck,

Acting Assistant Director for Projects, TVA Projects Division, Office of Special Projects.

[FR Doc. 88-11978 Filed 5-26-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-457]

Commonwealth Edison Co.; Braidwood Station, Unit No. 2; Issuance of Facility Operating License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission or NRC), has issued Facility Operating License No. NPF-77 to Commonwealth Edison Company (the licensee) which authorizes operation of Braidwood Station, Unit No. 2 (the facility) at reactor core power levels not in excess of 3411 megawatts thermal (100 percent rated power).

Braidwood Station, Unit No. 2 is a pressurized water reactor located in Will County, Illinois, about 20 miles south-southwest of Joliet, Illinois, in Reed Township. The license is effective as of the date of issuance.

The application for the license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in 10 CFR Chapter I which are set forth in the license. Prior public notice of the overall action involving the proposed issuance of an operating license was published in the **Federal Register** in December 15, 1978 (43 FR 58659).

The Commission has determined that the issuance of this license will not result in any environmental impacts other than those evaluated in the Final Environmental Statement and the Assessment of the Effect of License Duration on Matters Discussed in the Final Environmental Statement for the Braidwood Station, Units 1 and 2 (dated June 1984) since the activity authorized by the license is encompassed by the overall action evaluated in the Final Environmental Statement.

For further details with respect to this action, see (1) Facility Operating License No. NPF-77, with Technical Specifications and the Environmental Protection Plan; (2) the report of the Advisory Committee on Reactor Safeguards, dated February 11, 1985; (3) the Commission's Safety Evaluation Report, dated November 1983, (NUREG-1102), and Supplements 1 through 6; (4) the Final Safety Analysis Report and Amendments thereto; (5) the Environmental Report and supplements thereto; and (6) the Final Environmental Statement, dated June 1984, (NUREG-1026).

These items are available for inspection at the Commission's Public Document Room located at 1717 H Street NW., Washington, DC 20555 and in the Wilmington Township Public Library, 201 S. Kanakee Street, Wilmington, Illinois 60481. A copy of Facility Operating License NPF-77 may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects III/IV/V and Special Projects. Copies of the Safety Evaluation Report and Supplements 1 through 6 (NUREG-1002) and the Final Environmental Statement (NUREG-1026) may be purchased at current rates from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, and through the NRC GPO sales program by writing to the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7082.

Dated at Rockville, Maryland this 20th day of May 1988.

For the Nuclear Regulatory Commission.

Stephen P. Sands,

Project Manager, Project Directorate III-2, Division of Reactor Projects-III, IV, V and Special Projects.

[FR Doc. 88-11976 Filed 5-26-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-389]

Florida Power and Light Co.; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity For Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-16, issued to Florida Power and Light Company (the licensee), for operation of the St. Lucie Plant, Unit No. 2 located in St. Lucie County, Florida.

By application dated November 27, 1987, the licensee requested that the

reactor coolant system (RCS) pressure/temperature (P/T) limits and RCS low temperature overpressure protection (LTOP) system Technical Specifications (TS) be amended. The TS changes were necessary because the existing P/T limits and associated LTOP system settings would become invalid on May 23, 1988. The licensee specifically proposed new P/T limit curves for six operating periods starting at 4 Effective Full Power Years (EFPY) out to 32 EFPY, and proposed associated changes for the LTOP system TS to include reformatting the limiting conditions for operation, applicability, and action statements.

The licensee's November 27, 1987 application was noticed in the **Federal Register** on February 10, 1988 (53 FR 3954), and a proposed no significant hazards consideration determination was made by the staff.

The staff's review of the licensee's submittal is continuing; however, the existing P/T limits expired on May 23, 1988. By letters dated May 4 and 20, 1988, the licensee requested the staff to issue P/T limits valid until 6 EFPY, in order to permit the staff to complete its review and not affect plant operation. In essence, the originally proposed curves valid until 10 EFPY will be changed to be valid until 6 EFPY. The staff is renoticing this amended application because it represents a significant change from what was previously noticed. The net effect of the change is a more restrictive set of TS.

The staff is issuing this notice under exigent circumstances. As specified above, the existing P/T limits expired on May 23, 1988. The staff and the licensee have been evaluating the issues associated with this review and currently agree that the 6 EFPY curves are satisfactory. The licensee did not request emergency treatment of the amended application; the staff does not believe that an emergency situation exists. However, the staff does believe that the amendment should be issued promptly.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant considerations. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

As specified above, the staff noticed the original application and proposed a no significant hazards consideration determination. The staff evaluated the above three factors as part of the proposed determination.

The amended application involves taking the proposed P/T limits for 10 EFPY and making them valid for 6 EFPY. Therefore, the 6 EFPY curves will be more conservative. The staff's analysis of the three factors for a no significant hazards consideration determination as described in the original **Federal Register** notice is also valid for the more restrictive P/T limits. Thus, the staff continues to propose that the amended application does not involve a significant increase in the probability or consequences of an accident previously evaluated; or create the possibility of a new or different kind of accident from any accident previously evaluated; or involve a significant reduction in a margin of safety. Therefore, the staff proposed to determine that the amended application involves no significant hazards considerations.

The Commission is seeking public comments on this proposed determination. Any comments received within 15 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Rules and Procedures Branch, Division of Rules and Records, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of the **Federal Register** notice.

Written comments may also be delivered to Room 4000, Maryland National Bank Building, 7735 Old Georgetown Road, Bethesda, Maryland from 8:15 a.m. to 5:00 p.m. Copies of written comments received may be examined at the NRC Public Document Room, 1717 H Street, NW., Washington, DC. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By June 27, 1988, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rule of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene, which must include a list of the contentions that are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permited to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to

intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If the amendment is issued before the expiration of 30 days, the Commission will make a final determination on the issue of no significant hazards considerations. If a hearing is requested, the final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards considerations, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves significant hazards considerations, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 15-day notice period. However, should circumstances change during the notice period, such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 15-day notice period, provided that its final determination is that the amendment involves no significant hazards considerations. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 342-6000). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Herbert N. Berkow: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Harold F. Reis, Esq., Newman and Holtzinger, 1615 L Street NW., Washington DC 20036.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated November 27, 1987, as supplemented May 4 and 20, 1988, which are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC 20555, and at the Local Public Document Room, Indian River Junior College Library, 3209 Virginia Avenue, Fort Pierce, Florida 33450.

Dated at Rockville, Maryland, this 24th day of May, 1988.

For the Nuclear Regulatory Commission.

E.G. Tourigny,

Project Manager, Project Directorate II-2, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88-11977 Filed 5-26-8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-461]

Illinois Power Co.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Hearing

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-62 issued to Illinois Power Company (the licensee), for operation of Clinton Power Station, Unit 1 located in DeWitt County, Illinois.

This amendment consists of the addition of a note to item 14 on Table 3.3.7.5-1 to allow inoperability of primary containment isolation valve position indication when the valve/valve operator is electrically deactivated in the isolated position. When any motor-operated containment isolation valve is electrically deactivated, its breaker is usually switched to the "OFF" position. Power is consequently lost to the position indication circuit and all position indication in the main control room is lost. ACTION 82 associated with item 14 of Table 3.3.7.5-1 will require a plant shutdown after seven days if all position indication to a primary containment isolation valve is lost.

Prior to issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By June 27, 1988, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designted by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requsting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference

scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the oportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene shall be filed with the Secretary of the Commission, United States Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW., Washington, DC by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative for the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–800–325–6000 (in Missouri 1–800–342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Leif J. Norrholm: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Zeldon Zebel, Esquire, Schiff, Hardin and Waite, 7200 Sears Tower, 233 Wacker Drive, Chicago, Illinois 60606, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petition and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated February 5, 1988, which is available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC 20555, and at the Vespasian Warner Public Library, 120 West Johnson Street, Clinton, Illinois 61727.

Dated at Rockville, Maryland this 18th day of May 1988.

For the Nuclear Regulatory Commission.

Leif J. Norrholm,

Acting Director, Project Directorate III–2, Division of Reactor Projects–III, IV, V and Special Projects.

[FR Doc. 88–11972 Filed 5–26–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–285]

Omaha Public Power District: Partial Denial of Amendment to Facility Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) has partially denied a request by the licensee for an amendment to Facility Operating License No. DPR–40 issued to Omaha Public Power District, for operation of the Fort Calhoun Station, Unit 1 located in Washington County, Nebraska. The Notice of Consideration of Issuance of Amendment was published in the **Federal Register** on March 23, 1988 (53 FR 9509).

The amendment, as proposed by the licensee, would: (1) Relax the current Technical Specifications (TS) requirement to control airborne radioactive effluents on an instantaneous basis; (2) allow the licensee to use a non-standard format for reporting radioactive effluent releases; (3) allow the licensee to use annual average (rather than real-time) meteorological dispersion factors to calculate doses; and (4) correct and clarify some parts of TS 2.9.1 and 5.9.4.

With regard to item (1) above, the licensee proposed amending the TS and Basis to 2.9.1 by deleting the word "instantaneous" so that they state "to ensure that these releases result in an annual dose from radioactive materials in liquid and gaseous effluents released to unrestricted areas that are within the limits specified in 10 CFR Part 20." The effect of these changes would allow the licensee to exceed the concentrations specified in 10 CFR Part 20 on an "instantaneous basis." The staff finds the proposed change unacceptable because it would alow the licensee to exceed the concentrations in 10 CFR Part 20 on an instantaneous basis; this would not be consistent with the Standard Technical Specifications.

With regard to item (2), the licensee proposes to change TS 5.9.4.a to delete the phrase "as outlined in Regulatory Guide 1.21, Revision 1" from the Radioactive Effluent Release Reporting requirements. The proposed change would allow the licensee more flexibility in formatting their radioactive effluent release reports. The staff finds this change unacceptable since the licensee would no longer be required to use a standard format to report the quantities of radioactive effluents released from Fort Calhoun.

With regard to items (3) and (4), the staff finds the proposed changes acceptable. These items are addressed in a separate Federal Register Notice.

By June 27, 1988, the licensee may demand a heraing with respect to the partial denial described above and any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20055, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street NW., Washington, DC by the above date.

A copy of any petition should be sent to the Office of the General Counsel, 15B–18 OWFN, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to LeBoeuf, Lamb, Leiby and MacRae, 1333 New Hampshire Avenue NW., Washington, DC 20036, attorney for the licensee.

For further details with respect to this action, see (1) the application for amendment dated February 8, 1988, and (2) the Commission's Safety Evaluation forwarded to the licensee by letter dated May 4, 1988, which are available for public inspection at the Commission's Public document Room, 1717 H Street NW., Washington, DC 20555, and at the W. Dale Clark Library, 215 South 15th Street, Omaha, Nebraska 68102. A copy of Item (2) may be obtained upon request addressed to U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III, IV, V and Special Projects.

Dated at Rockville, Maryland, this 19th day of May, 1988

For the Nuclear Regulatory Commission.

Jose A. Calvo,

Director, Project Directorate-IV, Division of Reactor Projects-III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 88-11973 Filed 5-26-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-271]

Vermont Yankee Nuclear Power Corp.; Issuance of Amendment to Facility Operating License and Final Determination of No Significant Hazards Consideration

The U.S. Nuclear Regulatory Commission (the Commisson) has issued Amendment No. 104 to Facility Operating License No. DPR-28, issued to the Vermont Yankee Nuclear Power Corporation, (the licensee), which authorizes the use of spent fuel storage racks of new design for the Vermont Yankee Nuclear Power Station located in Windham County, Vermont. The amendment was effective as of the date of its issuance.

The amendment allows the installation of racks of new design in the spent fuel pool sufficient to accommodate 2870 assemblies, and the storage of fuel assemblies in the new racks up to the present Technical Specification limit of 2000 assemblies in the pool. The amendment is in partial response to the licensee's proposed application for amendment dated April 25, 1986, as supplemented on August 15, September 26, October 21, and November 24, 1986, and February 25, March 19, March 31, April 9, April 13, May 22, June 11, September 1, and December 11, 1987, and March 2, 1988.

Notice of Consideration of Issuance of Amendment and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing in connection with this action was published in the **Federal Register** on June 18, 1986.

Requests for a hearing were filed on January 29, 1987 by the New England Coalition on Nuclear Pollution and by the State of Vermont. On January 30, 1987 a request was filed by the Commonwealth of Massachusetts.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determinend that no significant hazards considerations are involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves on siginficant hazards considerations. The basis for this determination is contained in the Safety Evaluation related to this action. Accordingly, as described above, the amendment has been issued and made immediately effective and any hearing will be held after issuance.

The Commission has determined that this amendment satisfies the criteria for categorical exclusion in accordance with 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared.

For further details with respect to the action, see (1) the application for amendment dated April 25, 1986, as supplemented by letters dated August 15, September 26, October 21, and November 24, 1986, and February 25, March 19, March 31, April 9, April 13, May 22, June 11, September 1, and December 11, 1987 and March 2, 1988; (2) Amendment No. 104 to Facility Operating License No. DPR-28; (3) and the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC and at the Brooks Memorial Library, 224 Main Street, Brattleboro, Vermont 05301. A copy of items (2), and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects I/II.

Dated at Rockville, Maryland this 20th day of May, 1988.

For the Nuclear Regulatory Commission.

Vernon L. Rooney,

Project Manager, Project Directorate I-3, Division of Reactor Projects I/II.

[FR Doc. 88-11974 Filed 5-26-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-443]

Public Service Co. of New Hampshire (Seabrook Plant); Exemption

I

Public Service Company of New Hampshire (the licensee) is the holder of Facility Operating License No. NPF-56 for the operation of Seabrook Station nuclear power plant. This license, issued on October 17, 1986, restricts Seabrook Station to loading fuel and conducting precriticality testing only. However, the license provides, among othe things, that the licensee is subject to all rules, regulations and orders of the Commission now or hereafter in effect.

The facility is a pressurized water reactor rated at 3411 MW(t) at the licensee's site located in Rockingham County, New Hampshire.

II

Section 10 CFR 50.54(w) of the Commission's regulations requires that each commercial power reactor licensee shall obtain onsite property damage insurance in the amount of $1.06 billion. This requirement, among other changes, increased the amount of required property insurance from $620 million and became effective on October 5 1987.

On October 1, 1987, the licensee filed an Application for Schedular Exemption from the requirements for property insurance above $620 million until such time as the Commission may grant a low power (5%) operating license. This request was supplemented by additional information dated February 29, 1988. In support of its request, the licensee indicated that "Criticality at Seabrook Station has not been achieved. The primary system is not radioactive, and in accordance with license requirements, the reactor coolant system is maintained with a boron concentration equal to or greater than 2000 parts per million." Maintaining the boron concentration of the reactor coolant equal to or greater than 2000 parts per million ensures that the reactor cannot be made critical, even if all the control rods are fully withdrawn. The licensee also maintains that the coverage in the amount of $620 million that it currently carries is "more than adequate to compensate for any conceivable condition that may occur." The amount of coverage should be more than adequate since the reactor does not contain a significant inventory of fission products and the 2000 parts per million boron concentration of the reactor coolant prevents the reactor from achieving criticality and thereby generating fission products. Therefore, the consequences of any credible accident would not include any significant radiological hazards and the existing insurance coverage should be adequate to compensate for any conceivable condition.

The licensee indicates that the cost of property insurance in excess of $620 million (i.e. an additional $440 million in coverage) would exceed $1 million annually. In addition, by purchasing additional insurance, the licensee would

be liable under the terms of the policy to pay a potential retrospective premium assessment of as much as 7.5 times the annual premium if an accident were to occur at any insured site. Thus, potential costs to the licensee of buying the additional insurance could be significant.

III

The Commission may grant exemptions from the requirements of Part 50 "which are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security" (10 CFR 50.12(a)(1)). In its submittal, the licensee argued that the justification for its exemption request meets the "special circumstances" described in § 50.12(a)(2)(ii), (iii) and (v). Section 50.12(a)(2) stipulates, "The Commission will not consider granting an exemption unless special circumstances are present. Special circumstances are present whenever * * * (ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or (iii) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated; or * * * (v) The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation * * *"

The licensee meets the conditions for granting an exemption. First, with respect to § 50.12(a)(1), the exemption is authorized by law and does not present an undue risk to public health and safety. The risk to public health and safety presented by the Seabrook Station in its present state of cold shutdown is substantially lower than reactors operating at a significant percentage of rated power since the reactor is prevented from achieving criticality, it has not yet achieved criticality and does not contain a significant inventory of fission products.

The Seabrook exemption request also meets the special circumstances presented in § 50.12 (a)(2)(ii). The Commission agrees with the licensee's assessment that, under the conditions proposed, a significant accident is, for all practical purposes, highly improbable since the reactor has not gone critical or been allowed to operate at any power level. Therefore requiring excessive onsite property damage insurance before the reactor achieves criticality would not serve the underlying purpose of the rule, which is to provide sufficient funds to clean up after a significant accident. The licensee is requesting a temporary exemption only until such time as it may be allowed to make the reactor critical and operate at low power. The licensee states that it will comply fully with $50.54(w) prior to initial criticality.

The Commission agrees that these factors ensure that the circumstances of the exemption from the subject requirements prior to achieving initial criticality do not present an undue risk to the public health and safety.

IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, a temporary exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest. Therefore, the Commission hereby approves the following exemption:

The licensee is exempt from the requirements of 10 CFR 50.54(w) with respect to on-site property damage insurance in excess of $620 million prior to such time as Seabrook Station receives an operating license which allows the reactor to go critical or operate at any power level.

The NRC staff has determined that the granting of this exemption will not result in any significant environmental impact and that, pursuant to 10 CFR 51.5(d)(4), an environmental impact appraisal need not be prepared in connection with this action. Copies of the licensee's request for exemption dated October 1, 1987 and supplement dated February 29, 1988 are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC and at the Exeter Public Library, Founders Park, Exeter, New Hampshire 03833. Copies may be obtained upon written request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director of Reactor Projects I/II.

This Exemption is effective upon issuance.

Dated at Rockville, Maryland this 11th day of May 1988.

For the Nuclear Regulatory Commission.

Walter R. Butler,

Acting Director, Division of Reactor Projects-I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88-11980 Filed 5-26-88; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-25729; File No. MBS-88-13]

Self-Regulatory Organizations; Proposed Rule Change by MBS Clearing Corporation Relating to Modifications to the Schedule for the Conversion of GNMA Securities Which are To Be Designated for Book-Entry Trade, Clearance and Settlement; Notice of Filing and Immediate Effectiveness of Proposed Rule Change

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on May 16, 1988, the MBS Clearing Corporation filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interest persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On April 28, 1988, MBSCC issued a Bulletin for the Depository Division of MBS Clearing Corporation ("MBSCC") which further modified the conversion schedule of Government National Mortgage Association ("GNMA") securities to book-entry form.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B) and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change modifies the schedule for the conversion of GNMA securities which are to be designated for book-entry trade, clearance and settlement. For settlements beginning June 16, 1988, the 12.00–12.49% GNMA coupons will be

eligible for conversion to book-entry form. With this action, all coupons below or equal to 7.49% and higher than or equal to 12.00% are eligible for conversion to book-entry form.

In anticipation of the proposed rule change, Depository Division senior management has completed the installation and testing of expanded computer hardware and software required by larger-than-anticipated increases in participation and trading volume. MBSCC has also assisted Depository Division Participants in making necessary changes to their own operating systems. MBSCC believes that with such installation, testing, and modifications, the additional GNMA coupons will be implemented in an orderly manner.

The proposed rule change is consistent with Section 17A of the Securities Exchange Act of 1934 ("Exchange Act") in that it encourages the processing and facilitation of securities clearance and settlement of mortgage-backed securities.

(B) Self-Regulatory Organization's Statement on Burden on Competition

MBSCC does not believe that any burden will be placed on competition as a result of the proposed rule change.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments have not been generally solicited or received. However, representatives of the Public Securities Association, GNMA, as well as representatives of several Depository Division Bank Participants were consulted in connection with the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Securities Exchange Act of 1934 and subparagraph (e) of Securities Exchange Act Rule 19b–4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-referenced self-regulatory organization. All submissions should refer to File No. MBS–88–13 and should be submitted by June 17, 1988.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

Dated: May 20, 1988.

[FR Doc. 88–12036 Filed 5–26–88; 8:45 am]

BILLING CODE 8010–01–M

[File No. 500–1]

AMX International, Inc.; Suspension of Trading

May 24, 1988.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of AMX International, Inc., a Delaware corporation with offices located at 5477 Glen Lakes Drive, Dallas, Texas, and that questions have been raised about the adequacy and accuracy of publicly disseminated information concerning, among other things, the financial condition of the company and the value of its assets. The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of AMX International.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of AMX International, Inc., over-the-counter or otherwise, is suspended for the period from 10:00 a.m. (E.D.T.) on May 24, 1988 through 11:59 p.m. (E.D.T.) on June 2, 1988.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 88–12035 Filed 5–26–88; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–25736; File No. SR–NASD–87–9]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change

On February 6, 1987, the National Association of Securities Dealers, Inc. ("NASD") submitted a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1) and Rule 19b–4 thereunder, to amend section 19(f) of the NASD's Rules of Fair Practice to allow the receipt of performance-based fees under certain circumstances. In effect, the proposed rule change would permit members or persons associated with members to receive performance-based compensation for managing client accounts under circumstances similar to the circumstances enumerated in Rule 205–3 of the Investment Advisers Act of 1940 ("Advisers Act").[1]

The proposed rule change would allow a member or person associated with a member to receive compensation based on a share of profits or gains in an account when: (1) Written authorization is obtained from a member carrying the client's account; (2) the customer meets stated minimum net worth or investment size requirements; (3) there is a reasonable belief that the customer understands the compensation method and its risks; (4) the arrangement is reduced to writing; (5) there is a reasonable belief that the agreement was reached through arms-length negotiation; (6) the arrangement takes into account gains and losses over at least a one-year period; and (7) the member has disclosed all material information relating to the arrangement. Written performance agreements will be subject to examination by the NASD during routine inspections.[2]

Notice of the proposed rule change, together with its terms of substance was given by the issuance of a Commission release (Securities Exchange Act Release No. 24355, April 16, 1987) and by

[1] 17 CFR 275.205–3, adopted in Investment Advisers Act Release No. 996 (November 14, 1985); 50 FR 48556 (November 26, 1985).

[2] *See* letter from T. Grant Callery, Associate General Counsel, NASD to Robina M. Gumbs, Attorney, Division of Market Regulation, dated September 2, 1987.

publication in the **Federal Register** (52 FR 13778, April 24, 1987). One comment was received with respect to the proposed rule change.[3] The comment letter favors the proposal and suggests that the NASD be encouraged to interptet its proposed rule change coterminously with Rule 205–3 under the Advisers Act.[4] The NASD has represented to the Commission that it intends to interpret the proposed rule change in a manner consistent with Rule 205–3.[5]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD, and in particular the requirements of section 15A and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the above-mentioned rule change be, and hereby is approved. For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Dated: May 23, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88–12033 Filed 5–26–88; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Informal Airspace Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Informal Airspace Meetings.

SUMMARY: This notice announces informal airspace meetings to discuss the following: 1. Establishment of a Terminal Control Area (TCA) at Phoenix, AZ; 2. Modification of the TCA at Dallas/Fort Worth, TX; 3. Establishment of a TCA at Tampa, FL, and 4. Establishment of a TCA at Orlando, FL.

The formal airspace meeting dates and places are as follows:

Phoenix, AZ, TCA

Date: July 28, 1988.

Time: 7:00 p.m.

Location: Thunderbird Adventist Academy Chapel, 7401 East Sutton Drive, Scottsdale, AZ.

Dallas/Fort Worth, TX, TCA

Date: August 4, 1988.

Time: 7:00 p.m.

Location: Holiday Inn North, Conference Center, Meacham Room, 2540 Meacham Boulevard (I–35W), Fort Worth, TX; and

Date: August 9, 1988.

Time: 7:00 p.m.

Location: Holiday Inn Greater Southwest, Salon A, B & C, North Highway 360 and Brown Boulevard, North Arlington, TX; and

Date: August 11, 1988.

Time: 7:00 p.m.

Location: Dallas Marriot Quorum, Grand Ballroom, 14901 Dallas Parkway, Dallas, TX.

Orlando, FL

Date: August 16 and 17, 1988.

Time: 7:00 p.m.

Location: Valencia Community College, West Campus, Building 3, Room 111, 1800 S. Kirkman Road, Orlando, FL.

Tampa, FL

Date: August 23, 1988.

Time: 7:00 p.m.

Location: Gaither High School Auditorium, 1600 N. Dale Mabry Highway, Tampa, FL; and

Date: August 24, 1988.

Time: 7:00 p.m.

Location: University of South Florida, Bayboro Campus, Marine Science Laboratory Auditorium, 140 Seventh Avenue South, St. Petersburg, FL; and

Date: August 25, 1988.

Time: 7:00 p.m.

Location: Airport Administration Building, McElmurry Auditorium, General Spaatz Boulevard, Sarasota Airport, Sarasota, FL.

FOR FURTHER INFORMATION CONTACT: Joe Gill, Airspace Branch (ATO–240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9252.

Issued in Washington, DC, on May 18, 1988.

Temple H. Johnson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 88–11946 Filed 5–26–88; 8:45 am]

BILLING CODE 4910–13–M

Flight Service Station at Cherry Capital Airport, Traverse City, MI; closing

Notice is hereby given that on or about May 10, 1988, the present Flight Service Station at Cherry Capital Airport, Traverse City, Michigan will be closed. Services to the general public, formerly provided by this office, will be provided by the New automated Flight Service Station in Lansing, Michigan. This information will be reflected in the FAA organization statement the next time it is reissued.

(Sec. 313(a), 72 Stat. 752; 49 U.S.C. 1354.)

William H. Pollard,

Director, Great Lakes Region.

Issued in Des Plaines, Illinois on April 8, 1988.

[FR Doc. 88–11947 Filed 5–26–88; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Federal Law Enforcement Training Center; Meeting

AGENCY: Advisory Committee to the National Center for State and Local Law Enforcement Training.

ACTION: Notice of meeting.

SUMMARY: The agenda for this meeting includes: opening remarks by the Director of the Federal Law Enforcement Training Center and Committee Co-Chair; discussion of present and FY 89 program status and Operation Alliance update; a report from the Assessment Sub-Committee; and program development activities.

DATE: June 8, 1988.

ADDRESS: Federal Law Enforcement Training Center, Building 94, Board Room, Glynco Georgia.

FOR FURTHER INFORMATION CONTACT: Howard N. Goetsch, Assistant Director, Office of State and Local Training, Federal Law Enforcement Training Center, Glynco, Georgia 31524.

Charles F. Rinkevich,

Director.

May 23, 1988.

[FR Doc. 88–12013 Filed 5–26–88; 8:45 am]

BILLING CODE 4810–32–M

[3] Letter from Joseph P. Scordato, Vice President, Shearson Lehman Brothers, to Jonathan G. Katz, Secretary, SEC dated May 14, 1987.

[4] The Commission's Division of Investment Management takes the position that compensation received by a member or person associated with a member under this rule would constitute "special compensation" for purposes of the broker-dealer exception to the definition of the term "investment adviser" in section 202(a)(11)(C) of the Advisers Act. Accordingly, a member or person associated with a member, who receives compensation based on a share of profits or capital appreciation in a customer's account, and who does not fit within the exceptions from registration set forth in the Advisers Act, must comply with section 205(1) and Rule 205–3 under the Advisers Act with respect to such compensation.

[5] *See* letter to Katherine A. England, Branch Chief, SEC, from T. Grant Callery, Associate General Counsel, NASD dated May 4, 1988.

UNITED STATES INFORMATION AGENCY

Advisory Commission on Public Diplomacy

A meeting of the U.S. Advisory Commission on Public Diplomacy will be held in West Berlin June 6–7, 1988. The Commission will review USIA's programs in Europe and will consult with senior USIA officers from U.S. embassies in Bonn, USNATO Brussels, London, Moscow, and Paris.

Please call Gloria Kalamets, (202) 485–2468 for further information.

Dated: May 23, 1988.

Charles N. Canestro,

Management Analyst, Federal Register Liaison.

[FR Doc 88–11954 Filed 5–26–88; 8:45 am]

BILLING CODE 8230–01–M

VETERANS ADMINISTRATION

Veterans Administration Wage Committee; Meetings

The Veterans Administration, in accordance with Pub. L. 92–463, gives notice that meetings of the Veterans Administration Wage Committee will be held on:

Thursday, July 14, 1988, at 2:30 p.m.
Thursday, July 28, 1988, at 2:30 p.m.
Thursday, August 11, 1988, at 2:30 p.m.
Thursday, August 25, 1988, at 2:30 p.m.
Thursday, September 8, 1988, at 2:30 p.m.
Thursday, September 22, 1988, at 2:30 p.m.

The meetings will be held in Room 304, Veterans Administration Central Office, 810 Vermont Avenue, NW., Washington, DC 20420.

The Committee's purpose is to advise the Chief Medical Director on the development and authorization of wage schedules for Federal Wage System (blue-collar) employees.

At these meetings the Committee will consider wage survey specifications, wage survey data, local committee reports and recommendations, statistical analyses, and proposed wage schedules.

All portions of the meetings will be closed to the public because the matters considered are related solely to the internal personnel rules and practices of the Veterans Administration and because the wage survey data considered by the Committee have been obtained from officials of private business establishments with a guarantee that the data will be held in confidence. Closure of the meetings is in accordance with subsection 10(d) of Pub. L. 92–463, as amended by Pub. L. 94–409, and as cited in 5 U.S.C. 552b(c)(2) and (4).

However, members of the public are invited to submit material in writing to the Chairperson for the Committee's attention.

Additional information concerning these meetings may be obtained from the Chairperson, Veterans Administration Wage Committee, Room 1175, 810 Vermont Avenue, NW., Washington, DC 20420.

Dated: May 19, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,

Committee Management Officer.

[FR Doc. 88–12008 Filed 5–26–88; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 53, No. 103
Friday, May 27, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL RESERVE SYSTEM, BOARD OF GOVERNORS

TIME AND DATE: Approximately 12:00 noon, Wednesday, June 1, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: May 25, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88–12044 Filed 5–25–88; 10:18 am]

BILLING CODE 6210–01–M

FEDERAL RESERVE SYSTEM, BOARD OF GOVERNORS

TIME AND DATE: 10:00 a.m., Wednesday, June 1, 1988.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda

Because of their routine nature, no substantive discussion of the following items is anticipated. These matters will be voted on without discussion unless a member of the Board requests that an item be moved to the discussion agenda.

1. Proposed modification to Regulation H (Membership of State Banking Institutions in the Federal Reserve System) to implement the Competitive Equality Banking Act of 1987 to permit state member agricultural banks to amortize losses on qualified agricultural loans. (Proposed earlier for public comment; Docket No. R–0615)
2. Proposals regarding the Board's Statement of Policy on Banking Market Extension Mergers and Acquisitions. (Proposed earlier for public comment; Docket No. R–0386)

Discussion Agenda

3. Publication for comment of proposed amendment to Regulation Y (Bank-Holding Companies and Change in Bank Control) to implement the limitations placed on grandfathered nonbank banks by the Competitive Equality Banking Act of 1987.
4. Proposed revisions to the Board's Rules Regarding Availability of Information. (Proposed earlier for public comment; Docket No. R–0601)
5. Proposed 1989 Federal Reserve Board budget guideline.
6. Any items carried forward from a previously announced meeting.

Note.—This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452–3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Date: May 25, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88–12043 Filed 5–25–88; 10:18 am]

BILLING CODE 6210–01–M

NATIONAL CREDIT UNION ADMINISTRATION

TIME AND DATE: 1:45 p.m., Thursday, June 2, 1988.

PLACE: Amway Grand Plaza Hotel, Pantlind Ballroom/Hotel Concourse Level, Pearl at Monroe, Grand Rapids, Michigan 49503, 1–800–253–3690.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Open Meeting.
2. Economic Commentary.
3. Central Liquidity Facility Report and Review of CLF Lending Rate.
4. Insurance Fund Report.
5. Request by the State of Texas for Exemption from NCUA Lending Rules.
6. Proposed Field of Membership Expansion Request from Ocean Communities Federal Credit Union.
7. Request for Comments Chartering/Field of Membership (FOM) Issues.
8. Review NCUA Long Range Plan.
9. Legislative Update.

TIME AND DATE: 2:30 p.m., Wednesday, June 1, 1988.

PLACE: Amway Grand Plaza Hotel, Pearl Room/Hotel Concourse Level, Pearl at Monroe, Grand Rapids, Michigan 49503, 1–800–253–3690.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Closed Meeting.
2. Merger under section 205(h) of the Federal Credit Union Act. Closed pursuant to exemption (8), (9)(A)(ii), and (9)(B).
3. Termination of Conservatorship. Closed pursuant to exemption (8).
4. Assistance under section 208(a)(2) of the Federal Credit Union Act. Closed pursuant to exemption (8).
5. Review of Delegations of Authority. Closed pursuant to exemption (2).

FOR MORE INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (202) 357–1100.

Becky Baker,

Secretary of the Board.

[FR Doc. 88–12115 Filed 5–25–88; 3:11 pm]

BILLING CODE 7535–01–M

POSTAL SERVICE BOARD OF GOVERNORS

Notice of a Meeting

The Board of Governors of the United States Postal Service, pursuant to its Bylaws (39 CFR 7.5) and the Government in the Sunshine Act (5 U.S.C. section 552b), hereby gives notice that it intends to hold a meeting at 8:00 a.m. on Tuesday, June 7, 1988, at the University Plaza Holiday Inn, 333 John Q. Hammons Parkway, Springfield, Missouri. The meeting is open to the public. The Board expects to discuss the matters stated in the agenda which is set forth below. Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268–4800.

There will also be a session of the Board on Monday, June 6, 1988, but it will consist entirely of briefings and is not open to the public.

Agenda

Tuesday Session

June 7, 1988, 8:00 a.m. (Open)

1. Minutes of the Previous Meeting, May 2–3, 1988.
2. Remarks of the Postmaster General.

3. Consideration of the Postal Rate Commission's Recommended Decision in the Money Order Sale Limitation Case (Docket No. MC88–1). (Mr. Cox)
4. Productivity Measurement. (Mr. Strasser)
5. Report of the Chief Postal Inspector. (Mr. Clauson)
6. Semiannual Report on Consumer Protection. (Mr. Clauson)
7. Capital Investments.
   a. Research and Development Project—Remote Video Encoding. (Mr. Jacobson)
   b. Philadelphia, Pennsylvania, Airport Mail Facility (Mr. Smith)
8. Tentative Agenda for July 7–8, 1988, meeting in Washington, DC.

David F. Harris,

Secretary.

[FR Doc. 88–12116 Filed 5–25–88 3:11 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

Agency Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of May 31, 1988:

An open meeting will be held on Wednesday, June 1, 1988, at 10:00 a.m., followed by a closed meeting.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10) permit consideration of the scheduled matters at a closed meeting.

Commissioner Fleischman, as duty officer, voted to consider the items listed for the closed meetings in closed session.

The subject matter of the open meeting scheduled for Wednesday, June 1, 1988, at 10:00 a.m., will be:

1. Consideration of a staff report and recommendations concerning the use of predispute arbitration clauses by the securities industry in agreements with its public customers. For further information, please contact Robert Love at (202) 272–3064.
2. Consideration of possible amendments to Rule 10b–4 (17 CFR 240.10b–4), the short tendering rule, in light of the decision of the Court of Appeals for the Second Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker.* For further information, please contact M. Blair Corkran at (202) 272–2853.
3. Consideration of whether to approve a proposed rule change by the New York Stock Exchange ("NYSE" or "Exchange") that would permit members to install telephone lines at their booth spaces that will enable them to communicate from the Exchange floor with non-members located off the floor. The proposed NYSE rule would specifically prohibit the use by members of portable telephones on the Exchange floor. For further information, please contact Robert J. Sevigny at (202) 272–2409.
4. Consideration of whether to issue a release for public comment (1) proposed amendments to revise the reporting requirements for issuers changing their fiscal year end; (2) proposed related amendments to Form 8–K; (3) proposed amendments to the accounting and proxy rules relating to financial reporting; and (4) proposed amendments to the quarterly reporting rules. For further information, please contact Howard Hodges at (202) 272–2553.

The subject matter of the closed meeting scheduled for Wednesday, June 1, 1988, following the 10:00 a.m. open meeting, will be:

Formal order of investigation.
Institution of injunctive action.
Institution of administrative proceeding of an enforcement nature.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Kevin Fogarty at (202) 272–3195.

Shirley E. Hollis,

Assistant Secretary.

May 24, 1988.

[FR Doc. 88–12122 Filed 5–25–88; 4:02 pm]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 53, No. 103
Friday, May 27, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 220

School Breakfast Program; Nutritional Improvements and Offer Versus Serve

Correction

In proposed rule document 88-11512 beginning on page 18289 in the issue of Monday, May 23, 1988, make the following corrections:

§ 220.8 [Corrected]

On page 18292, in § 220.8(a)(2), in the table, in the first column, in the last line, after "guidance)", insert "[3]"; and in the second column, in the second entry, "1/3 cup oz" should read "1/3 oz".

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 661

[Docket No. 80482-8082]

Ocean Salmon Fisheries off the Coasts of Washington, Oregon, and California

Correction

In rule document 88-9883 beginning on page 16002 in the issue of Wednesday, May 4, 1988, make the following corrections:

1. On page 16002, in the third column, in the last paragraph, in the fifth line, "salmon" was misspelled.

2. On page 16003, in the second column, in the sixth complete paragraph, in the third line, "be" should read "by".

3. On page 16006, in the second column, in the sixth complete paragraph, in the sixth line, "an" should read "and".

4. On page 16008, in the table, in the last column, the fifth entry should read "Conservation Zone 2 (Klamath River mouth) is closed".

5. On page 16010, in the first column, in paragraph 1., in the second line, after "as" insert "follows:".

6. On page 16011, in the third column, in paragraph 7., in the second line, "Queens" should read "Queets"; and in the third line, "15'" should read "45'"

7. On the same page, in the table, in the second column, in the second entry, in the first line, "48=" should read "48°"; in the third entry, in the first line, "47=" should read "47°"; in the last entry, in the first line, "47=" should read "47°", and in the last line, "125'" should read "125°".

8. On the same page, in the table, in the fourth column, all entries beginning with "July 1..." and ending with "...quota", should appear in the third column "Open seasons" directly under the entry beginning with "May 1..." and ending with "...quota."; and the word "All" appearing directly under the entries for "July 1..." should remain in the last column "Salmon species" opposite the "July 1..." entry.

BILLING CODE 1505-01-D

DEPARTMENT OF EDUCATION

34 CFR Part 99

Family Educational Rights and Privacy

Correction

In rule document 88-7764 beginning on page 11942 in the issue of Monday, April 11, 1988, make the following corrections:

§ 99.6 [Corrected]

1. On page 11945, in the second column, in § 99.6(a)(4), in the fifth line, "§ 99.1(a)(1)" should read "§ 99.31(a)(1)".

§ 99.7 [Corrected]

2. On the same page, in the second column, in the heading for § 99.7, "manual" should read "annual".

§ 99.20 [Corrected]

3. On page 11946, in the second column, in § 99.20(b), in the first line, "education" should read "educational".

§ 99.31 [Corrected]

4. On page 11947, in the first column, in § 99.31(a)(3), in the second line, "authorize" should read "authorized".

5. On the same page, in the second column, in § 99.31(a)(5)(ii), in the third line, "or State" should read "of State".

§ 99.36 [Corrected]

6. On page 11948, in the third column, in § 99.36(a), in the first and second lines, "of safety or" should read "or safety of".

§ 99.67 [Corrected]

7. On page 11949, in the second column, in § 99.67(b), in the sixth line, "complainant" was misspelled.

8. On page 11950, in the third column, in "*Section 99.3*", in the second paragraph, in the 11th line, "statue" should read "statute".

9. On page 11953, in the second column, in the sixth indented paragraph, in the first line, "Two" should read "The".

10. On page 11954, in the third column, in the fourth line, "disclosed" should read "disclose".

11. On page 11956, eleven lines from the bottom, "student" should read "statute".

12. On page 11957, in the second column, eleven lines from the bottom, after "the" insert "student as".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 436 and 442

[Docket No. 88N-0047]

Antibiotic Drugs; Cefmenoxime Hydrochloride for Injection

Correction

In rule document 88-8936 beginning on page 13400 in the issue of Monday, April 25, 1988, make the following corrections:

§ 436.363 [Corrected]

1. On page 13401, in the third column, in § 436.363(c)(3), after "where:", in the fourth line, "w_j" should read "w_i".

§ 442.22a [Corrected]]

2. On page 13403, in the first column, in § 442.22a, in paragraph (b)(4)(i), in the last line, after "sodium" insert "sulfate".

§ 442.222 [Corrected]

3. On page 13404, in the first column, in § 442.222, in paragraph (b)(1)(iv)(A), the formula should read:

$$\text{Micrograms of cefmenoxime per milligram} = \frac{R_u \times P_3 \times 100 \times d}{R_s \times C_u (100\text{-}L\text{-}S)}$$

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 88N-0040]

Sulfamethazine in Food-Producing Animals; Public Hearing Before the Commissioner

Correction

In notice document 88-10012 beginning on page 15886 in the issue of Wednesday, May 4, 1988, make the following corrections:

1. On page 15888, in the second column, in the first paragraph, in the second line, "(=0)" should read "(P=0.00005)".

2. On the same page, in the third column, under **V. Hearing Procedures Under 21 CFR Part 15**, before paragraph 1, insert the following:

"Options available to the agency or the Center for Veterinary Medicine include:".

3. On the same page, in the same column, the last line should read "containing products marketed under 21 CFR 510.450 (section 512(d) of the act and 21 CFR 514.111)."

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-020-08-4212-13; A-23217]

Public Land Exchange; Mohave and Yavapai Counties, AZ

Correction

In notice document 88-6071 beginning on page 9150 in the issue of Monday, March 21, 1988, make the following corrections:

1. On page 9151, in the first column, the 12th line should read "T. 14½ N., R. 6 W.".

2. On the same page, in the same column, the 30th line should read "T. 13 N., R. 7 W.".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Radio Technical Commission for Aeronautics (RTCA); Special Committee 160 (9th Mtg.)-406 MHz Emergency Locator Transmitters (ELT); Open Meeting

Correction

In notice document 88-11194 appearing on page 18018 in the issue of Thursday, May 19, 1988, make the following correction:

In the first column, in the first paragraph, in the seventh line, "June 5" should read "June 15".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[INTL-28-86]

Apportionment of Expenses in the FSC and DISC Contexts

Correction

In proposed rule document 88-11004 beginning on page 17473 in the issue of Tuesday, May 17, 1988, make the following corrections:

1. On page 17473, in the second column, the "INTL" number is corrected as set forth above.

§ 1.861-8 [Corrected]

2. On page 17474, in the third column, in the section heading following **Par. 4**, the section number should read as set forth above.

3. On page 17475, in the second column, in § 1.861-8(g), in "*Example (23)*", in paragraph (iii), in the first line "(a)" should read "(A)".

4. On the same page, in the third column, in the same section, paragraph and example, in paragraph (C), the last four lines should read "Apportionment of the general and administrative expenses to the residual grouping, gross income from domestic sales of electronic equipment:".

BILLING CODE 1505-01-D

federal register

Friday
May 27, 1988

Part II

Federal Reserve System

12 CFR Part 229
Availability of Funds and Collection of Checks; Final Rule
Federal Reserve Bank Services; Notice

FEDERAL RESERVE SYSTEM

[Docket No. R-0620]

12 CFR Part 229

Regulation CC; Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board has adopted a new rule (Regulation CC) to implement the Expedited Funds Availability Act. This rule sets out the requirements that banks and other depository institutions make funds deposited into accounts available according to specified time schedules and disclose funds availability policies to their customers. Regulation CC also establishes rules designed to speed the return of unpaid checks.

The Board has also submitted the collection of information requirements in Regulation CC to the Office of Management and Budget (OMB) for its review under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) and OMB regulations on Controlling Paperwork Burdens on the Public (5 CFR Part 1320). The information collection requirements are contained in Regulation CC and published in this notice. Additional supporting documents may be obtained from the Board clearance officer listed below. Any comments on the collection requirements should be sent to the OMB desk officer listed below. OMB's usual practice is not to take any action on an information collection until at least ten working days after notice in the **Federal Register**, but occasionally the public interest requires more rapid action.

EFFECTIVE DATE: September 1, 1988, except for 12 CFR 229.12, which is effective on September 1, 1990. After September 1, 1990, 12 CFR 229.11 will no longer be effective.

FOR FURTHER INFORMATION CONTACT: For information regarding Subparts A and C contact Joseph R. Alexander, Senior Attorney, (202/452–2489), or Stephanie Martin, Attorney, (202/452–3198), Legal Division.

For information on §§ 229.10 through 229.14, and §§ 229.19 through 229.21 of Subpart B, contact Louise L. Roseman, Assistant Director, Division of Federal Reserve Bank Operations, (202/452–3874).

For information on §§ 229.15 through 229.18 of Subpart B, contact Gerald P. Hurst, Senior Counsel, (202/452–3667), Kathleen S. Brueger, Attorney, (202/452–2412), or Thomas J. Noto, Attorney, (202/452–3667), Division of Consumer and Community Affairs.

For the hearing impaired *only:* Telecommunications Device for the Deaf, Earnestine Hill or Dorothea Thompson, (202/452–3254).

Federal Reserve Board Clearance Officer, Nancy Steele, Division of Research and Statistics, (202/452–3822).

OMB Desk Officer, Robert Neal, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3228, Washington, DC 20503, (202/395–7340).

SUPPLEMENTARY INFORMATION:

Overview

Delayed availability—the holds that some banks [1] place on checks deposited into their customers' accounts before the funds may be withdrawn—was a subject of growing concern in the Congress for a number of years. Many argued that the holds placed by many banks were unduly long, and that depositors have a right to prompter access to their funds. Banks that impose holds responded that their availability schedules reflect the time needed for the collection and return of checks returned unpaid by the paying bank and provide a measure of protection against the risk that the bank could not recover funds from the depositor if those funds had already been withdrawn from the depositor's account.

The Congress concluded that federal legislation was required to address delayed availability practices and passed the Expedited Funds Availability Act (the "Act") (Title VI of Pub. L. 100–86, enacted on August 10, 1987). The Act seeks to ensure prompt availability of funds and to expedite the return of checks; the Board is directed to issue regulations to implement the Act, which becomes effective on September 1, 1988.

The Act includes specific and detailed provisions requiring banks to: (1) Make funds available to their customers within specified time frames, (2) pay interest on interest-bearing transaction accounts not later than the day the bank receives provisional credit, and (3) disclose their funds availability policies to their customers. These statutory provisions provide the Board with little flexibility in developing rules to implement the Act's requirements.

The Act requires that cash deposits, wire transfers, and certain check deposits that Congress believes pose little risk to the depositary bank, such as Treasury checks and cashier's checks, generally be made available for withdrawal by the business day after the day of deposit. The time when the depositary bank must make other check deposits available for withdrawal depends on whether the check is "local" or "nonlocal" to the depositary bank. A local check is a check deposited in a depositary bank that is located in the same Federal Reserve check processing region as the paying bank. A nonlocal check is a check deposited in a different check processing region than the paying bank. There are a total of 48 Federal Reserve check processing offices in the United States, and the territory served by each office constitutes a check processing region.

Under the temporary schedule that becomes effective on September 1, 1988, a depositary bank must make the proceeds of local checks available for withdrawal by the third business day following deposit; that is, the proceeds of local checks deposited on a Monday must be available for withdrawal by the following Thursday. The depositary bank must make the proceeds of nonlocal checks available for withdrawal by the seventh business day following deposit; that, is, the proceeds of a Monday deposit must be available for withdrawal by Wednesday of the following week. On September 1, 1990, these time periods are reduced. At that time, proceeds of local and nonlocal checks must be available for withdrawal by the second and fifth business day following deposit, respectively. Special rules are provided for cash withdrawals, deposits at nonproprietary automated teller machines, and deposits made in banks outside the continental United States.

Congress provided several exceptions to the availability schedules. When a bank invokes one of these exceptions, it may extend the hold on a customer's account beyond the statutory schedule by a reasonable period of time, as determined by Regulation CC.

The statute requires banks to disclose their availability policies to their customers and inform their customers that deposited funds may not be available for immediate withdrawal. Banks are required to provide disclosures to new customers prior to opening an account or upon request. In addition, disclosures are required on preprinted deposit slips, at staffed

[1] Regulation CC terminology corresponds with the terminology of the Uniform Commercial Code, with some modifications. "Bank" is defined to include all depository institutions. A "paying bank" is the bank on which the check is drawn. In the case of payable through drafts, the payable through bank is the paying bank. A "returning bank" is an intermediary bank handling a returned check. A "depositary bank" is the bank in which the check was first deposited. (See § 229.2 of Regulation CC for the complete definitions of these terms.)

locations where consumers make deposits, and at automated teller machines. Banks must also provide notice to their consumer customers whenever their availability policies change.

The Act gives the Board authority to make improvements in the check collection and return systems in order to shorten the time within which depositary banks learn of the nonpayment of checks, and thereby reduce the number of situations when the bank will be required by law to make funds available to its customers before it learns a check has been dishonored. The Board's authority is broad and general, and extends to checks that are not cleared through the Federal Reserve System. Previously, the Federal Reserve generally had the authority to regulate only those checks it collected.

The Board issued for public comment a proposed regulation and proposed Federal Reserve Bank services to implement the Act on December 3, 1987. (52 FR 47,112 (Dec. 11, 1987).) Over 1,000 comments have been received on the proposals.[2] Many of these comments were very thorough, and provided excellent analyses of issues raised in the proposal. A number of commenters stated that the proposal did a good job implementing the Act's requirements, and provided guidance that is essential for industry compliance. The commenters, however, expressed concern over the complexity of the Act and regulation, and the increased costs and risks to the banking industry due to the disclosure and funds availability requirements. In particular, many commenters were concerned with the risks inherent in the requirement to provide next-day availability for certain check deposits. This, as well as a number of other concerns, relate to statutory requirements the Board has little or no flexibility to modify.

The Board and Board staff considered all comments received, and discussed aspects of the proposed regulation with the Consumer Advisory Council and the Return Item Advisory Group, which is a joint Federal Reserve/banking industry group, as well as representatives of both industry and consumer groups. Two consulting firms were retained to assess the effect of certain aspects of the proposal on the banking industry. Based on the analysis of the issues raised by the public comments and this additional input, the Board made a number of changes to the proposed regulation. Other provisions of the proposed regulation, including some of those criticized by commenters, were retained either because they are required by the Act, or because they are important to carry out the purposes of the Act.

Discussion

Regulation CC (12 CFR Part 229), Availability of Funds and Collection of Checks, contains three subparts. Subpart A defines terms and provides for administrative enforcement. Generally, the terms in the regulation are defined as they are in the Act. The Board has adopted a number of changes for the sake of clarity, to conform the terminology to that which is familiar to the banking industry, to define terms not defined in the Act, and to carry out the purposes of the Act.

Subpart B specifies schedules within which banks must make funds available for withdrawal. The regulation reflects the availability schedules provided in the Act. Thus, deposits of cash and electronic payments, as well as certain check deposits, must be made available for withdrawal on the next business day following deposit. Longer schedules are provided for other checks, based on whether the checks are local or nonlocal. The following charts depict the schedules for these checks. The schedules for local and nonlocal checks, and in limited instances certain checks that must be given next-day availability, are subject to several exceptions to protect the depositary bank in higher risk situations.

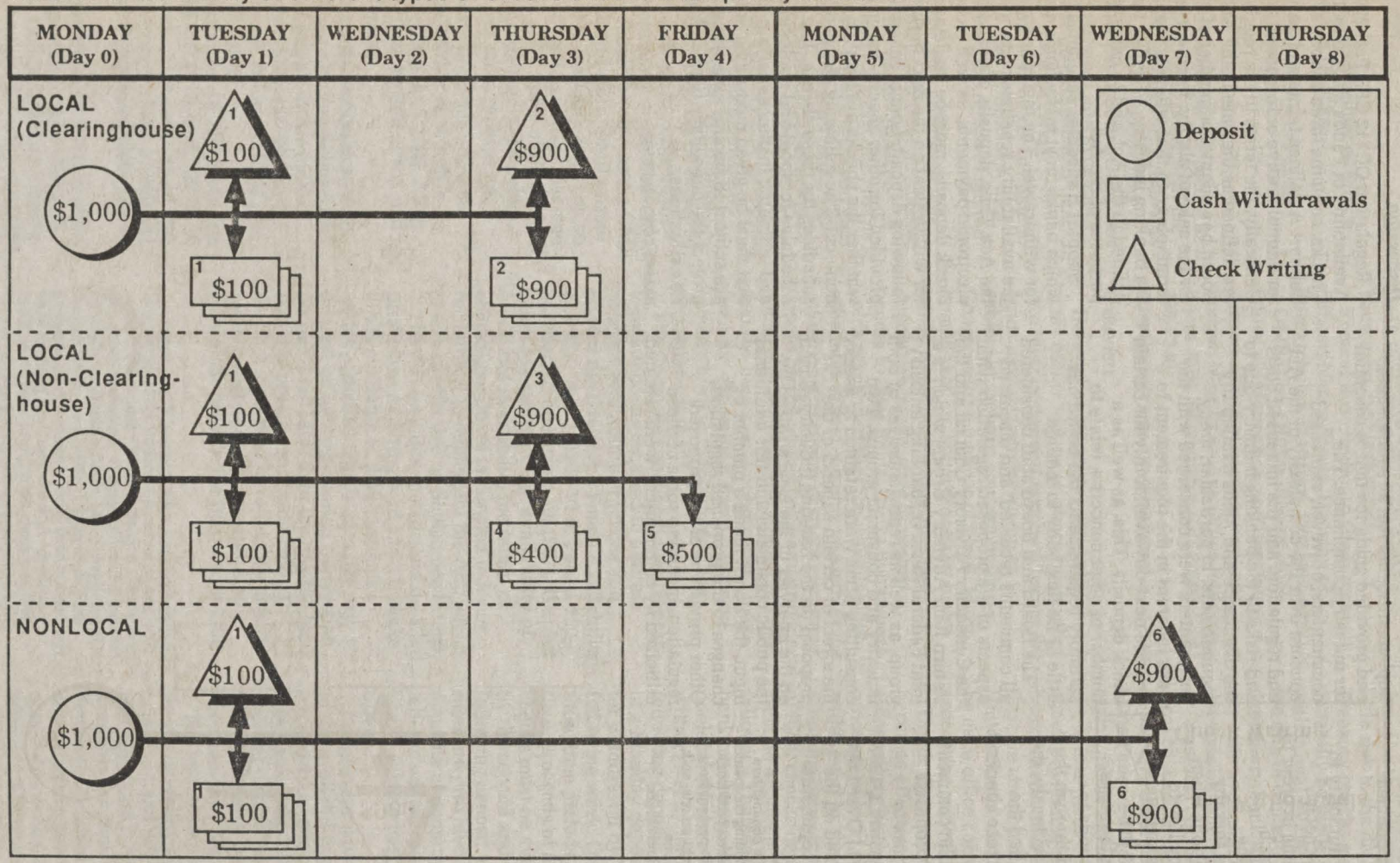
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[2] Approximately two-thirds of the commenters were commercial banks or bank holding companies. Ten percent of the comments were received from savings and loan associations, eight percent from corporations, five percent from credit unions, and the remainder from trade associations, clearinghouses, consumer groups, and others.

Temporary Funds Availability Schedules

Figure 1

Illustrates availability of different types of checks under the temporary schedules



1 The first $100 of a day's deposit must be made available for either cash withdrawal or check writing purposes at the start of the next business day § 229.10(c)(1)(vii).

2 For local checks cleared through a local clearinghouse, the remainder of the deposit must be made available for either cash withdrawal or check writing purposes by the **third** business day following the day of deposit § 229.11(b)(1).

3 For local checks cleared outside a local clearinghouse, the remainder of the deposit must be made available for check writing purposes by the **third** business day following the day of deposit § 229.11(b)(2).

4 For local checks cleared outside a local clearinghouse, **$400** of the deposit must be made available for cash withdrawal no later than 5:00 p.m. on the day specified in the schedule. This amount is in addition to the $100 that must be made available on the business day following the day of deposit § 229.11(b)(2).

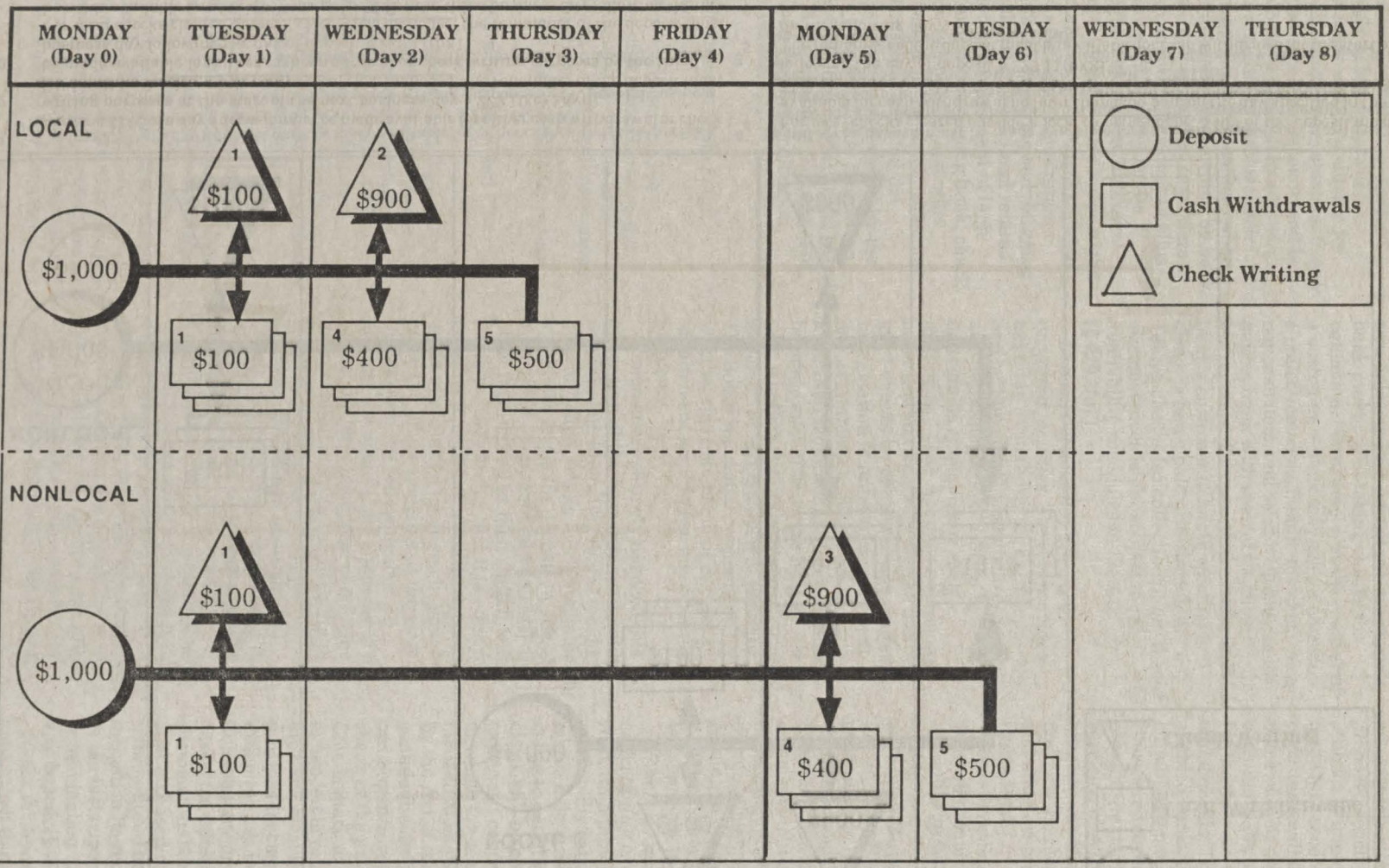
5 The remainder of the deposit must be available for cash withdrawal at the start of business on the following day § 229.11(b)(2).

6 For nonlocal checks, the remainder of the deposit must be made available for either cash withdrawal or check writing purposes by the **seventh** business day following the day of deposit § 229.11(b)(2).

Permanent Funds Availability Schedules

Figure 2

Illustrates availability of different types of checks deposited the same day, under the permanent schedules.



1 The first $100 of a day's deposit must be made available for either cash withdrawal or check writing purposes at the start of the next business day § 229.10(c)(1)(vii).

2 Local checks must be made available for check writing purposes by the **second** business day following deposit § 229.12(b).

3 Nonlocal checks must be made available for check writing purposes by the **fifth** business day following deposit § 229.12(c).

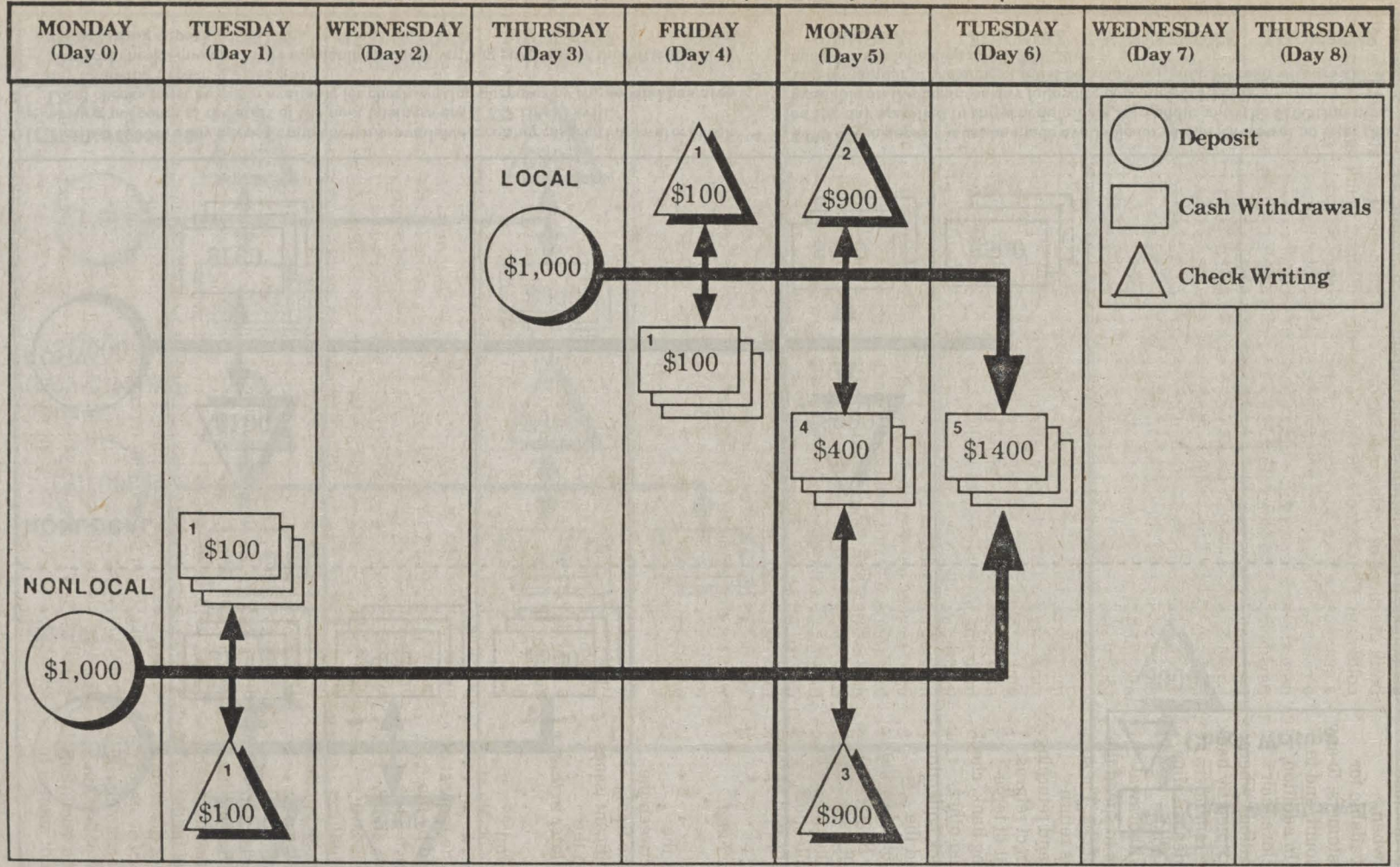
4 $400 of the deposit must be made available for cash withdrawal no later than 5:00 p.m. on the day specified in the schedule. This is in addition to the $100 that must be made available on the business day following deposit § 229.12(d).

5 The remainder of the deposit must be made available for cash withdrawal at the start of business the following day § 229.12(d).

Permanent Funds Availability Schedules

Figure 3

Illustrates availability of different types of checks deposited on separate days, under the permanent schedule.



1 The first $100 of a day's deposit must be made available for either cash withdrawal or check writing purposes at the start of the next business day § 229.10(c)(1)(vii).

2 Local checks must be made available for check writing purposes by the **second** business day following deposit § 229.12(b).

3 Nonlocal checks must be made available for check writing purposes by the **fifth** business day following deposit § 229.12(c).

4 **$400** of the deposit must be made available for cash withdrawal no later than 5:00 p.m. on the day specified in the schedule. This applies to the aggregate amount of deposits that must be made available on a specified day, and is in addition to the $100 that must be made available on the business day following deposit § 229.12(d).

5 The remainder of the deposit must be made available for cash withdrawal at the start of business the following day § 229.12(d).

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Subpart B also includes rules regarding exceptions to the schedules, disclosure of funds availability policies, and payment of interest. The Act and regulation require banks to disclose their specific policy as to when deposited funds will be available for withdrawal to existing customers, to any person opening a new account, and to any person upon request. In addition, banks are required to disclose their availability policies in locations where consumer deposits are accepted by bank employees, and to provide reminders at ATMs and on preprinted deposit slips that deposited funds may not be available for immediate withdrawal.

Subpart C includes rules to speed the collection and return of checks. These rules cover the expeditious return responsibilities of paying and returning banks, authorization of direct returns, notification of nonpayment of large-dollar returns by the paying bank, check indorsement standards, and other related changes to the check collection system. The Board adopted the indorsement standard required by the regulation (Appendix D to Regulation CC) on April 4, 1988. (53 FR 11,832 (April 4, 1988).) A discussion of the impact of Subpart C on the check collection system is summarized at the end of this overview.

Significant Changes in the Final Regulation CC

The following describes the substantive differences between the proposed regulation and the final Regulation CC. Other significant issues and comments received on the regulation are highlighted later in this document.

1. Availability Schedules and Exceptions

Treasury Accounts. At the request of the Treasury, accounts held by the United States Treasury, such as Treasury General Accounts and Treasury Tax and Loan Deposit Accounts, are not subject to the availability and disclosure requirements of Subpart B of the regulation. (§ 229.2(a).)

Noncash Items. The Act and regulation exclude noncash items from the definition of check. Thus, noncash items are not subject to the funds availability requirements of the statute and regulation. A number of commenters asked the Board to clarify that accepting checks on a collection basis is permitted under the regulation, and that such checks are not subject to the regulation's availability requirements.

While the regulation does not generally authorize banks to take checks for collection as an alternative to taking them for deposit subject to the statutory schedules, it does permit certain current bank practices of taking checks for collection. For example, at the request of a customer, a bank may take a check on a collection basis, handle the check as a noncash item, and send it directly to the paying bank with special payment instructions. This practice enables a bank's customer to know whether a check is being paid or dishonored. Taking checks for collection under these circumstances is not subject to the availability schedules in the Act. (§ 229.2(u).)

Deposits of next-day checks at unstaffed facilities. The Act provides next-day availability for cash deposits and certain check deposits to accounts at a depositary bank "staffed by individuals employed by such institution." (The Act does not require, however, that Treasury checks and "on us" [3] checks be deposited at a staffed teller station in order to receive next-day availability.) The proposed regulation required that these deposits be made available on the next business day, whether or not they were deposited in person to an employee of the bank. The Board requested comment on whether this expansion of the Act's requirement would pose any operational problems.

Commenters strongly opposed this expansion of the next-day availability requirement, indicating that it would be very difficult to make funds available on a next-day basis for deposits made at automated teller machines (ATMs) and other facilities other than staffed teller stations. They stated that it is often not possible to collect and verify deposits made at unstaffed locations in time to make the funds available at the start of business on the following day. To address the operational concerns of the banks, the final regulation conditions the receipt of next-day availability to deposits (other than the deposit of Treasury checks and on us checks) "made in person to an employee of the depositary bank," in accordance with the Act. The Board believes that extending the hold on these deposits to the local and nonlocal schedules is not warranted by these operational concerns. Thus, the regulation provides that deposits that are eligible for next-day availability that do not meet this condition must be made available for withdrawal by the start of the second business day following deposit. (§ 229.10(c).)

ATM cut-off hours. In addition to the next-day availability requirements, commenters cited other provisions of the proposed regulation that would be very difficult to implement operationally with respect to accepting deposits at, and permitting withdrawals from, ATMs. Some of their concerns focused on what constitutes the start and close of a day for the purpose of ATM withdrawals and deposits. The proposed regulation enabled banks to establish a cut-off hour of 2:00 p.m. or later for deposits considered received on a given day. To provide greater flexibility in the servicing of ATMs, the final regulation allows a cut-off time as early as 12:00 noon for the receipt of deposits at ATMs and other off-premise facilities. (§ 229.19(a).)

Start of business. The regulation generally requires that funds be made available for withdrawal at the start of business on the day specified in the schedule. The proposed regulation provided that the start of business was generally the time the branch opens to the public, and, in the case of ATMs, not later than 7:00 a.m. In response to comments that customer accounts often cannot be updated with the day's opening balance by 7:00 a.m., the regulation has been modified to require a 9:00 a.m. start of business for ATM withdrawals. (§ 229.19(b).)

Notice of reasonable cause to doubt collectibility exception. The Act and regulation provide an exception to the availability schedules for instances where a depositary bank has reasonable cause to doubt whether a particular check will be collected. Commenters expressed concern regarding the manner in which the reason this exception is invoked must be disclosed, as required by the Act, if the reason relates to confidential information, such as the pending insolvency of the drawer of the check or the paying bank. The Commentary to the regulation has been expanded to provide guidance on how the bank must disclose, in the notice it provides its customer, the reason this exception has been invoked. The revised Commentary provides that in such cases, the bank may disclose to the customer that the exception is being applied based on confidential information. The bank is required to include in its records a brief statement of the facts upon which the determination to invoke this exception was based. (§ 229.13(e) and § 229.13(g).)

Cash Withdrawal Limitation. Certain banks limit the amount of cash a customer may withdraw on any day at

[3] Checks drawn on the depositary bank.

ATMs and/or staffed teller facilities. The proposed regulation did not prohibit these limitations as long as the bank's policy is applied without discrimination to all customers of the bank, is not dependent on the length of time the funds have been in the account (as long as the hold has expired), and is related to security requirements or bonding limitations of the bank. Commenters believed this policy is overly restrictive, particularly in the case of policies related to ATM cash withdrawal limits. The final regulation does not prohibit cash withdrawal limitations at ATMs if the bank's policy is not dependent on the length of time the funds have been in the account, and in the case of limits on over-the-counter cash withdrawals, is applied without discrimination to all customers, and is related to security, operating, or bonding requirements of the bank. The regulation does not authorize such policies if they are otherwise prohibited by statutory, regulatory, or common law. (§ 229.19(c).)

Repeated Overdrafter. The proposal contained an exception to the availability schedules for deposits to accounts of repeated overdrafters. Commenters suggested that the proposed exception would be very difficult operationally to implement. The final rule is revised in an effort to simplify the application of this exception. The exception now defines a repeated overdrafter as a customer that overdraws its account, or bounces checks, on six or more banking days during a six-month period, or on two or more banking days during a six-month period in the amount of $5,000 or more. (§ 229.13(d).)

Time Period for Exceptions. The proposed regulation allowed a bank to extend the availability schedule by not more than four business days when it invokes an exception to the regulation's availability schedule. The final regulation allows a bank to extend the schedule by a reasonable period of time, and states that an extension of up to four business days is a reasonable period. An extension of more than four days may be reasonable, but the bank has the burden of so establishing. (§ 229.13(h).)

Relation to State Law. The Act provides that a state law supersedes federal law if it requires that funds be made available more promptly than required by federal law. Other provisions of state law that are inconsistent with the Act or regulation are preempted. This standard is broader than those of other consumer statutes, such as the Electronic Fund Transfer Act and Fair Credit Billing Act, which provide for preemption of provisions of state law that are inconsistent, "and then only to the extent of the inconsistency."

The proposed regulation included standards that would be applied to determine whether state law relating to the time funds must be available for withdrawal are inconsistent with federal law, and thus preempted. The proposal did not, however, provide standards for determining whether state disclosure requirements related to funds availability are inconsistent. The Board provided, in the regulation, that disclosures or notices concerning availability provisions of state law relating to transaction accounts are preempted by the requirements of Regulation CC. (229.20(c).)

2. Interest Accrual

Use of Fractional Availability. The Act requires that a bank begin to accrue interest on interest-bearing accounts not later than the day it receives provisional credit on the funds deposited. To facilitate compliance with this requirement, the final regulation permits a bank to begin accruing interest on check deposits based on the average availability the bank receives on such deposits on a bank-wide basis. (229.14(a).)

3. Disclosures

Case-by-Case Hold Policy. The proposed regulation required as a general rule that banks disclose their specific policy in a way that would allow customers to determine when a particular deposit would be available for withdrawal. The proposed regulation provided a simplified alternative disclosure for banks that generally make funds available on the business day following the day of deposit, and place holds only on a case-by-case basis. This proposed alternative disclosure required a bank to disclose that it usually provides next-day availability, although from time to time it may hold deposits for a longer specified time, and that if a longer hold was imposed, the customer would be notified. The proposal required that the bank furnish the notice that availability of a deposit was going to be delayed at the time the deposit was made. A bank could provide notice of the delay later, if the bank informed the customer that a hold might be placed at the time of the deposit, and then notified the customer by the end of that day if a hold was in fact going to be placed on the deposit.

Generally, the commenters favored an alternative disclosure for banks that had case-by-case hold policies. Several commenters, however, asked that the ability to use the case-by-case disclosure not be limited to banks with a policy of next-day availability. In addition, commenters objected to the timing of the notice requirement when a bank imposed a case-by-case hold. Specifically, commenters stated that a teller may not know whether a check will be held, and thus would not be able to inform the customer of the possibility of a hold at the time of the deposit. In addition, commenters stated that the requirement that the bank notify the customer of any hold on the day of the deposit was too restrictive.

The Board adopted modifications to the proposed disclosure requirements to address these concerns. The modified disclosure rule does not limit the case-by-case alternative to banks that generally give next-day availability. Instead, the rule allows any bank that generally makes funds available for withdrawal sooner than is required in the regulation to use this alternative disclosure.

A bank that extends a hold on a case-by-case basis must provide notice to its customer within the same time frames as the notice that is required when an exception to the availability schedules is invoked. Thus, a bank would be required to provide a notice at the time of deposit if the deposit is made at a staffed teller station and the decision to extend the hold is made at the time of deposit. Otherwise, the bank must mail the notice of the hold to the customer not later than the business day following the day of deposit. In addition, the final rule also parallels the requirement applicable to the reasonable cause exception by prohibiting a bank that does not provide a notice of a hold at the time of the deposit from imposing service fees or charges for overdrafts or returned checks resulting from the hold, if the check subject to the hold is in fact paid. (§ 229.16(c).)

ATM Notice. The proposed regulation contained special notice requirements for ATMs at which customers of banks other than the bank to which the ATM is proprietary are able to make deposits. The proposed notice included a requirement to identify the bank to which the ATM is proprietary. These requirements generated concerns as to consumer confusion, competitive effect, disclosure burden, and effect on state law. The final regulation eliminates the requirement to identify the bank to which an ATM is proprietary at the ATM, but a bank that extends the time period applicable to deposits at nonproprietary ATMs must explain its policy in its initial disclosure and either provide a list of proprietary or

nonproprietary ATMs with that disclosure, or identify the bank's name on all proprietary ATMs. (§ 229.18(c).)

Branch Location Notice—Drive-Through Teller Windows. The Act requires that a notice of time periods applicable to the availability of funds be posted in each location where employees accept deposits. The proposed regulation required this notice to be posted in the lobby at some place where customers would be likely to see it before making their deposits, and required that the notice also be posted at any drive-through teller windows. Commenters noted the practical problems the drive-through requirement would generate and the fact that the Act itself is silent on the matter. The requirement that this notice be posted at drive-through teller windows has been eliminated in the final regulation. (§ 229.18(b).)

Change in Terms Notice. The proposed regulation required that notices of changes in availability policy be sent to all customers. The final regulation limits this requirement to consumer accounts, consistent with the statutory requirement. In addition, the Commentary provides that banks are not required to send a change in terms notice if the Board revises Appendix B, which lists the routing numbers of certain nonlocal checks that are subject to prompter availability than the nonlocal schedule. (§ 229.18(e).)

4. Check Return Rules

Standards for expeditious return. The proposed regulation required paying and returning banks to return checks expeditiously, using the forward collection process as the standard for expeditious return. A number of commenters stated that this standard was uncertain, particularly in comparison to the current midnight deadline rule, and expressed concern that litigation in this area may increase as a result. These commenters asked that a more definitive standard for expeditious return be provided.

The forward collection standard, rather than a specific number of days for return, was proposed as the standard for expeditious return to facilitate compliance for banks, particularly country banks or banks returning checks to country banks, that require a longer period of time to return checks to a depositary bank. In order to respond to commenters, concerns, the final regulation contains a second test of what constitutes expeditious return by a paying or returning bank. Under this second test, a bank satisfies its return requirements if it returns a check so that the check would normally be received by the depositary bank within two days after the check is presented in the case of a local paying bank or four days after the check is presented in the case of a nonlocal paying bank with respect to the depositary bank. If a check is not received within these time frames, the return would still be expeditious if the return process met the forward collection standard. The Board believes that the combination of these rules will speed the return of checks so that the majority of checks can be collected and returned within the temporary statutory availability schedules. At the same time, it provides a workable standard that can be implemented by paying banks and correspondent banks offering check return services. (§§ 229.30(a) and 229.31(a).)

Expeditious Return—Notice Option. Under the proposed regulation, a bank could fulfill its responsibilities to return checks expeditiously by providing a notice of nonpayment expeditiously, with the check returned in a slower manner. Commenters opposed this notice alternative, stating that notices are often inaccurate, and consequently the depositary bank often cannot charge back the customer's account with confidence based on a notice. Commenters did not believe that this notice alternative was warranted, and stated that the paying bank should be required to return the check itself in an expeditious manner. The final regulation eliminates notice as an option for meeting the duty of expeditious return. (§ 229.30(a).)

Unidentifiable Depositary Bank. The proposed regulation permitted a paying or returning bank to send a returned check to a bank that handled that check for forward collection, even if the collecting bank does not agree to act as a returning bank. In response to comments that it was unreasonable to impose expeditious return requirements on banks that did not hold themselves out as returning banks, the final regulation limits this option for return to cases where the paying or returning bank is unable to identify the depositary bank with respect to a returned check. In these cases, the bank may send the check to a bank that handled the check for forward collection, if the bank advises the collecting bank that it is unable to identify the depositary bank. Checks that must be returned in this manner are not subject to the expeditious return requirements. (§§ 229.30(b) and 229.31(b).)

Notice in Lieu of Return. If a check is unavailable for return, a paying or returning bank can send in its place a notice in lieu of return. The depositary bank must treat this notice as it would a returned check. The proposed regulation permitted electronic notices in lieu of return. Commenters stated that allowance for electronic notices in lieu would entail significant accounting and reconcilement problems. The final regulation requires a notice in lieu of return be in the form of a copy of the returned check, and if no such copy is available, a written notice. (§§ 229.30(f) and 229.31(f).)

Midnight deadline extension for checks of $100 or less. One of the objectives of the proposed regulation was to reduce the volume of checks that are returned. Over one-half of all returned checks are in amounts of $100 or less. Many of these returns are automatically redeposited, and over 60 percent are paid on the second presentment. To eliminate many of these returns entirely, the proposed regulation allowed the paying bank to hold checks of $100 or less for an additional two business days beyond its midnight deadline in an effort to secure payment.

Most of the respondents that commented on this provision opposed its inclusion in the final regulation. Banks asserted that this practice would create accounting and reconcilement problems, as well as the customer relations problems arising from the imposition of returned check charges. Banks also argued that unlike an automatic redeposit service, where the depositary bank makes the decision to redeposit the check and incur the risk that the check may be returned a second time, this provision placed the decision to hold the checks an additional two days on the paying bank, although the risks remain with the depositary bank or its customer. Very few commenters indicated that they would use this optional authority. Therefore, the Board has deleted from the final regulation the provision to hold low-dollar checks an additional two business days, in an effort to obtain payment.

Notice of Nonpayment. Notice of large-dollar returns is now required only for those checks collected through the Federal Reserve. The proposal expanded this requirement to all checks of $2,500 or more, regardless of the channel through which they were cleared, and reduced the time within which notice must be received by the depositary bank. Commenters generally supported this requirement, but recommended several modifications. A number of technical changes have been made to the final regulation. These include changes that address cases in which the paying bank cannot determine with reasonable certainty from the check all of the required information for

the notice, as well as locations at which depositary banks must accept notices of nonpayment. The final regulation also addresses the depositary bank's duty to notify its customer that a check is being returned, and the paying bank's responsibility for giving notice of nonpayment and subsequently returning the check. (§§ 229.33 and 229.34(b).)

Indorsements. The final regulation includes indorsement standards and rules for depositary banks, subsequent collecting banks, and returning banks. The Board approved these indorsement standards on April 4, 1988. One subsequent modification to the indorsement standard was made to eliminate the requirement that the depositary bank indorsement avoid the MICR clear band along the bottom of the check. (§ 229.35(a); Appendix D.)

Inquiry to Paying Bank. To address the concerns of the banking industry regarding the risks inherent in providing next-day availability for cashier's, certified, and teller's checks, the proposed regulation included a duty on the paying bank to respond to inquiries regarding the authenticity of official checks that it issued. The final regulation eliminates this requirement, due to operational difficulties noted by the commenters.

Liability—Responsibility for Back of the Check. The final regulation defines the liability of the paying and depositary bank for untimely returns due to unreadable indorsements caused by material on the back of the check. The paying bank is responsible for the condition of the back of the check when it is issued. Thus, an unreadable indorsement due to a carbon band, printed contract, or other material on the back of the check at the time it is issued is the responsibility of the paying bank. The depositary bank is responsible for the condition of the check after issuance and before acceptance by the depositary bank, such as indorsements or other stamps placed on the check by its customer or a prior indorser. (§ 229.38(d).)

Liability—Bona Fide Errors. Under the proposed regulation, a bank would not be liable for a violation of the return rules of Subpart C if the violation were due to a bona fide error. The liability standard in the final regulation provides that a bank is required to exercise ordinary care and act in good faith, without the shield of the bona fide errors provision. The bona fide errors shield is not necessary, as the standards for negligence liability incorporate the purpose of the bona fide error provision. (§ 229.38(a).)

Exclusions. Under the proposed regulation, U.S. Postal Service money orders, checks drawn on the account of the U.S. Treasury, and checks indorsed by, or for credit to, the Treasury, were excluded from the expeditious return requirements of Subpart C. At the request of the Treasury, the final regulation eliminates the exclusion for checks indorsed by, or for credit to, the Treasury. The final regulation also excludes checks drawn on a state or local government from the expeditious return requirement. (§ 229.42.)

Variation by Agreement. A number of commenters asked that banks be explicitly permitted to vary the requirements of the regulation by agreement, as is permitted under the Uniform Commercial Code. There are a number of situations where an allowance for variation by agreement would be useful. For example, a depositary bank may wish to limit its liability to its depositor, or a paying bank to its customer, for late return due to material on the back of the check by the depositor or customer that obscures the depositary bank's indorsement. The final regulation permits variation by agreement for the provisions of Subpart C check return rules. Persons that are not party to the agreement, however, are not bound by the variations of the regulation's requirements. Banks are not authorized to vary the requirements of the funds availability and disclosure requirements of Subpart B by agreement. (§ 229.37.)

Transition Rule for Merged/Acquired Banks. Commenters stated that it would be extremely difficult to comply with certain requirements of the regulation for a period of time following a merger or acquisition of a bank. These difficulties arise from having to treat the banks that have merged as one entity, before the operations of the banks have been consolidated. New provisions have been added to the regulation to provide a one-year transition period for merged/acquired banks, during which they may be treated as separate banks for certain purposes. (§§ 229.19(g) and 229.40.)

Federal Reserve Bank Services (Docket No. R–0621)

Returned check services. The Board has adopted new Federal Reserve Bank returned check services designed to facilitate bank compliance with the regulatory requirements to return checks expeditiously, effective September 1, 1988. These services were published for public comment in December 1987. (52 FR 47,171 (Dec. 11, 1987).) Under the new services, Federal Reserve Banks will accept and process any returned check, and return the check directly to the local depositary bank or a processing center designated by the depositary bank, bypassing any intermediary collecting banks in the indorsement chain. Direct return of checks will reduce the time required to return checks to the depositary bank. In contrast, today a Federal Reserve Bank only accepts and processes returned checks that it collected, and returns each check to the bank that deposited the check with the Reserve Bank for forward collection.

Reserve Banks will also accelerate their processing of returned checks. Beginning September 1, 1988, local returns will be processed on an overnight basis and dispatched with the forward collection checks the next morning. Nonlocal returns will be prepared for high-speed processing ("qualified") by the first Federal Reserve office and dispatched to the second Federal Reserve office the following night. The Federal Reserve offices will also accept returned checks that have been qualified by the paying bank or prior returning bank, and dispatch them as quickly as forward collection checks. Today, local returns are processed during the day, and dispatched one day later. Moreover, nonlocal returns are processed manually by two Reserve Bank offices, adding an extra day to the return process.

With the introduction of new returned check services, returns will be priced explicitly, with the returned check fees assessed on the paying or returning bank depositing returns with the Federal Reserve Bank. Forward collection fees will be reduced due to the elimination of the return cost component. Currently, the Federal Reserve does not explicitly price returned checks; instead, the costs of handling returns are incorporated in the Reserve Banks' forward collection fees. Reserve Banks will also offer a same-day notification service for all large-dollar returned checks. Beginning on January 1, 1989, any depositary bank that has an on-line electronic connection with funds transfer capabilities with the Federal Reserve must receive large-dollar notices of nonpayment electronically.

The Board has approved additional 1988 expenditures to implement the new returned check service offerings, not to exceed $15,000,000 in capital expenditures and $15,000,000 in operating expenditures. The costs of providing these services will be recovered by the Reserve Banks through the fees assessed for the services.

Truncation and extended MICR capture services. As part of the December 1987 package, the Board proposed to make the truncation service being piloted by six Reserve Banks a permanent service that could be offered

by all Reserve Banks. In truncation, the MICR-line information on the check is captured and presented to the paying bank electronically, while the paper checks are retained by the presenting bank. Although initially Reserve Banks would provide a truncation service to paying banks who request this service on a local basis only, eventually the Federal Reserve System intends to provide a national interbank truncation service; that is, truncation at the first Federal Reserve Bank to receive the check. Private sector service providers would be able to participate in a nationwide network under the rules of the National Association for Check Safekeeping (NACS). One Reserve Bank is now engaged in interbank truncation on a pilot basis, under the NACS rules.

The benefits of truncation include expeditious check processing and return and a reduction in the number of times the paper check is handled. The benefits of truncation will increase as checks are truncated earlier in the collection process. The Board also requested comment on a proposed service that offers many of the same benefits of truncation without stopping the flow of the paper check—the extended MICR capture service. Under this service, which has also been provided on a pilot program basis, Reserve Banks would deliver payment information by electronic transmission or magnetic tape, provide returned check and retrieval service, and deliver the checks to the paying bank several days later using less time-critical transportation.

The Board approved an expansion of the Federal Reserve's truncation and extended MICR capture pilot programs to permanent services for all Federal Reserve offices, effective July 15, 1988. (See Docket R–0621, published elsewhere in today's **Federal Register**, for additional information on truncation and extended MICR capture services.)

Effect of the Proposal

Cost effect. The requirements of the Act and regulation will result in several benefits to the public. Transaction account customers will be given specific information on when funds will be made available for withdrawal, which should help them better manage their accounts. In addition, many customers will gain earlier access to their funds.

A number of commenters indicated, however, that the overall costs to the banking industry to implement the availability and disclosure requirements will be quite significant. For many banks, these requirements will result in higher operating expenses and lost investment income due to earlier withdrawal of collected balances. There is also a potential for increases in bad check losses that may result from the availability requirements. In particular, the commenters stated that banks will be exposed to an unacceptable level of risk from the requirement that certain check deposits, such as cashier's checks and certified checks, be made available for withdrawal at the start of the next business day following deposit, regardless of the amount. The next day availability of these checks, however, is a requirement of the Act.

While the improvements to the check return system provided in Subpart C of the regulation may increase costs to the banking industry in the short term as banks adjust to the new processing environment, these initiatives may result in a reduction of the overall cost of processing returns in the long run. Returns will be received by the depositary bank more quickly than they are today, reducing the bank's risk from providing prompt availability of funds to its customers. Returned checks will be handled by a smaller number of intermediary banks, due to the direct return provisions in the regulation. The availability and disclosure requirements may result in a reduction in the number of returns, because funds may be available for withdrawal sooner, and customers would know more precisely when they may withdraw funds from their accounts. Most importantly, the new indorsement standard should facilitate the more efficient processing of returns by making the depositary bank more readily identifiable. Future enhancements to the indorsement standard would allow all parties in the check collection system to automate their return processing completely, thus further lowering costs.

Competitive Effect. An important factor considered in the development of the regulatory framework for expedited returns and related Reserve Bank services was the effect on competition in the check collection system. In this regard, the Board requested comment on whether there are any returned check services or other procedural changes for returning banks that the Federal Reserve did not propose that might assist the returning bank in providing returned check services.

Commenters' primary concerns with the implementation of the proposed Federal Reserve services centered around the potential for the Federal Reserve to become the predominant provider of returned check services, given the availability schedules and deadlines that will be provided by the Federal Reserve Banks. Several commenters urged that the Federal Reserve delay offering returned check services or, at a minimum, delay unbundling returned check costs from forward collection prices until correspondent banks and other interested parties could develop their own returned check products and get some experience with the market pricing mechanism. There were also comments suggesting that the Federal Reserve has an unfair competitive advantage due to its role as regulator and service provider, and its lower price structure, due, in part, to the fact that the Federal Reserve does not incur certain costs, such as presentment fees, that the private sector must pay.

The Board implemented the requirements in Subpart C of Regulation CC to improve the check return process effective September 1, 1988, in conjunction with the effective date of the funds availability and disclosure requirements mandated by the Act. Industry representatives indicated that implementation of these improvements concurrent with the effective date of the funds availability requirements is important to minimize risks to the depositary bank from making funds available on a more prompt basis.

To enable banks to comply with these requirements, the Federal Reserve Banks will begin offering returned check services that would meet the requirements in the Act on September 1, 1988. Handling of returned checks by the Federal Reserve must be explicitly priced with the introduction of these new services, since return costs cannot be recovered through the Federal Reserve Banks' forward collection fees as they are today. Some returned checks handled by the Federal Reserve under the new services will not have been collected through the Federal Reserve, and thus will not have been subject to the Federal Reserve's forward collection fees. In addition, paying banks and returning banks will be able to deposit returned checks with the Federal Reserve in various ways that result in different costs being incurred by the Reserve Banks. To provide correspondent banks with as much advance notice as possible in order to develop competing returned check services, the Board published, on April 4, 1988, estimated price ranges and deadlines for the new Federal Reserve returned check services. It is the Board's belief that the proposed services meet the standards that the Federal Reserve has established for priced services, as they will recover costs; yield clear public benefits by speeding the handling of returned checks; and because initially, adequate returned check

services are unlikely to be provided by the private sector.

Educational Efforts

During the public comment period, Federal Reserve Banks conducted over 220 seminars throughout the country to explain the requirements of the proposed regulation, and better prepare the public to comment on the Board's proposals. Approximately 17,500 participants attended these seminars, representing over 9,000 depository institutions. The Federal Reserve Banks plan to conduct additional seminars in June, to assist the industry in preparing for the regulatory and operational changes to be effective on September 1. In addition, Federal Reserve staff is working closely with various industry groups with similar seminars they plan to offer their constituencies.

Effect of the New Return Rules on the Check Collection System

The following is an explanation of the current process for returning checks and a description of the responsibilities of paying, returning, and depositary banks now and in the future, under the check return requirements of Regulation CC. This overview should assist the reader in better understanding the effect of the proposed changes to expedite the return of checks on paying banks, returning banks, and depositary banks.

In contrast to the forward collection process, the returned check process is a slow, relatively labor intensive, and costly operation. A study prepared for the Bank Administration Institute concluded that, while the forward collection process takes an average 1.6 days to complete, the return process takes an average of 5.2 days. (*Return Items Study, Final Report,* prepared for the Bank Administration Institute by J.D. Carreker and Associates, Inc. (May 1985), "BAI Study.") The BAI study found that, during the return process, the average returned check is handled by 3.4 banks: the paying bank, an average of 1.4 returning banks, and the depositary bank. Even though less than one percent (the study estimated 0.86 percent) of all checks are returned, the absolute volume of returns (the study estimated 350 million annually) is relatively large.

The BAI Study found that approximately 40 percent of returned checks take seven days or longer to complete the collection and return cycle and 15 percent take 10 days or longer. Under the temporary schedules, the proceeds of local checks must be available for withdrawal on or before the third business day after deposit and the proceeds of nonlocal checks must be available for withdrawal on or before the seventh business day after deposit. Under the permanent schedule, proceeds of local checks must be available for withdrawal on or before the second business day after deposit and proceeds of nonlocal checks must be available for withdrawal on or before the fifth business day after deposit. Approximately one-third of the checks handled by the Federal Reserve Banks would be considered nonlocal under the Act.

Both correspondent banks and Federal Reserve offices frequently act as returning banks between the paying and depositary banks in the return process. Correspondent banks may route forward collection checks for payment either through the Federal Reserve or through private channels. Thus, the return process currently may include one or more correspondents and the Federal Reserve before the returned check reaches the depositary bank. The more intermediate processing steps a returned check must pass through on its route to the depositary bank, the greater the probability that additional time will be necessary to complete the process.

Many checks are collected through local clearing arrangements, clearinghouses, and direct exchange arrangements. Such arrangements consist of two or more banks agreeing to exchange checks drawn on each other. There are many such arrangements, and they are a very efficient and fast means of collecting and returning certain checks. The returned check processes of local clearinghouses should be largely unaffected by the Board's proposals, although the individual participants are subject to the provisions of the Act.

The Paying Bank

Current. Today, the paying bank's principal duty when returning a check is to assure timely dispatch of the check back to the presenting bank. The U.C.C. and the Federal Reserve's Regulation J specify that the paying bank must dispatch a check it has determined not to pay by midnight of the banking day following the day the paying bank received the check for payment (the "midnight deadline"). This obligation may be satisfied by dispatching the returned check by courier or by mail. The return of checks presented for payment through clearinghouses is usually subject to the rules of the clearinghouse and these checks are dispatched accordingly.

Typically, paying banks receive checks for payment throughout the day: from correspondents, the Federal Reserve, or through a clearinghouse. Checks received on a Monday, for example, would be posted to customers' accounts on Monday night and any checks that are not to be paid (due to insufficient funds, account closed, etc.) are rejected from the system and reports are prepared for management review. The actual decision to return a check can be made automatically as a matter of bank policy or following review by management on Tuesday. The checks to be returned are then sent by courier with the bank's forward collection checks, by mail or courier to other collecting banks, or by messenger to the clearinghouse. The return process in this example must begin by midnight Tuesday to conform to the U.C.C. Because the return process must begin by midnight, many paying banks return checks by mail when a courier leaving after midnight would be faster. If a check to be returned was presented by the Federal Reserve and is for $2,500 or more, the paying bank is also obligated to provide notice of return to the depositary bank by midnight of the third banking day following receipt (Thursday in this example). Receipt of the physical check by the depositary bank within this time frame would fulfill this notification requirement.

Many paying banks currently receive checks from more than one collecting bank and, therefore, dispatch returned checks to each of those banks. If the paying bank does not deposit checks for collection with the bank to which it is returning checks, these checks are usually returned through the mail. In some cases, mail is also used by paying banks to transport returns to the bank to which it sends its forward collection checks in order to ensure compliance with the midnight deadline. The paying bank currently has little incentive to make an effort to speed the return process and is generally not concerned about the return process after a returned check has been dispatched timely.

New return rules. A major impetus for change in the role of the paying bank will be the responsibility placed on the paying bank by § 229.30 of the regulation. This section states that the return process must be accomplished in an "expeditious manner," thus providing the incentive to the paying bank to take steps to speed the flow of returned checks. Under this new duty, the paying bank must dispatch returned checks with the same speed and diligence that it would dispatch forward collection checks received for deposit by noon on the banking day after the day of presentment of the returned check. This means that a check presented to the paying bank on Monday that is not paid must be dispatched as quickly as a

check deposited in that bank on Tuesday morning that is drawn on the depositary bank. A paying bank also returns a check expeditiously under the new rules if it returns a local check to the depositary bank within two business days following presentment, or a nonlocal check within four business days following presentment. The Federal Reserve will provide new deadlines for deposit of returned checks and other new or enhanced services, to assist paying banks in meeting the regulation's new duties.

Some of the changes in the return process from the perspective of the paying bank will be:

1. In many cases, paying banks will dispatch returns by the same manner, and at the same time, as they send forward collection checks. This will usually mean that returns will be sent via courier rather than mail. The paying bank will be required to meet the deposit deadlines and sorting requirements set by any returning bank to which the returned check is sent.

2. Additional options will be available to send returns. Returns would not be required to follow the indorsement chain through which the check was originally collected. This means that the paying bank could return all checks to a single returning bank rather than sending them to multiple presenting banks. Paying banks could return checks to the depositary bank or to a bank agreeing to process returns, including the Federal Reserve. If the paying bank cannot identify the depositary bank from the indorsement, it may find it necessary to send that returned check back to the presenting bank. The Federal Reserve would accept returned checks from all paying banks and explicitly charge for this service. Other returning banks are likely to establish similar services.

3. Paying banks will have the option to prepare a returned check for automated processing by high-speed equipment. This option will be used only when the paying bank is sending the returned check to a returning bank. The bank can produce a "qualified returned check" (QRC) by enclosing a returned check in a carrier envelope or attaching a strip to the bottom of the check, and encoding the carrier or strip with the nine-digit routing number of the depositary bank, a special returned check identifier, and the amount of the check. By creating QRCs, the paying bank facilitates expeditious return of the check to the depositary bank. Preparation of QRCs by paying banks also reduces the cost of the overall return process because returning banks will be able to handle these checks more efficiently. To encourage paying banks to prepare QRCs, the Federal Reserve will provide later deposit deadlines at lower prices for QRCs than for returned checks that are not qualified. The Board believes that correspondent banks will adopt a similar strategy.

4. Paying banks will be required to provide notice of nonpayment on all returned checks of $2,500 or more, regardless of the channel of collection, at an earlier time than required today. Notices will have to be received by the depositary bank by 4:00 p.m. (local time) on the second business day following presentment of a check to the paying bank. This means that if a decision is made to return a check of $2,500 or more that was presented on Monday, the paying bank must ensure that the notice is received by the depositary bank no later than 4:00 p.m. Wednesday. The Federal Reserve will provide timely notice to the depositary bank provided that the message is originated by Fedwire by noon on the due date or that the physical returned check or a telephone message is given to the Federal Reserve by 9:00 a.m. on the due date.

Returning Banks, Including Federal Reserve Banks

Current. Returning banks currently receive returned checks from paying banks and from other returning banks, and subsequently send those returned checks to depositary banks and to other returning banks. Banks that act as collecting banks during the forward collection process also act as returning banks during the return process. Generally, a returning bank receives a returned check from the bank to which it sent the check for collection or payment. The returning bank then sends the returned check to its prior indorser. In sending the returns to its prior indorser, returning banks are under a duty similar to the duty applicable to paying banks to dispatch returned checks by the midnight deadline. One of the advantages to the practice of returning through the indorsement chain is that parties in the return process have established account relationships that were used during the forward collection process. The payment for the returned check is typically a reversal of the payment made during the forward collection process.

The Federal Reserve functions as a returning bank in the current return process only for checks that it handled in the forward collection process. The Federal Reserve receives returned checks from paying banks and sends them to depositary banks and other returning banks. Approximately 43 percent of the returns currently handled by the Federal Reserve are sent to correspondent banks acting as returning banks. In some Federal Reserve regions, where correspondent banking is particularly active, the Federal Reserve office currently sends well over 50 percent of the returns it handles to correspondents in their role as returning banks.

New return rules. Under the regulation, returning banks will be held to a standard similar to paying banks. That is, returning banks must handle returned checks in an "expeditious manner," i.e., returned checks must be processed and dispatched in the same general manner as forward collection checks or returned to the depositary bank within the two day/four day time period established for paying banks. This means that returning banks must process returned checks in a much shorter time frame than is typical today.

Federal Reserve Banks will establish new deposit deadlines for returned checks that closely parallel those for forward collection checks. It is expected that other returning banks will also establish new deposit deadlines for returned checks. While these deadlines need not be the same as for checks received for forward collection, returning banks may wish to establish these deadlines so as to permit paying or other returning banks to send returned checks to them on the same courier as forward collection checks. Returning banks may return a check directly to the depositary bank or to another returning bank as long as the route chosen for the return is expeditious.

Returning banks would have the option, but not be required, to convert returns to QRCs. If a returning bank chooses to prepare a QRC, it may take a day to do so beyond the time when the check would otherwise have been dispatched. An extra day is not available when returning directly to the depositary bank, because preparation of a QRC would not speed the return of such checks.

It is anticipated that one of the most significant changes in the return processing system for non-Federal Reserve returning banks will be the effect of the Federal Reserve's direct return policy. Federal Reserve offices will no longer send returned checks to other non-Federal Reserve returning banks. This potential shift in volume (about 43 percent of current Federal Reserve return volume) could significantly reduce the number of returned checks that are handled by these returning banks.

The Depositary Bank

Current. The depositary bank receives returned checks from both paying and returning banks. Generally, a returned check is received from the bank used by the depositary bank for forward collection. Depositary banks also receive notices of nonpayment on checks of $2,500 or more collected through the Federal Reserve.

New return rules. The depositary bank's requirement to place a standard indorsement on the check is critical to improvements in the return process. By following the new indorsement standard and imprinting a complete, legible indorsement on the check, the depositary bank will greatly assist paying and returning banks in identifying the depositary bank and, therefore, in processing the return promptly. To comply with the standard, most depositary banks will need to replace their current indorsement plates. Some banks may want to work with corporate customers that encode checks prior to deposit to have the corporate customer place the depositary bank's indorsement on the check according to the new standard. Some small depositary banks may want to arrange with their correspondent to have the correspondent place its indorsement on the check as the depositary bank endorsement. Failure to follow the indorsement standard may increase the risk of loss to the depositary bank because paying and returning banks may be relieved of liability for delay in return if the delay is due to a nonstandard indorsement.

Depositary banks may receive returns from returning banks with which the depositary bank currently does not have a forward check collection relationship. Many depositary banks will, for the first time, begin receiving returned checks directly from the Federal Reserve. If the depositary bank requests courier delivery of its returned checks at a location where the Federal Reserve does not currently provide courier service, the depositary bank may be charged for the transportation.

Some depositary banks that currently are charged by a returning bank for returned checks will begin receiving returned checks without a per item charge. Depositary banks must pay, in same-day funds, for returned checks on the day the checks are received. If paying banks and returning banks that return checks directly do not wish to receive same-day payment by wire transfer, cash, or Federal Reserve net settlement, or if the paying or returning bank does not maintain an account relationship with the depositary bank, the banks may agree as to the form of payment. The form of payment may be a check or an ACH payment.

Depositary banks that have an electronic connection with the Federal Reserve with funds transfer capability will have to receive notices of nonpayment electronically after January 1, 1989.

Under the new check return rules, depositary banks will receive returned checks and notices of nonpayment earlier than they do today, and will receive notices of nonpayment on all large-dollar returned checks, instead of only those checks which were collected through the Federal Reserve.

Future regulatory initiatives. The rules contained in Subpart C of the regulation will significantly improve the check return process. Under the temporary schedule, these rules will facilitate the return of most checks before the time the depositary bank must make funds available for withdrawal. A significant percentage of checks will not be returned to the depositary bank before the time funds must be made available, however, under the permanent availability schedule, which takes effect in 1990. The Board will review whether further modifications to the check return rules should be proposed, providing for an even more expeditious return of checks, after assessing the effect of the new requirements on the check return system.

Changes to the forward collection process are also being considered. On April 4, 1988, the Board requested public comment on whether a paying bank should be required to pay checks presented before its cut-off hour, on the day of presentment and without the imposition of presentment fees. This proposal has the potential to speed the collection of some checks. In December 1987, the Board requested comment on actions the Board should take to limit certain delayed disbursement practices. The Board will consider specific proposals to limit the delayed disbursement of "official" checks in the near future.

Section-by-Section Analysis

The Board received 940 comment letters on Docket No. R–0620, a proposed regulation (Regulation CC, 12 CFR Part 229) to clarify the provisions of the Expedited Funds Availability Act, to provide detailed rules to facilitate compliance with the availability and disclosure requirements, and to make several substantive changes to the current law on the collection of checks and the Board's current Regulation J (12 CFR Part 210) to encourage faster return of unpaid checks, thus minimizing the losses that could result from compliance with the availability schedules.

The comments to Docket No. R–0621 (proposed new Federal Reserve Bank Services) will be summarized in a separate document.

The following list shows the 940 commenters by category:

Category of commenter	Number of comments
Commercial banks	573
Savings and loan institutions	107
Credit unions	49
Bank holding companies	52
Trade associations	36
Clearinghouses	13
Corporations (banking-related business)	69
Corporations (other)	8
Consumer groups	1
Individuals	6
Federal government	4
State government	5
Federal Home Loan Banks	10
Other (legal, educational community)	7
	940

The following list shows the 940 commenters by Federal Reserve District:

Federal Reserve District	Number of commenters
1. Boston	21
2. New York	60
3. Philadelphia	25
4. Cleveland	59
5. Richmond	74
6. Atlanta	82
7. Chicago	207
8. St. Louis	34
9. Minneapolis	32
10. Kansas City	75
11. Dallas	129
12. San Francisco	142
	940

A number of comment letters from members of the same trade association or subsidiaries of the same holding company were identical. A group of 47 commercial banks who are members of the Independent Bankers Association of America sent identical letters. Thirty commercial banks affiliated with the holding company MCorp sent identical letters, as did 23 commercial banks affiliated with First Republic Bank Corp.

Section 229.2 Definitions.

"ACCOUNT"

The proposed rule defined "account" as a deposit as defined in 12 CFR 204.2(a)(1)(i) that is a transaction account as described in 12 CFR 204.2(e). The definition briefly described such accounts and gave examples, such as a demand deposit account, a negotiable

order of withdrawal account, a share draft account, an automatic transfer account, and any other transaction account that is not a time or savings deposit under 12 CFR Part 204. The definition of "account" excluded accounts where the account holder is a bank.

The Board received 26 comments on the definition of "account." Seven commenters supported the definition as it appeared in the proposal. Seven commenters requested that business accounts be excluded because corporate customers can already bargain for availability. Six commenters opposed the exclusion of interbank accounts because such an exclusion would be unfair to banks that use correspondents and would limit the ability of depositary banks to manage funds.

Section 602(1) of the Act states that the term "account" means "a demand deposit account or other similar transaction account at a depository institution." The Board believes that this term is intended to include both consumer and corporate accounts.

As for interbank accounts, most banks generally give better availability to checks deposited in accounts held by other banks than that required in the schedules, with the exception of next-day availability checks. Furthermore, banks should be familiar with the requirements of the Act and therefore do not need disclosures. To require disclosures to account-holding banks would be difficult because a depositary bank may modify its collection schedules for transit checks on a fairly frequent basis. In addition, the Act would be difficult to apply to interbank accounts in certain situations. For example, nonlocal cashier's, certified, and teller's checks generally would not be deposited into interbank accounts with special deposit slips, which the correspondent could require under the regulation as a condition for giving next-day availability. For these reasons, the final regulation excludes interbank accounts from the definition of "account."

The commenters also raised other issues concerning the definition of "account." Four commenters requested that the regulation set out the CFR definitions of "deposit" and "transaction account" rather than refer to them. The final regulation clarifies the definition of "account" with a description and examples. The Board did not set out the CFR definitions as well because to do so would lengthen the regulation unnecessarily.

One commercial bank requested that the availability schedules extend to money market deposit accounts, which are not transaction accounts under the Board's Regulation D. The final regulation continues to exclude nontransaction accounts, such as money market deposit accounts, because of the Act's limiting language in section 602(1), which refers to transaction accounts held by depository institutions.

Two commenters raised questions concerning the "account" definition. A commercial bank asked whether the definition included accounts in savings and loan institutions used to deposit transit items. Such accounts are interbank accounts and are excluded from coverage. A savings and loan institution asked whether the definition included a savings account from which funds are automatically transferred to cover overdrafts in a NOW account. Such automatic transfer or "ATS" accounts are included in 12 CFR 204.2(e) as transaction accounts and therefore would be accounts under this regulation.

The definition in the final regulation also excludes accounts held by the Treasury of the United States as well as accounts of foreign offices of domestic and foreign banks. The Board does not believe that the Congress intended the Act to apply to U.S. Treasury accounts and has therefore excluded them from the definition of "account" with the consent of the U.S. Treasury. The language of the Commentary has been revised to clarify that, for purposes of Subpart C, the definition applies to accounts maintained by certain nondepository institutions including Federal Reserve Banks, Federal Home Loan Banks, and private banks, and to make other clarifications.

"AUTOMATED TELLER MACHINE" ("ATM")

The proposed rule defined "automated teller machine" or "ATM" as an electronic or mechanical device at which a natural person may make deposits by cash or check to accounts and perform other transactions.

One commercial bank suggested that the definition of "ATM" specifically define "natural person" to include corporations and partnerships. This change is not necessary because "natural person" as used in the ATM definition refers to the person who performs functions at the machine, not the account-holding entity.

Two commenters asked that the ATM definition be revised to explicitly state that an ATM does not include night depositories or any device that does not accept deposits, such as a cash dispenser. The proposed definition clearly excludes cash dispensers in that it defines ATM as any device that accepts deposits and performs other functions. These facilities are not intended to be included under the definition of ATM. The Board has clarified the definition to provide that only electronic, and not mechanical, devices are considered ATMs. The Commentary notes that night depositories and cash dispensers are not considered ATMs.

In addition, the final regulation changed the provision that an ATM is a device at which a natural person may "make deposits by cash or checks to accounts" to provide that an ATM is a device at which a natural person may "make deposits to an account by cash or check."

"AVAILABLE FOR WITHDRAWAL"

The proposed regulation defined "available for withdrawal" with respect to funds deposited as any use generally permitted to the depositor for actually and finally collected funds under the bank's account agreement and policies, such as for payment of checks drawn on the account, electronic payments, withdrawals by cash, and transfers between accounts.

The Board received six letters commenting on the definition of "available for withdrawal." One commenter objected to the definition in general terms, and one suggested that the time funds are available for withdrawal should be the time data on the deposit are available for processing. The Board has retained the definition of "available for withdrawal" generally as it appeared in the proposal, except that "any use" has been changed to "all uses," and the definition and Commentary have been changed to clarify that a bank may certify a check when funds are available for withdrawal even if the check has not been delivered to the paying bank. To allow a bank to hold funds until data on the deposit are available for processing would undermine the Act's goal of minimizing hold periods for all customers.

One commenter believed that the definition should not preclude a depositary bank from charging the customer interest whenever the bank has to make funds available before receiving provisional credit. The final regulation does not include such a change because the Act does not condition availability on whether or not the depositary bank has received credit for the deposited checks. To charge the customer interest for funds made available before provisional credit is received would be contrary to purposes of the Act.

One commenter suggested that the statute is unclear as to whether the Congress meant "available for withdrawal" to include withdrawal of cash or whether it meant withdrawal only by check unless cash was specified. The Board believes that the statute is clear in its intent to provide availability to customers by cash *and* by check except for the explicit cash rules in §§ 229.11(b)(2), and 229.12(d).

Two commercial banks requested that the Board clarify that a bank is not in violation of the Act or the regulation if it holds funds that are subject to garnishment, tax levy, or court order restricting disbursements from the account. The Commentary has been amended to clarify that funds may be available for withdrawal even if they are subject to legal process preventing withdrawal.

"BANK"

The Act defines "depository institution" as an institution defined in clauses (i) through (vi) of section 19(b)(1)(A) of the Federal Reserve Act, or an office, branch, or agency of a foreign bank located in the United States. The definition in the proposed regulation changed the term "depository institution" to "bank" and explicitly set out the terms of the cited clauses of the Federal Reserve Act. The proposal also defined "bank" to include a "branch" of a "foreign bank" as defined in section 1(b) of the International Banking Act. The proposed definition required that a bank be located in the United States and that the term "bank" included all of a bank's offices in the United States.

Three commercial banks requested that the Board include private banks and industrial banks within the definition of "bank." The Board believes that the language of the Act (section 602(12)) which defines "depository institution" (equivalent to "bank" in the regulation) clearly limits the definition of "bank" for purposes of Subpart B. Given the Act's broad mandate to the Board to improve and regulate the check processing system, however, the Board has expanded the definition of "bank" for the purposes of Subpart C, and in connection therewith, Subpart A. For check collection system improvements to function properly, they must apply to checks deposited in all types of banks. This is necessary because all paying banks that return checks will not be able to differentiate the manner of return based on type of depositary bank. The final regulation has been revised to provide that, for purposes of Subpart C, and in connection therewith, Subpart A, the term "bank" includes any person engaged in the business of banking, including a Federal Reserve Bank and a Federal Home Loan Bank. This definition would include private bankers and could include certain industrial banks. These institutions will be subject to the expedited return provisions of Subpart C and appropriate provisions of Subpart A.

"BANKING DAY" and "BUSINESS DAY"

The proposed regulation defined "business day" as a calendar day other than a Saturday or a Sunday, January 1, the third Monday in January, the third Monday in February, the last Monday in May, July 4, the first Monday in September, the second Monday in October, November 11, the fourth Thursday in November, or December 25. The definition stated that if January 1, July 4, November 11, or December 25 falls on a Sunday, the next Monday is not a business day. The proposal defined "banking day" as that part of any business day on which the bank is open to the public for carrying on substantially all of its banking functions.

The Board received 44 comments on the definitions of "banking day" and "business day." Twenty-five commenters suggested that when the depositary bank and the paying bank are in the same state, a state holiday should not be a business day. (Twelve of the 24 letters were from Hawaiian institutions which celebrate four nonstandard state holidays.) Such a rule would be difficult to administer and would create confusion for customers and out-of-state banks. Therefore, the final regulation retains the definition of "business day" as it appeared in the proposal.

Nine commenters stated that "business day" should be defined the same as "banking day" so that a bank will never have to make funds available on a day it is not open for business. The Act provides, in section 602(3), that "business day" means any day other than a Saturday, Sunday, or legal holiday. The Act anticipates that the way banks count days for purposes of the availability schedules will be uniform for every bank; the commenters' suggestion would allow the schedules to vary depending on whether or not the bank is open. The reason for having the banking/business day dichotomy is because banking days are relevant to when a deposit is considered received, and business days, which are more uniform than banking days, are more appropriate when counting the days in which funds must be available. The statutory availability schedules are based on check collection and return times which are not related to the banking days of the depositary bank. Therefore, the final regulation does not incorporate this suggestion.

Two commenters agreed with the proposed definitions. Two other commenters suggested that "banking day" be defined as "that day, as normally communicated to deposit customers, on which the bank routinely posts deposits to customer accounts." The Board considers the definition of "banking day" in the proposed rule to be more complete and clearer to the customer than the suggested definition. The final regulation, therefore, retains the proposed definition of "banking day."

Another commenter suggested that all banks be put on the same holiday schedule. The Board believes that regulating when a bank can and cannot be open would be unnecessary for the purposes of the Act at this time.

Two community banks pointed out that some small banks close on Wednesday and open on Saturday due to community needs. The commenters stated that the definition of business day is a burden to such banks. The Board recognizes that community banks and credit unions often do not keep standard business hours but does not believe that the definition will create undue burden for community banks. Because the regulation does not force any bank to be open at any particular time, but only requires that all banks make funds available according to the availability schedules through whatever medium is open to the public on the day funds must be available (e.g., over the counter or ATM), the Board believes that any burden on banks with nonstandard hours will be minimal.

Another commenter noted that if a legal holiday falls on a Saturday, the previous Friday should not be a business day. The Board did not exclude Fridays before Saturday holidays from the definition of "business day" because it is often the case that customers need access to their accounts on the day before a holiday, particularly on December 31 when many account holders need to settle their year-end finances. Even if a depositary bank is closed on a Friday before a Saturday holiday, customers should have funds available for check-writing purposes or for cash withdrawals from ATMs on that day.

Three letters contained comments that because branches often do not have on-line communication with on-premise ATMs, the banking day for an ATM should be governed by whether the main office of the bank is open, not by whether any particular branch is open.

The Commentary to the final regulation has been revised to clarify that for deposits made at an ATM, if the day is a banking day for the account-holding branch of the depositary bank, then it is a banking day for the ATM. Even if the depositary bank branch has no on-line contact with a proprietary ATM, the branch may still arrange to have access to the ATM to verify deposits.

No changes have been made to the definitions of "business day" and "banking day" in the regulation.

"CASHIER'S CHECK"

The proposed regulation defined "depository check" as a cashier's check, certified check, or teller's check.

The Board received 140 comments in response to the definition of "depository check." Twenty-one commenters requested that the Board change the term "depository check" to "official check." The Board recognizes that the term "depository check" caused confusion in the banking. The final regulation deletes the term "depository check" and refers specifically to cashier's checks, certified checks, and teller's checks.

One hundred three letters suggested that in order for a cashier's, certified, or teller's check to receive next-day availability it should be labeled "Official Check" on its face so that the depositary bank can easily identify it as eligible for next-day availability.

To require that all cashier's, certified, and teller's checks be labeled "Official Check" would not avoid fraud—the dishonest depositor would label all deposited checks "Official" in hopes that the depositary bank would automatically give them next-day availability. The Board recognizes the fact that sometimes it is hard to determine whether or not a particular check is a cashier's, certified, or teller's check, but believes that the "Official" label would provide a false sense of security. The Board believes that it is better that bank personnel be trained to look at the check itself rather than look at the label on the check. There is nothing in the regulation that prevents an issuing bank from voluntarily labeling a cashier's, certified, or teller's check as an official check, and many such checks are so labeled. Such a label, however, is not a prerequisite for next-day availability.

Twelve commenters suggested that the identification problem be solved by requiring all cashier's, certified, and teller's checks to have a unique MICR code. The only free position on the MICR-line is position 44, which, under this regulation, must now be used to identify a qualified returned check. Therefore, the final regulation does not require a special MICR code for cashier's, certified, and teller's checks.

The Board has also amended the definition of cashier's check to exclude checks drawn by a bank on itself or another bank used to pay vendors or employees; the Board does not believe that these checks serve the same function as checks provided to customers.

"CHECK"

The proposed regulation defined "check" as a negotiable demand draft that is drawn on or payable through or at an office of a bank, or drawn on the Treasury of the United States, a state government, a Federal Reserve Bank, or a Federal Home Loan Bank; a United States Postal Service money order; or a traveler's check. The definition provided that "check" does not include a noncash item and that a draft may be a "check" even though it is described on its face as a "money order." The definition further provided that for purposes of Subpart C, the term "check" also includes a demand draft of the type described in the definition that is nonnegotiable.

One hundred sixty-one comment letters suggested that changes be made to the definition of "check." Eighty commenters opposed the inclusion of warrants drawn on state or local governments. These commenters argued that there is no means to ensure that a state or local government will act expeditiously in paying warrants, and even if the issuing government is subject to the paying bank rules of expeditious return, it is unlikely that it would comply. Some commenters suggested that if warrants are to be considered checks, they should be labeled with a warning that delays may be caused by the issuing government that are beyond the depositary bank's control. Only four commenters favored inclusion of warrants. One state treasurer requested clarification on the status of drafts drawn on a state agency and presented to the state treasury for payment. The commenter also noted that a state court had ruled that state warrants are nonnegotiable drafts.

The final regulation includes state warrants in the definition of "check." Because some units of general local government also draw checks on themselves, the final regulation has been revised to include these instruments in the definition of check as well. The regulation does not impose the duty of expeditious return on the state or local governments that issue warrants. Many warrants are used to pay state unemployment compensation and other vital payments to consumers. The Board believes that the Act intended to cover these and other instruments that are the functional equivalent of checks.

Thirty-three commenters requested that the definition explicitly state that the regulation applies only to checks drawn on or payable through or at a bank located within the United States. The proposed regulation required checks to be drawn on entities which are located in the United States (the U.S. Treasury, state governments, Federal Reserve Banks, and Federal Home Loan Banks) or drawn on or payable through or at banks, which must be, under the regulation's definition of "bank," located in the United States. Accordingly, the Board has not made this revision to the definition.

Commenters also addressed the status of drafts drawn on nonbank entities, such as bank holding companies, which are payable through or at a bank. Nineteen commenters requested that such items be included in the definition of "check." Six commenters requested that they *not* be included, two of whom stated that if a nonbank entity can not obtain a routing number, then items drawn on those entities should be noncash items. Section 602(7) of the Act explicitly states that "check" includes negotiable demand drafts drawn on or payable through a bank, which the Board expanded to include payable at drafts for reasons stated in the Commentary. Therefore, in the final regulation, all drafts that are payable through or at a bank, even if drawn on a nonbank entity, remain within the definition of "check." One commercial bank requested that any item drawn on a savings and loan institution, a credit union, or a brokerage house be excluded from the definition of "check"—this suggestion was clearly contrary to the Act's definition.

Thirteen commenters opposed defining payable through drafts as "checks." They argued that the risk of return of such items is high, particularly with drafts drawn on insurance companies which tend to be held for long periods of time before being returned. The Act's definition of "check," however, clearly states that payable through drafts are checks. Therefore, payable through drafts are defined as "checks" in the final regulation.

One commenter requested that the definition provide that a check must be payable in United States dollars. Because items drawn in foreign currency are not normally handled by banks as cash items, the final regulation has been amended to provide that the term "check" does not include an item

payable in a medium other than United States money.

One commercial bank asked that the phrase "and which the Federal Reserve Banks agree by regulation or operating letter to handle as a cash item" be added to the end of the definition. The U.S. Treasury requested that the Board add the words "a negotiable demand draft drawn on a Federal Reserve Bank including fiscal agency checks." The Board considered both suggestions, but decided that the first creates undue uncertainty in the definition of "check," as some banks might not be aware of these checks which the Federal Reserve Bank collects, and the second is not needed because checks drawn on Federal Reserve Banks, including fiscal agency checks, are already within the definition of "check" and need no explicit mention.

One commercial bank asked that the Board require all checks to be pre-encoded with the paying bank's routing number and the drawer's account number. The definition of "noncash item" states that any check without the paying bank's routing number encoded in magnetic ink may be treated as a noncash item. As for encoding the drawer's account number, the Board believes that the drawer's account number is not necessary to speed the return of checks by paying banks or to aid depositary banks in granting availability under the Act.

The definition in the final regulation has also been amended to clarify that the definition of "check" does not include traveler's checks drawn on banking offices outside of the United States or checks payable in foreign currencies. The Commentary to this definition has also been revised extensively for clarity.

"CHECK CLEARINGHOUSE ASSOCIATION"

The proposed regulation defined "check clearinghouse association" as any arrangement by which participants exchange checks in a specified area. The definition also stated that a "check clearinghouse association" may include arrangements using the premises of a Federal Reserve Bank, but it does not include the handling of checks for forward collection or return by a Federal Reserve Bank.

The Board received 127 comments on the definition of "check clearinghouse association." Eighty-three commenters stated that the Board should limit the definition of "check clearinghouse association" to a local, metropolitan, or regional area as indicated section 602(8) of the Act. Thirty-one commenters (all of which were affiliated with the same bank holding company) agreed with the definition as proposed, and seven commenters thought that members of a clearinghouse should be local to each other regardless of their location. Two commenters suggested that the definition should be decided by each association and its local Federal Reserve Bank. The Board rejected this suggestion in favor of a uniform definition. The Board has, however, changed the definition to accord more closely with the statutory language.

Three commenters requested clarification of other aspects of the definition of "check clearinghouse association." One commercial bank asked for clarification of the status of associate clearinghouse members. The regulation's definition of "participant," which closely parallels the definition in the Act (section 602(19)), provides that a "participant" is a bank that is located in the geographic area served by a check clearinghouse association and both collects and receives for payment checks through the check clearinghouse association either directly or through an intermediary. Therefore, associate clearinghouse members would be considered participants under the definition of "check clearinghouse association." The regulation has been clarified to indicate that banks that exchange checks through an intermediary are only participants if the intermediary is a participant.

A savings and loan institution asked that the definition be amended to state that the term "clearinghouse" does not apply to two banks that directly present and return checks to each other. The Board has added a provision that a check clearinghouse association must be an arrangement between three or more banks. The Board does not believe that the definition of "check clearinghouse association" was intended to apply to direct exchanges between any two banks.

One commercial bank requested that a "clearinghouse" be limited to those organizations with well-defined members and rules. The Board believes, however, that the Congress intended a broader definition of "check clearinghouse association." The Commentary has been expanded to explain that the definition includes informal arrangements regardless of whether the participants have formally constituted themselves as an association, provided that the participants generally exchange checks among each other.

The Commentary to this definition has been revised extensively for clarity.

"CHECK PROCESSING REGION"

The proposed regulation defined "check processing region" as the geographical area served by an office of a Federal Reserve Bank for purposes of its check processing activities.

The sole comment on "check processing region" was from a commercial bank which agreed with the definition but requested that the Board provide a map of regions. The definition in the final regulation is unchanged, and the final regulation does not include a map; however, maps are generally available at local Reserve Banks.

"CONSUMER ACCOUNT"

The proposed regulation and the Act (section 602(10)) defined "consumer account" as any account used primarily for personal, family, or household purposes.

One commercial bank requested that the Board redefine "consumer account" as "any account held by an individual." The Board has retained the language of the Act and the proposed regulation; however, a Commentary to the provision has been added. The definition of "consumer account" is relevant only for certain requirements of Subpart B.

"DEPOSITARY BANK"

The proposed regulation defined "depositary bank" as the first bank to which a check is transferred even though it is also the paying bank or the payee. The definition provided that for the purposes of Subpart C, the term also included a Federal Reserve Bank or a Federal Home Loan Bank to which a check is transferred by a person other than a bank.

Because the definition of "bank" has been revised in the final regulation to include Federal Reserve Banks and Federal Home Loan Banks for the purposes of Subpart C, the second sentence in the definition of "depositary bank" has been dropped as superfluous.

Four commenters agreed with the proposed definition of "depositary bank," and one commenter suggested the term be changed to "receiving bank." After considering other terms for "depositary bank" such as "receiving bank" and "bank of first deposit," the Board decided to keep the term "depositary bank," which is consistent with the terminology of the Uniform Commercial Code.

The definition has been changed to clarify an issue that was raised by eleven commenters—that the depositary bank for deposits at shared ATMs is the bank with the account relationship with the depositor, not necessarily the owner/operator of the ATM. The

definition now provides that when a check is deposited in an account, the depositary bank is the bank holding the account into which the check is deposited even if the check is physically received by another bank first.

"ELECTRONIC PAYMENT"

The proposed regulation defined "electronic payment" as a wire transfer or an ACH credit transfer.

The Board received 71 comments on the definition of "electronic payment." Seventeen of the commenters favored explicit exclusion of electronic credit and debit card transfers. The Commentary to the definition of "electronic payment" has been expanded to explain that point-of-sale transactions would not be covered by this definition unless the transactions were effected by wire transfer or ACH credit transfer.

Many letters included comments on the inclusion of ACH credits within the definition. Twenty-two commenters opposed the inclusion of ACH credits on the grounds that they are governed by other rules, which already provide for better than next-day availability. (Two opposed the inclusion of *any* wire transfers.) Twenty commenters requested that the regulation should provide same-day availability for all electronic payments. Six commenters agreed with the proposed definition. The U.S. Treasury requested that the Board add the provision "Treasury regulations governing the availability of electronic funds transfers (wire and ACH) including 31 CFR Part 210, to the extent not inconsistent, supersede 12 CFR Part 229."

The Board has retained ACH credits within the definition of "electronic payment" and has left the wording of the definition as it appeared in the proposal. The Board recognizes that existing rules offer better than next-day availability for ACH credits, but also recognizes that there is no liability for violating existing rules. This regulation does not override Treasury regulations or ACH association rules that require prompter availability. Existing rules for ACH credits will not be superseded, instead the regulation will provide a floor for liability.

The commenters raised other ACH issues as well. Two commenters asked for clarification of the status of ACH debits, and one asked whether banks must accept all forms of ACH transfers. The Commentary clarifies that ACH debits are not affected by this regulation. There is no provision in the regulation that requires any bank to accept any particular type of deposit. (See § 229.19(c)(2)(i).)

One commenter suggested that electronic payments and wire transfers should not be considered any different from checks. Sections 602(25) and 603(a) of the Act, however, make special provision for "wire transfers" and specify that they are to be given next-day availability, which clearly indicates that the Congress meant for them to be treated differently from checks.

The Commentary to the term electronic payment has been revised for clarity.

"LOCAL CHECK" AND "LOCAL PAYING BANK"

The proposed regulation defined "local check" as a check drawn on or payable through or at a local paying bank. The definition also provided that a depositary bank may rely on the check's routing number, as listed in Appendix A, to determine whether a check is a local check.

The proposed regulation defined "local paying bank" as a paying bank to which a check is sent for forward collection that is located in the same check processing region as the branch or proprietary ATM of the depositary bank in which that check was deposited.

The Board received 42 comments on the definition of "local paying bank" and three on the definition of "local check." Sixteen commenters requested that the Board clarify that a paying bank is "located" in the same check processing region as the depositary bank branch only when the second through fourth digits of the routing number on the deposited check are the same as the second through fourth digits of the routing number on checks drawn on the depositary bank branch. The commenters reasoned that because checks are cleared and returned by processing facilities that are indicated by routing numbers, the suggested approach would be consistent with the Board's statement in the Commentary that "the Act makes a clear connection between availability and the time it takes for checks to be cleared and returned." The commenters raised the question of whether the routing number on the deposited check should be compared to the routing number associated with the depositary bank's physical location or the routing number printed on checks drawn on the depositary bank (which may be the routing number of the depositary bank's check processing center located in a different check processing region from the depositary bank).

Section 602(13) of the Act defines "local originating depository institution" (equivalent to "local paying bank" in the regulation) as "any originating depository institution which is located in the same check processing region as the receiving depository institution" (equivalent to "depositary bank" in the regulation). The Board believes the Congress intended that, generally, "local" checks are those deposited into depositary banks that are physically located in the same check processing region as the paying bank to which a check is sent for collection. The Act anticipates that customers will be able to determine which checks are local. The customer is much more likely to know a bank's physical location than to know the location associated with a bank's routing number.

The Board also recognizes, however, that it may be difficult for the depositary bank to determine in which check processing region a paying bank is located without relying on the encoded routing number. Many banks will perform an automated sort of local and nonlocal checks using machine-readable routing numbers. Therefore, the definition of "local check" allows (but does not require) the depositary bank to rely on the routing number of the deposited check. (It is not a burden to the depositary bank to determine in which check processing region its own branch is physically located.) The Board has amended the definition to provide that it is the physical location of the depositary bank that must be compared with the paying bank's routing number, and that the depositary bank can rely on the routing number only if the check is sent for payment or collection based on the routing number.

Two savings and loan institutions asked whether all of a bank's branches are local to each other if they are in different check processing regions but send all checks to a central location for processing. Under the current routing number policy, if branches are in different check processing regions, they must have different routing numbers. Therefore, as outlined above, only those branches within the same region would be local to each other. As one bank holding company commented, banks with branches in the same state but different check processing regions must either have more than one hold policy for intrastate checks or provide local availability statewide.

Five commenters agreed with the definition of "local paying bank" and two agreed with the definition of "local check" as it appeared in the proposal. Six commenters were concerned with the inequities in sizes of check processing regions. They noted that in the western part of the country, check processing regions can cover huge areas

and that it would be unfair to include out-of-state checks in the definition of "local" even if the paying bank is located in the same region. A related comment from three Hawaiian savings and loan institutions voiced a similar concern; the commenters felt that mainland checks should not be local to Hawaiian banks even though drawn within the same check processing region. Similarly, a New York commercial bank asked that checks drawn on banks in Puerto Rico and the Virgin Islands not be considered local in New York. The Board recognizes the distance problems, but the Act defines "check processing region" (section 602(9)) as the geographical area served by a Federal Reserve Bank check processing center or such *larger* area as the Board may prescribe. The Board has not enlarged the areas identified as check processing regions, but given the provisions of the Act, neither has it changed the regulation to accommodate these comments.

A branch of a bank located in Guam pointed out that Appendix A contained the routing numbers 1214 and 3214 for Guam, Saipan and Pacific locations. Because these locations are not within the United States as defined by the Act (section 602(23)) and the regulation, these routing numbers have been deleted from Appendix A.

Five commenters said that it would be difficult to educate tellers and customers regarding check processing regions and the local/nonlocal distinction. These commenters advocated an in-state/out-of-state distinction instead. One clearinghouse suggested that in states where no Federal Reserve office exists, the primary clearinghouse should be designated as the logical territory for local availability schedules. Because of the provisions of the Act noted above, the Board has not adopted these suggestions.

The definition of local paying bank has also been revised to clarify that where a check is deposited in a nonproprietary ATM, both the nonproprietary ATM and the branch of the depositary bank holding the customer's account must be in the same check processing region as the paying bank for the paying bank to be a local paying bank. The Commentary to these definitions has also been revised extensively for clarity.

"MERGER TRANSACTION"

The Board received 14 comments requesting clarification of the status of merged or acquired banks under the availability schedules and the return rules of Subpart C. The commenters asked that the Board provide a transition period in which the two banks are considered separate entities while their operating systems are integrated. The Board addressed this issue by defining merger transaction in § 229.2 and adding §§ 229.19(g) and 229.40 to provide that merged banks may be treated as separate banks for a period of up to one year. Examples of the effect of these changes are included in the Commentary to §§ 229.19 and 229.40. The Board believes that a one-year transition period is necessary because it is often difficult for merged or acquired banks to integrate their systems immediately.

"NONCASH ITEM"

The proposed regulation defined "noncash item" as an item that would otherwise be a check, except that: a passbook, certificate, or other document is attached; it is accompanied by special instructions, such as a request for special advice of payment or dishonor; it consists of more than a single thickness of paper, except a check that qualifies for handling by automated check processing equipment; or it has not been preprinted or post-encoded in magnetic ink with the routing number of the paying bank.

The Board received 24 comments on the definition of "noncash item." Twenty-three of the commenters requested that the regulation specifically state that credit card drafts are noncash items. The Commentary to the definition of "check" specifically excludes credit card drafts. Therefore, the availability schedules do not apply to credit card drafts, and there is no need to include them in the definition of "noncash item."

One commercial bank requested that unreadable or misencoded checks be included in the definition of "noncash item." The Board did not incorporate this suggestion in the final regulation. Unreadable checks may become reject items at any point in the check collection process. A rule that allowed the status of an item to change from check to noncash item at an undetermined point in the check collection process would be unworkable.

In addition, the Board added language to the Commentary clarifying that checks sent for collection with special instructions are noncash items.

"PARTICIPANT"

The Commentary has been revised to clarify the term "participant" as it relates to a clearinghouse participant.

"PAYING BANK"

The Act defines "originating depository institution" as the branch of a depository institution on which a check is drawn. The proposed regulation substituted the term "paying bank," which was defined as: the bank by which a check is payable, unless the check is payable at or through another bank and is sent to the other bank for payment or collection; the bank at or through which a check is payable and to which it is sent for payment or collection; the bank whose routing number appears on a check in magnetic ink or in fractional form and to which the check is sent for payment or collection; the Federal Reserve Bank or Federal Home Loan Bank by which a check is payable; or the state on which a check is drawn.

The Board received 72 comments on the definition of "paying bank." Eleven commenters agreed with the proposed definition.

Fifty commenters objected to the inclusion of payable through banks within the definition of "paying bank." Three of the commenters requested that the Board ask the Congress to amend the Act to provide longer availability schedules for payable through drafts or, alternatively, that payable through drafts be noncash items. A joint comment from four consumer groups noted that consumers will be confused if payable through drafts drawn on local credit unions are treated as nonlocal, and thus requested that the burden of conforming to local schedules be placed on the institutions using the payable through drafts. Commenters pointed out that the statutory definition of "originating depository institution" (equivalent to "paying bank" in the regulation) was "the branch of a depository institution on which a check is drawn" (section 602(17)). The Act's definition does not explicitly include payable through or payable at banks. The commenters favored limiting the definition to the drawee bank, because it is the drawee bank that will make the decision whether or not to pay a check.

The Board believes that the Act does not clearly specify the treatment of payable through drafts for the purpose of availability, or other purposes. In defining the "originating depository institution" in section 602(17) as the "institution on which a check is drawn" the Act does not define the term "drawn." Although in a technical sense the institution on which a check is drawn can refer to the institution holding the drawer's account, the term can be used more generically to designate the person to whom a draft is directed and who is requested to pay the amount specified. *E.g.*, Black's Law Dictionary 44 (5th ed. 1979). A

depository institution through which a draft is payable can be viewed as a paying bank with respect to that draft. *E.g., Berman* v. *United States National Bank,* 197 Neb. 268, 249 N.W.2d 187 (1976).

The Board finds that the structure of the statute itself shows that the Congress did not intend the "institution on which a check is drawn" in section 602(17) to be used in a technical sense, and that this phrase can reasonably be read to include the institution through which a check is payable. Section 602(7) of the Act defines the term "check" to include negotiable demand drafts "drawn on or payable through an office of a depository institution located in the United States." As noted above, under section 602(17) of the Act, the "originating depository institution" is defined to mean the branch of a depository institution on which a check is drawn.

Under other provision of the Act, a check deposited in an account is either local or nonlocal, and subject to differing maximum hold periods, based on whether the originating depository institution is local or nonlocal with respect to the depository institution in which the check is deposited. Whether an originating depository institution is local or nonlocal depends upon whether it is located in the same Federal Reserve check processing region as the depository institution in which the check is deposited. Thus, for each check subject to the Act, Congress clearly intended that there be an originating depository institution.

Some checks covered by the Act are written on accounts held at organizations that are not depository institutions, *i.g.,* an insurance company, but are payable through a depository institution. If the term "drawn" in the definition of "originating depository institution" is viewed narrowly, such a draft would be neither a local nor nonlocal check and thus not subject to the Act, since it would be "drawn" on no depository institution. This interpretation would conflict with the Act's definition of check, which the Board believes is intended to cover all drafts payable through depository institutions. In order to resolve this conflict, such drafts must be viewed as being "drawn" on the payable through institution for purposes of section 602(17). In addition, it is clear that Congress did not intend the technical definitions found in state laws governing negotiable instruments to govern interpretation of the Act's provisions. To the contrary, the Act establishes a comprehensive federal framework for the collection and payment of checks and expressly defines many terms, like "check," in ways that vary from accepted definitions under state laws such as the Uniform Commercial Code. The Act expressly provides that its provisions and the implementing regulations supersede any provision of state law that is inconsistent with the Act.

In short, the term "depository institution on which a check is drawn" in section 602(17) can be read as referring both to the institution at which a customer's funds are held and to the institution through which a draft may be payable. Therefore, where a depositor writes a draft on funds held in one depository institution and where the draft is payable through another depository institution, such as many credit union share drafts, it is unclear from the terms of the statute which institution Congress intended to be the originating depository institution. Where a term is capable on its face of more than one interpretation, construction of that term must depend on the legislative history and purposes of the statute. Based on a review of the fundamental objectives of the statute, the Board finds that these kinds of drafts were also intended to be viewed as drawn on the payable through institution for purposes of determining whether they are local or nonlocal checks.

Under the Board's final rule, credit union share drafts payable through another bank but sent to the credit union on which they were drawn would be considered local or nonlocal based on the location of the credit union. On the other hand, if these drafts were sent to the payable through bank, because they bear the routing number of the payable through bank or because the credit union refused to accept payable through drafts delivered to it, the determination is made based on the location of the payable through bank. As a practical matter, because credit unions using payable through share drafts place the routing number of the payable through bank on their drafts, most of these drafts would be sent to the payable through bank for collection and would be considered nonlocal even though they are deposited in a bank located in the Federal Reserve check processing region where the credit union on which the draft is drawn is located. This approach is consistent with the Act's designation of checks as local or nonlocal based on the time required for the collection and return of the checks.

The approach of basing the determination as to whether a payable through share draft is local or nonlocal on the location of the credit union would expose the bank receiving the share draft for deposit to increased risks of check fraud, because drafts sent to the payable though institution for collection routinely would be returned after funds would have to be made available under the availability schedules for local checks in the Act. Comments on the proposed rules to implement the Act indicated that sophisticated groups would be likely to take advantage of this opportunity to defraud depository institutions. If the determination of whether the payable through share draft is local or nonlocal is based on the location of the credit union, banks seeking to minimize the losses due to such fraud might be reluctant to accept these share drafts for deposit thereby reducing the acceptance of share drafts. Some commenters are apparently concerned that the treatment of payable through share drafts as nonlocal checks in many cases would reduce the acceptance of these instruments more than their acceptance will be reduced by the potential for increased fraud. On balance, the Board does not believe that this potential for a lower level of acceptance of credit union share drafts offsets the risks of increased fraud to other banks warrants a different approach to the treatment of payable through share drafts.

In addition, treatment of credit union payable through drafts as local or nonlocal depending on the location of the credit union on which they are drawn would greatly complicate the tasks of banks taking share drafts for deposit. Banks must have some reliable method of readily establishing whether a check is local or nonlocal for availability purposes. Because the Act defines the local/nonlocal distinction in terms of Federal Reserve check processing regions, the only practical method available at this time of identifying local and nonlocal checks for purposes of check processing is to rely on the routing numbers that appear on checks, which can be read by automated check processing equipment. Similarly, the only practical way to disclose to customers the difference between local and nonlocal checks is through the use of these routing numbers. In the case of payable through share drafts, the routing number appearing on the draft is that of the payable through bank, not the credit union.

In arriving at a final rule, the Board considered and rejected several alternative approaches to the treatment of credit union share drafts payable through another bank. First, as suggested by some comments, the Board

could have provided that a share draft deposited in an account at a bank is local or nonlocal based on the location of the credit union, even though the share draft is sent to a payable through bank for collection. This approach was rejected because it would expose depositary banks to increased risks of check fraud, would be difficult to disclose, and would be difficult to implement as more fully described above.

A second alternative, suggested by one commenter, was to prohibit the use by credit unions and other banks of drafts payable through a nonlocal bank. This alternative would have addressed the risk, disclosure, and operating problems, but has been rejected at this time because it would have been more disruptive than the approach adopted by the Board. The Board, nevertheless, remains concerned about the remote disbursement aspects of the use of nonlocal payable through banks, and may reconsider this issue in the future.

A third alternative was to consider the drawee bank as the paying bank for payable through drafts and hold the drawee bank (usually a credit union) liable for any losses suffered by the depositary bank due to the fact that the depositary bank had to give local availability on a check that was sent to a nonlocal bank for collection. This alternative only addressed the risk issue and did not deal with the disclosure and operating issues.

After the close of the comment period but before adoption of the final regulation, the Board received affidavits from a trade association. The affidavits were from a payable through bank and a processor that serves payable through banks for a large number of credit union share drafts. These affidavits described these banks' share draft processing operations and speculated that under the check collection improvements required by Subpart C collection and return of share drafts deposited in banks that were not local to the payable through bank might be returned within the local schedules, if certain conditions were met. The Board believes that even if these time frames are met for the checks described, a significant number of credit union share drafts that are payable through nonlocal banks would not be collected and returned within the local schedules. Consequently, the Board believes that the approach taken in the proposal is the fairest alternative and has retained payable through banks in the final regulation's definition of "paying bank."

Although the Board believes that the definition of paying bank as initially proposed provides for the appropriate treatment of payable through share drafts, the Board notes that future changes in the share draft program could result in reductions in the schedules applicable to such share drafts. For example, if these checks were truncated early in the collection process and were identified by a "truncation eligible" identifying number in the MICR-line, such checks might be collected and returned more swiftly than other checks that are payable through nonlocal banks, and therefore could be included in the reduced schedules provided for in § 229.11(c)(2) or 229.12(c)(2) and included in Appendix B to the regulation. Further, the truncation identifier would facilitate disclosures and internal bank operations.

Two commenters asked that the Board clarify that the payable through bank's duties under the Uniform Commercial Code be changed, i.e., that payable through banks should not be subject to paying bank liabilities. The Board believes that because the payable through or payable at bank would not be making the decision whether to pay a check, it should not be liable for wrongful dishonor. As explained in the Commentary to the final regulation, however, the payable through or payable at bank would be responsible for the expedited return of checks and notice of nonpayment requirements of Subpart C. The payable through or payable at bank may contract with the payor with respect to these Subpart C responsibilities. (See Commentary and Comment Summary for Subpart C.)

Five commenters requested that the Board clarify the status of a state government that issues warrants drawn on itself. As stated in the regulation, the definition of "paying bank" includes a state. The definition has been revised to include units of general local government because commenters indicated that some units of general local government draw checks on themselves. The Board believes that it is important that the availability schedules apply to these checks because they include payments that are important to bank customers. It is necessary to include state and local governments in the definition of paying bank so that determinations can be made as to whether checks drawn on them are local checks or nonlocal checks, if the checks do not meet the requirements for next-day availability. Checks drawn on states and units of general local government are excluded from the coverage of Subpart C because the Act does not clearly impose liability on states for failure to meet their duties under Subpart C. Without such liability, imposing the duties of Subpart C on states or units of general local government would have little effect.

One credit union requested that the Board provide a transition period for credit unions who use nonlocal payable through banks so that they can modify their practices. The Board did not make such a provision because section 603(c)(3) of the Act provides that the temporary availability schedules go into effect on September 1, 1988. As explained in the Regulatory Flexibility Analysis, the Board will not make exceptions in the regulation for specific types of institutions.

One commenter said that to condition the definition of "paying bank" on the "sending" of a check may cause uncertainty under future truncation arrangements where checks are not actually "sent." The Board has not changed the definition but has clarified in the Commentary that truncation arrangements do not affect the definition.

The Commentary to the definition of "paying bank" has also been revised to clarify that a check sent to a bank for payment based on that bank's routing number on the check is the paying bank with respect to that check even if the check is fraudulent and is not drawn on the paying bank.

"PROPRIETARY ATM"

The proposed regulation defined "proprietary ATM" as an ATM that is (1) owned or operated by, or operated exclusively for, the depositary bank; (2) located on the premises (including the outside wall) of the depositary bank; or (3) within 50 feet of the premises of the depositary bank. The definition further provided that an ATM is not considered to be proprietary to more than one unaffiliated bank; if the criteria of provisions (1) through (3) are met by more than one bank with respect to any ATM, the ATM would be proprietary to the bank that satisfied the lowest-numbered criterion. The definition stated that if more than one bank meets the owned or operated criterion, the ATM is considered proprietary to the bank that operates it.

The Board received 103 comments, the majority from commercial banks, on the definition of proprietary ATM. Four commenters agreed with the proposed definition. One commercial bank asked that the Board make no distinction between proprietary and nonproprietary ATMs. This request is clearly contrary to the Act, which explicitly defines "proprietary ATM" in section 602(16) and provides for different availability requirements depending on whether an

ATM is proprietary or nonproprietary in section 603(e).

Fifty-seven commenters said that the Board should require disclosure of ownership as a part of the definition. Two commenters felt that posting the name of the proprietary bank on every ATM would be confusing to customers who use shared ATM networks. In an attempt to minimize disclosure burden and consumer confusion, and in recognition of the fact that some states do not allow identification of the proprietary bank on an ATM, the Board's final regulation does not require that the name of the proprietary bank be posted at each ATM. Section 229.16(b)(5) of the regulation has been amended to provide that a depositary bank's disclosure statement shall contain a description of how the customer can differentiate between a proprietary and a nonproprietary ATM, if the bank imposes delays on deposits at nonproprietary ATMs longer than on deposits at proprietary ATMs.

Twenty-eight commenters requested clarification of the criterion that states that a proprietary ATM is one that is within 50 feet of the premises of the depositary bank. One bank holding company suggested that the question of whether an ATM is proprietary should be determined solely by the owned/operated criterion and not by the location of the ATM. Because section 602(16)(A)(ii) of the Act provides that a proprietary ATM is one that is in close proximity, as defined by the Board, to the depositary bank, the Board retained the 50-foot criterion but added the phrase "and not identified as being owned or operated by another entity" for clarification.

Three commenters requested that the Board define and clarify the distinctions between owning and operating an ATM. The Board has revised the Commentary accordingly.

Twenty-four commenters asked that the Board either strike or clarify the provision that an ATM is not considered to be proprietary to more than one unaffiliated bank. The Board has revised the definition to address the concerns of the commenters. The final regulation's definition eliminates the "unaffiliated" provision and the provisions regarding the priority rules governing the three criteria. The Board believes that the final definition is clearer and easier to apply than the definition originally proposed. Based on a question asked by seven commenters, the Commentary clarifies that some ATMs may not be proprietary to any bank.

One commenter suggested that an on-premise ATM should not be proprietary to the bank that owns it if another bank services it. The regulation provides that if more than one bank meets the owned or operated criterion, the ATM is considered proprietary to the bank that operates it.

A commercial bank asked whether an ATM that is jointly owned but operated by a third-party contractor is proprietary to both owners/operators. The Commentary has been expanded to explain that where the ATM is jointly owned, and operated by a nonbank servicer, the ATM is proprietary to the owners.

Another commercial bank asked whether the lead bank in an ATM network is the proprietary bank for those ATMs owned and operated by franchisees. Under the regulation's priority rules, if the franchisee is the owner/operator, the franchisee, not the lead bank, is the proprietary bank.

Three commenters asked the Board to clarify whether an ATM that is proprietary to one bank within a holding company is automatically proprietary to all affiliated banks. As stated above, the final regulation does not include the "unaffiliated" provision, therefore, in this situation, the ATM would not be proprietary to all affiliated banks.

The Commentary has also been revised to clarify that the operator of an ATM is the person that puts deposited checks into the forward collection stream and to make other clarifications.

"QUALIFIED RETURNED CHECK"

The proposed regulation defined "qualified returned check" ("QRC") as a check that is prepared for handling by automated check processing equipment for return to the depositary bank. The definition provided that a qualified returned check must be encoded in magnetic ink with the routing number of the depositary bank, the dollar amount of the check, and a return identifier in the form of a "2" in position 44 of the MICR-line.

The Board received 24 comments on the definition of "qualified returned check." Nineteen commenters suggested that the bank that creates a QRC should encode its routing number on the check in order to leave an audit trail. The Board believes that it would be beneficial for the creator of a QRC to print its name and routing number on the QRC, either on the envelope or strip, but believes that the costs to the industry of doing so might outweigh the benefits of being able to identify the creating bank. The Board has not included this requirement in the final regulation because of the uncertain expense and burden to the qualifying bank.

One commercial bank was opposed to any provision for QRCs in the regulation. The commenter cited operational difficulties associated with carrier envelopes and adhesive strips and generally opposed the use of QRCs. The Board believes that, overall, the preparation of QRCs for automated processing speeds up the return system, despite the occasional operational problem. Because of the importance of shortening check return times, the Board will continue to encourage the creation of QRCs in the final regulation.

A bank holding company requested that the Commentary state that a QRC may be automated by use of electronic media accompanying the returned check as an alternative to the stripping process. The Board rejected this proposal because, at this time, electronic media may not be readily usable by returning banks generally.

A savings and loan institution commented that it is not necessary to encode the dollar amount of the check on a QRC. The definition has retained the dollar amount requirement as this is necessary for high speed processing of the check.

The definition in the regulation has been amended to delete the content requirements for the MICR encoding on QRCs. These requirements have been moved to §§ 229.30 and 229.31 so that a returned check may be a QRC even if there is an encoding mistake. Clarifying changes have also been made to the Commentary.

"RETURNING BANK"

The proposed regulation defined "returning bank" as a bank (other than the paying or depositary bank but including a Federal Reserve Bank or Federal Home Loan Bank) handling a returned check or notice in lieu of return.

Because the definition of "bank" has been revised in the final regulation to include Federal Reserve Banks and Federal Home Loan Banks for the purposes of Subpart C, and in connection therewith, Subpart A, the clause including such banks as "returning banks" has been deleted as superfluous.

Two commenters noted that the definition of "returning bank" specifically excluded the depositary bank, but the Commentary on "returning bank" did not. The Commentary has been amended to correspond to the language of the regulation.

The definition of returning bank has been revised in the regulation and the accompanying Commentary to clarify that a returning bank is considered a

collecting bank for the purpose of the U.C.C. midnight deadline applicable to collecting banks.

"SIMILARLY SITUATED BANK"

The proposed regulation defined "similarly situated bank" as a bank of similar size, located in the same community, and with similar check payments activities as the paying bank or returning bank.

One trade association asked the Board to clarify the meaning of the phrase "similar check payment activities" which is part of the "similarly situated bank" definition. The definition of similarly situated bank and the Commentary to § 229.30(a)(2) have been expanded to explain that two banks have similar check payment activities if they handle a similar volume of checks.

"TELLER'S CHECK"

The proposed regulation defined "teller's check" as a check drawn by a bank on another bank.

The Board received five comments on the definition of "teller's check." Two commenters favored giving next-day availability to checks drawn by banks on bank holding companies and suggested that such checks be included in the definition of "teller's checks." The Board agrees that such checks are the functional equivalent of teller's checks and has redefined "teller's check" to be any check drawn by a bank on another bank or payable through or at a bank. The Board believes that any check drawn by a bank, even if drawn on a nonbank, that is payable through or at a bank is generally as low-risk as checks drawn by a bank on another bank because the drawing bank is responsible for the check. Such checks usually appear to be teller's checks to those who purchase and accept them.

One Federal Home Loan Bank suggested that a special provision for next-day availability for Federal Home Loan Bank checks drawn by other banks would not be necessary as they are already included in the definition of "teller's check" as a check drawn on one bank by another. Because the definition of "bank" includes Federal Home Loan Banks for the purposes of Subpart C, but not Subpart B, checks drawn on Federal Home Loan Banks must be specified separately in § 229.10(c).

A commercial bank asked that the term "teller's check" be changed to "bank draft." The Board decided that "bank draft," which is sometimes used in place of "teller's check," can easily be misinterpreted to mean *any* draft drawn by a bank. The Board prefers the narrower term "teller's check" for checks drawn by one bank on another.

Another commercial bank commented that if teller's checks are to be treated the same as cashier's checks for availability purposes, then stop payment of teller's checks should not be allowed, and Article 3 of the Uniform Commercial Code should be amended accordingly. The Board is aware of the stop payment problem associated with the use of teller's checks and other "near-cash-equivalent" items. The Board may address this issue in the future, but to do so at this time would be premature. The definition also has been revised and a Commentary added to exclude checks drawn by a bank to pay employees and vendors.

"TRAVELER'S CHECKS"

The definition of "traveler's check" has been revised to clearly limit it to traveler's checks drawn on a bank and to exclude the references to the denominations of these checks. A Commentary has been added to aid banks in identifying traveler's checks.

"WIRE TRANSFER"

The definition of "wire transfer" and the Commentary have been revised to more clearly exclude point-of-sale and related transactions.

Miscellaneous Comments

One commenter requested that the Board define "insufficient funds" and "uncollected funds." Another asked the Board to define "hold." The Board believes that these are commonly-used terms that need no explicit definition in the regulation.

The Board received 21 comments on the issue of whether the regulation allows banks to send cash items for collection. Fifteen commenters favored sending cash items for collection, two were opposed, and three requested clarification on this issue. The Congress clearly did not intend for banks to be able to evade the statutory availability schedules. (See Commentary and Comment Summary to "noncash item.")

Three commenters asked that the final regulation contain a letter or number for each definition. The Board has amended the regulation accordingly.

Section 229.10 Next-Day Availability.

(a) *Cash deposits.* The Board received 504 letters that commented on § 229.10. Those 504 letters contained 179 comments in response to § 229.10(a) on cash deposits. The proposed rule stated that a bank shall make funds deposited in an account by cash available for withdrawal not later than the business day after the banking day on which the cash is deposited. The proposed rule differed from the Act's language, which provides next-day availability for cash only when deposited at a staffed facility. The Board proposed to expand next-day availability for cash deposits to include deposits made to unstaffed locations because current law generally provides for next-day availability for cash deposits, and the Board was not aware of any impediments to providing such availability at unstaffed locations such as proprietary ATMs, night depositories, lobby deposit boxes, or through the mail. The Board requested comment on any problems this requirement may pose for depositary banks.

Many commenters opposed the proposed rule on cash deposits. Of the 179 commenters that discussed this issue, only 15 favored next-day availability for all cash deposits. Ninety-nine commenters asked for at least one additional day before giving availability to deposits made at unstaffed locations. Commenters cited verification problems at off-premise ATMs and drop boxes. Commenters explained that it is generally not possible to collect and verify deposits made at off-premise unstaffed locations in time to make funds available the next morning. Fifty-one commenters stated that the 2:00 p.m. cut-off hour is too late to give the depositary bank enough time to collect from and balance off-premise ATMs. These commenters also noted that night deposit boxes are for the convenience of customers who make late evening deposits, and that the bank usually empties them out early in the morning. The commenters stated that it would not be fair to require banks to give next-day availability for cash deposits to night depositories made after the morning pick-up but before the 2:00 p.m. cut-off hour. Many commenters suggested that cash deposits be considered received when the ATM or depository is serviced by the bank.

Twelve commenters cited § 4–106 of the U.C.C., which provides that each branch is considered a separate bank for determining the time at which a bank must carry out an action. The commenters argued that the cash deposit rule should accord with the U.C.C. (i.e., a cash deposit to an off-premise facility should not be considered made to the depositary bank until actually received at the depositary bank), or should at least apply to only cash deposits made in the same state where the account is located.

Because of the operational difficulties in making cash deposited at unstaffed facilities available the day after deposit, the Board has revised this paragraph and the accompanying Commentary to

require that cash deposits at unstaffed facilities be available for withdrawal on the second business day after the banking day of deposit. (See also discussion of modification to provision related to cut-off times in § 229.19(a).)

(b) *Electronic payments.* The comments the Board received on § 229.10(b), electronic payments, are covered in the definitions section under "electronic payment." This paragraph and the Commentary have been revised to provide that an electronic payment is received when the bank has received both actually and finally collected funds and the information on the account and the amount to be credited. The Commentary has also been revised to clarify that this paragraph does not affect Treasury or ACH association rules on the availability of ACH payments.

(c) *Certain check deposits.* The Commentary to § 229.10(c) has been revised to reflect changes to the regulation, discussed below, concerning deposits of certain checks at unstaffed facilities. As in the case of cash, commenters indicated that these checks should not be given next-day availability unless deposited at staffed facilities in accordance with the Act.

(c)(1)(i) *Treasury checks.* Twenty-five commenters responded specifically to § 229.10(c)(1)(i), which provides next-day availability to checks drawn on the Treasury of the United States and deposited in an account held by the payee of the check. One trade association agreed with the proposed rule. A commercial bank opposed the rule because of the high risk of forgery of Treasury checks. Twenty-four commercial banks, citing the long delays of government check returns, requested that the Treasury or the Federal Reserve provide a telephone inquiry service through which a depositary bank could verify a Treasury check. A savings and loan institution requested that next-day availability be limited to those Treasury checks deposited by direct deposit (ACH).

The Board has made no changes to § 229.10(c)(1)(i) of the proposed rule. The statutory language (section 603(a)(2)(A) of the Act) is clear and indicates that next-day availability be given to Treasury checks regardless of whether or not they are deposited at a staffed facility. The Board recognizes the risk of forgery, but does not believe that Treasury checks are more susceptible to forgery than any other type of check that requires next-day availability.

The Board has elected not to establish any duty on issuers of next-day checks (government entities or banks) to respond to inquiries concerning those checks. The Board was concerned with the burden on paying banks to implement procedures to respond promptly to such inquiries, especially given the short time in which such a service would have to be established. The Board will continue to study the need for and feasibility of an inquiry service in cooperation with the banking industry.

The Commentary to this provision has been revised for clarity.

(c)(1)(ii) *U.S. Postal Service money orders.* Section 229.10(c)(1)(ii) of the proposed regulation provided next-day availability for U.S. Postal Service money orders deposited into an account held by a payee of the money order. The Act does not address U.S. Postal Service money orders, but the Board proposed to add them as next-day checks because they are functionally equivalent to other next-day checks and do not present greater risk of loss to banks.

Twenty-two commenters opposed the addition of U.S. Postal Service money orders to the next-day availability list. The commenters cited reasons such as high risk of forgery and theft, untimely returns, and lack of holder in due course status under U.C.C. § 3–805. Four commenters agreed with the inclusion of U.S. Postal Service money orders, and one commenter requested that the Board publish a directory of routing numbers for these items. U.S. Postal Service money orders generally bear the routing number "0000 0800 2." Appendix A has been expanded to include a list of routing numbers designating certain categories of checks that must be accorded next-day availability.

The Board believes that U.S. Postal Service money orders are no more prone to forgery and theft than other types of next-day checks. The Board believes that U.S. Postal Service money orders are used for payments that are important to the recipients of the payments and should be covered by the availability schedules. Section 229.10(c)(1)(ii) of the final regulation has been revised to require U.S. Postal Service money orders to be deposited at staffed facilities in order to obtain next-day availability.

(c)(1)(iii) *Federal Reserve Bank and Federal Home Loan Bank checks.* Section 229.10(c)(1)(iii) of the proposed regulation provided next-day availability for checks drawn on a Federal Reserve Bank or Federal Home Loan Bank and deposited in an account held by a payee of the check. The Act does not address Federal Reserve Bank or Federal Home Loan Bank checks, but the Board proposed to add them as next-day checks. Section 602(11) of the Act provides that the term "depository check" means any cashier's check, certified check, teller's check, and any other functionally equivalent instrument as determined by the Board. The Board determined that Federal Reserve Bank and Federal Home Loan Bank checks are often used as the functional equivalent of cashier's, certified, and teller's checks, and, in the case of fiscal agency checks, Treasury checks.

Three commenters agreed with the proposed rule. Twenty-four commenters opposed the inclusion of Federal Reserve Bank and Federal Home Loan Bank checks. The commenters cited reasons similar to to those cited for opposition of the inclusion of U.S. Postal Service money orders—forgery, theft, and untimely returns. Ten commenters requested that Federal Home Loan Bank checks drawn outside the depositary bank's Federal Reserve district be considered nonlocal checks because of their longer return time. Two Federal Home Loan Banks noted that inclusion of their checks as next-day checks would decrease the acceptability of their checks by depositary banks. Two commenters stated that no checks should be added to the next-day list unless they are subject to the new account exception.

The Board believes that Federal Home Loan Bank and Federal Reserve Bank checks, like U.S. Postal Service money orders, are no more prone to forgery and theft than other types of next-day checks. The likelihood of return of such checks is generally less than the likelihood of return of cashier's, teller's, and certified checks from banks. Return times for Federal Reserve Bank and Federal Home Loan Bank checks are generally equal to or faster than return times for cashier's, certified, and teller's checks. Furthermore, checks drawn on Federal Reserve Banks and Federal Home Loan Banks by other banks are not significantly more risky than those drawn by the Federal Reserve Bank or Federal Home Loan Bank. Consequently, the Board determined that Federal Reserve Bank and Federal Home Loan Bank checks are the functional equivalents of cashier's, certified, and teller's checks and therefore should be subject to the next-day availability requirements in the final regulation.

Section 229.10(c)(1)(iii) of the final regulation has been revised to require that Federal Reserve Bank and Federal Home Loan Bank checks be deposited at staffed facilities in order to obtain next-day availability.

One bank holding company requested that the Board publish a directory of Federal Reserve Bank, Federal Home Loan Bank, and U.S. Postal Service

money order routing numbers. The Board has included these routing numbers in Appendix A to the final regulation.

(c)(1)(iv) *State and local government checks.* Section 229.10(c)(1)(iv) of the proposed regulation provided next-day availability for a check drawn by a state or local government that is deposited: in an account held by the payee of the check; in a depositary bank located in the same state that issued the check or the same state as the unit of local government that issued the check; and with a special deposit slip, if such slips are required by the depositary bank under § 229.10(c)(2).

The Board received 13 comments on this provision. Four commercial banks agreed with the requirement that to receive next-day availability, the check must be deposited in a depositary bank located in the same state as the state or unit of local government that issued the check.

Eight commercial banks and one bank holding company opposed giving state and local government checks next-day availability, largely because such checks are a high forgery risk. Sections 603(a)(2)(B) and (C) of the Act, however, specifically grant next-day availability to state and local government checks. The Act contains a requirement for next-day availability that was not included in the proposed regulation, i.e., that the check must be deposited to a staffed facility. In view of the risk of fraud and the technical problems of giving next-day availability to ATM deposits (discussed below), the Board has amended the regulation to permit a bank to require that to receive next-day availability, state and local government checks must be deposited in person to an employee of the depositary bank.

Section 229.10(c)(1)(iv) has been revised to permit a bank to require the use of special deposit envelopes as well as special deposit slips.

(c)(1)(v) *Cashier's, certified, or teller's checks.* Section 229.10(c)(1)(v) of the proposed regulation provided next-day availability for depository checks that are deposited in an account held by the payee of the check and deposited with a special deposit slip, if such slips are required by the depositary bank under § 229.10(c)(2). Because the term "depository check" has been eliminated from the regulation, the final regulation refers to these checks by name, i.e., cashier's checks, certified checks, and teller's checks.

The Board received 99 comments on the depository check provision. Sixty-one commenters opposed next-day availability for cashier's, certified, and teller's checks. Most of the commenters were concerned about the risk of fraud with such checks. The commenters noted that these checks are often forged or stolen and that the depositary bank would undergo great risk by making funds available before knowing whether the check was genuine.

Other commenters suggested that the Board should put more limitations on the conditions under which cashier's, certified, and teller's checks must be given next-day availability. Twenty-six commercial banks suggested that only checks drawn by a bank on itself should receive next-day availability. Five commenters suggested that only those cashier's, certified, and teller's checks that are local checks to the depositary bank should get next-day availability. A credit union and a bank holding company suggested that next-day availability for these checks be required only when deposited in accounts that are at least six months old.

Section 603(a)(2)(F) of the Act specifically grants next-day availability to cashier's, certified, and teller's checks. The Act contains a requirement for next-day availability that was not included in the proposed regulation, i.e., that the check must be deposited to a staffed facility. In view of the risk of fraud and the technical problems of giving next-day availability to ATM deposits (discussed below), the Board has amended the regulation to permit a bank to require that cashier's, certified, and teller's checks must be deposited in person to an employee of the depositary bank to receive next-day availability. Given the Act's specific requirements for next-day availability, the Board believes it would be inappropriate to include any of the other limitations suggested by the commenters.

One commercial bank suggested the regulation explicitly exclude personal money orders from next-day availability. The Board believes that such language is unnecessary because, generally, personal money orders are not covered by the definitions of cashier's, teller's, or certified checks, and therefore would not be afforded next-day availability. Personal money orders are generally signed by the purchasing customer, not by an officer of the issuing bank and therefore are not cashier's checks subject to the requirement for next-day availability.

The regulation has also been revised to permit a bank to require the use of special deposit envelopes as well as special deposit slips.

(c)(1)(vi) *"On us" checks.* Section 229.10(c)(1)(vi) of the proposed regulation provided next-day availability for checks deposited in a branch of the depositary bank and drawn on the same or another branch of the depositary bank if both branches are located in the same state or the same check processing region.

The Board received 20 comments on this provision. One bank holding company agreed with the provision (but disagreed with giving next-day availability to any other type of check). Fourteen commenters requested that the provision remain as proposed regarding the treatment of payable through drafts, i.e., that payable through drafts not be considered on us checks for the payable through bank.

The Act and final regulation afford next-day availability to checks deposited to and drawn on the same bank, i.e., on us checks do not include payable through drafts deposited in the payable through bank. The Board believes that to treat payable through drafts as on us checks for the payable through bank would create risks for the payable through bank, because the time necessary to verify that the check will be paid by the drawee of the check would often extend beyond the opening of business the next day when funds must be made available. The treatment of payable through drafts as on us checks for the drawee bank and not for the payable through bank is different from the treatment of payable through drafts under the definition of "paying bank." The final regulation treats the payable through banks as the paying bank for payable through drafts. (See Commentary and Comment Summary on the definition of "paying bank.") These two rules are consistent in that they both minimize the risk of fraud for the depositary bank.

Two commercial banks and one savings and loan institution suggested that on us checks should have an extra day before funds are made available so that the depositary bank has extra time to verify the signature of the drawer. Given the Act's specific requirements for next-day availability for on us checks (section 603(a)(2)(E)), the Board believes it would be inappropriate to add another day to the statutorily mandated availability schedule.

Two commenters asked whether a statewide bank that covers two check processing regions must give next-day availability to on us checks when the check is deposited at a branch in a different check processing region from the branch on which the check is drawn. Under the Act and the regulation, as long as the two branches are in the same state *or* the same check processing region, the on us check must be given next-day availability.

Accordingly, § 229.10(c)(1)(vi) has not been revised, although the Commentary to it has been revised for clarity.

(c)(1)(vii) *$100 rule.* Section 229.10(c)(1)(vii) of the proposed regulation provided that the depositary bank give next-day availability to the lesser of $100 or the aggregate amount deposited on any one banking day by check or checks other than checks subject to § 229.10(c)(1) (i) through (vi).

The Board received 71 comments on the $100 dollar rule. Thirty-four commenters opposed the $100 rule. The major reasons given for opposition were risk and operational burden. The commenters complained that to require depositary banks' to provide automatically up to $100 on the day after deposit is an invitation to fraud. Many commenters also noted that it is extremely difficult for banks to keep track of the $100 and the rest of the deposited funds separately.

In addition to the commenters who explicitly opposed the $100 rule, 14 others pointed out the operational problems that banks will have in complying with the rule. Because many banks, automated systems lack the capacity to track the $100 separately from the rest of the deposit, the commenters predicted that depositary banks would either have to make $100 available every day or would have to make the entire deposit available on the business day after deposit. The commenters considered either option to be excessively risky for the depositary bank.

The Board appreciates the risks and burdens of the $100 rule, but given the Act's provision that a depositary bank give next-day availability to "the first $100 deposited by check or checks on any one business day" (section 603(a)(2)(D)), the Board has retained the $100 rule in the final regulation.

Three commenters suggested that the aggregation of deposits for the purposes of the $100 rule be on a per-customer, not a per-account basis. The commenters pointed out that if aggregation is done on a per-account basis, a customer could evade the $100 limitation by making deposits to multiple accounts on the same day. The Board concurs with the commenters, and has clarified that aggregation may be across all deposits by check or checks on any one banking day to all accounts of the customer. Similarly, two commenters asked that the regulation clarify that the $100 rule applies to the aggregate of all the deposits on one banking day, not to each individual deposit. The language of the regulation clearly states that aggregation for the $100 rule may be across all of a customer's deposits during one banking day.

Two commenters suggested that next-day checks should be included in the aggregation for purposes of the $100 rule. In the Board's view, the Act provides for next-day availability of up to $100 of local and nonlocal checks deposited *in addition to* the next-day checks described in § 229.10(c)(1) (i) through (vi). The final regulation and the Commentary have been revised to clarify the relation between the $100 rule and other availability requirements.

Five commenters asked whether the depositary bank must make $100 available on the next day if the customer receives at least $100 cash back on the deposit at the time of deposit. The Commentary has been amended to clarify that, in such a case, the depositary bank need not make another $100 available the next day. Similarly, four commenters suggested that the $100 rule should not apply to deposits which the depositary bank has applied towards a negative balance. The Commentary has been modified to explain that if the account to which the deposit is made has a negative book balance or negative available balance at the time of deposit, the $100 that must be available on the next business day may be made available by applying the $100 to the negative balance rather than by withdrawal by cash or check the next day.

Five commenters asked whether a bank has discretion to choose from which deposited check the $100 is to be deducted. It is the Board's view that the bank may choose from which local or nonlocal check or checks the $100 is deducted as long as the remaining balance is made available for withdrawal according to the appropriate local or nonlocal schedule.

Two commenters suggested that the $100 rule should be waived in the cases where the depositary bank makes the entire amount of the deposit available when provisional credit is received. The Board believes this suggestion is contrary to the Act and has not incorporated it into the final regulation. Under such a rule, in certain cases the depositary bank would not receive next-day provisional credit from its correspondent and would not give next-day availability to any portion of the deposit even for checks that are next-day checks under the Act.

(c)(2) *Checks not deposited in person.* A new paragraph has been added concerning checks not deposited at staffed facilities. Certain checks, including U.S. Postal Service money orders, state and local government checks, Federal Home Loan Bank and Federal Reserve Bank checks, and cashier's, certified, and teller's checks, must be deposited in person to an employee of the depositary bank in order to receive next-day availability. This new paragraph provides that when these checks are not deposited in person to an employee of the depositary bank, they must be made available on the second business day after deposit.

(c)(3) *Special deposit slip.* Section 229.10(c)(2) of the proposed regulation provided that, as a condition to giving next-day availability, a depositary bank may require that a state or local government check or a depository check be deposited with a special deposit slip that identifies the type of check. The paragraph also provided that if a depositary bank requires a special deposit slip, it must make the slips readily available to its customers. Because the term "depository check" has been eliminated from the regulation, the final regulation (in § 229.10(c)(3)) refers to these checks by type, i.e., cashier's checks, certified checks, and teller's checks.

The Board received 92 comments on the special deposit slip provision. Fifty commenters disapproved of the provision. Most of the commenters stated that special deposit slips are a useless alternative for the depositary bank and predicted that few banks would take advantage of the provision. The commenters cited problems such as the increased expense of printing the new slips and reprogramming sorting systems, inconvenience to both banks and customers, and confusion on the part of customers who must determine when to use the special slip. Many commenters stated that they would not use the special deposit slips, but would instead resort to a manual sorting system which will increase costs and slow up processing.

The Board recognizes the disadvantages of special deposit slips. The use of special deposit slips is optional, not mandatory, in both the Act and the final regulation. Special deposit slips may be used by banks that wish to identify checks that cannot be identified as next-day checks by their routing number.

Fifteen commenters requested that the special deposit slip provision be expanded to include all next-day checks for which next-day availability is conditioned on the check being deposited into an account held by a payee of the check. The commenters pointed out that in an automated system, the depositary bank can not ascertain whether the next-day check has been deposited into an account of a

payee. The Act clearly states that state and local government, cashier's, certified, and teller's checks are the only checks for which a bank can require a special deposit slip for next-day availability. The Board believes that it would not be appropriate to expand on the statutory limitations. Furthermore, Treasury checks and other next-day checks for which special deposit slips may not be required can be identified from their routing numbers by high speed equipment.

Fourteen commenters asked for clarification regarding the teller's duty to inform the customer that a special deposit slip may be required for next-day availability. The regulation does not impose an affirmative duty on the teller to alert a customer that a special deposit slip may be appropriate, as long as the bank has notified the customer in its general disclosure statement that special deposit slips are required for next-day availability of state and local government, cashier's, certified, and teller's checks, and the special slips are made readily available to the customer. If a bank agrees to prepare a deposit for a customer, however, it must use a special deposit slip when appropriate.

Thirteen commenters expressed concern over the potential misuse, either intentional or accidental, of special deposit slips by customers. The commenters suggested that the depositary bank should be able to maintain control of the special deposit slips, i.e., not provide free access to the slips in the lobby but keep them behind the teller counter. A bank may retain some control over the dispensation of special deposit slips as long as the slips are reasonably and freely available and that customers are informed as to where in the branch the slips can be obtained.

This section and the Commentary to it have been revised to permit the use of special deposit envelopes for use at ATMs and other unstaffed facilities. The Commentary has also been revised to clarify the requirement that special deposit slips be available for customers.

Other comments on § 229.10—Account of payee requirement. The Board received 16 comments on the requirement that Treasury checks, U.S. Postal Service money orders, Federal Reserve Bank and Federal Home Loan Bank checks, state and local government checks, and cashier's, teller's, and certified checks be deposited into an account held by a payee of the check to get next-day availability. Seven commenters agreed with the requirements as proposed.

Five commenters addressed the situation where there is more than one payee on a check. Two commenters suggested that the regulation should require joint payee checks to be indorsed by all payees with the signature guaranteed for any payee who is not a joint holder of the account into which the check is deposited. Three commenters requested that the regulation require that all payees of the check must also be holders of the account for the check to get next-day availability. Another commenter asked that the regulation require the check to be deposited into an account held by one of the payees, not necessarily all of the payees.

The language of the Act is somewhat different from the language of the proposed regulation. The Act provides that the check be "endorsed only by the person to whom it was issued." This statutory provision could be interpreted to include a check that has been indorsed in blank and deposited to the account of a third party. The Board believes that the Act intends to allow the depositary bank to limit next-day availability to those next-day checks that are deposited to an account of a payee, and reworded the provision in the regulation accordingly. The final regulation requires only that the check be deposited in an account of a payee; all joint payees need not be holders of the account as long as all joint payees have indorsed the check. Two commenters requested that the Board clarify that "payee" means the named payee on the check, not transferees. The Commentary has been amended to require that checks be deposited in the account of an original payee of the check.

Availability based on provisional credit. Forty-five commenters suggested that depositary banks should be able to make funds available on the date on which the depositary bank receives provisional credit for the deposited checks rather than on the day after deposit. Many of the commenters stated that if banks give availability to uncollected funds, they will be in essence making loans to the account holders. Others commented that it was unfair for a depositary bank to have to make funds available to its customers before the bank to which the checks are sent in the forward collection chain makes funds available to the depositary bank.

In most cases, banks receive next-day provisional credit for checks, therefore the statutory local and nonlocal availability schedules would actually be longer than the time by which funds would be made available. In certain cases, however, provisional credit would not be received on the day after deposit and the statutory next-day availability requirements would not be met (e.g., for nonlocal cashier's, certified, and teller's checks). Because the Act clearly provides for next-day availability for certain checks, the Board decided it would not be appropriate to allow depositary banks to extend availability for such checks. Depositary banks are free, however, to give better availability to local and nonlocal checks than is required by the Act and the regulation.

Certain Federal Reserve Bank practices. Three commercial banks commented that the Federal Reserve Bank in their district requires all in-district banks to make a separate sort of all checks under $100 drawn on in-district banks. Because of this practice, out-of-district banks get faster availability on low-dollar checks than do in-district banks. Given the requirement of § 229.10(c)(1)(vii) that up to $100 of local and nonlocal checks be given next-day availability, the commenters requested that their local Federal Reserve Bank process in-district, low-dollar checks as fast as out-of-district, low-dollar checks. The Federal Reserve Bank's policy will be changed accordingly.

Record of losses. Two commenters suggested that banks should keep a record of losses that are attributable to the availability schedules. The Board suggests that such records may be useful for banks to keep, but has not required that they be kept under the regulation.

Calculation of reserves. Four commenters asked whether pay-outs of uncollected funds should be included as "cash items in process of collection" for calculation of reserves. Alternatively, the commenters asked if such pay-outs should be included as "vault cash" that would serve as a portion of maintained reserves. Cash items in the process of collection are a deduction from reservable deposits for uncollected funds. Similarly, a withdrawal of funds from an account is a deduction from reservable deposits. (See 12 CFR 204.) Including withdrawals of uncollected funds as cash items in the process of collection could result in a double deduction that would be inappropriate. Similarly, accounts paid out in withdrawals are not available to meet depositors' claims and therefore should not be considered as vault cash.

General comments. Several banks did not comment specifically on a particular provision, but instead made general comments on next-day availability. Twelve commenters voiced opposition to next-day availability in general (some opposed the local and nonlocal schedules as well) on the grounds that

such availability will induce an unacceptable level of fraud. Two commenters noted that remote community banks will be especially hard-hit by the next-day availability requirements because all of their checks are processed at a central processing facility, which increases the length of the collection and return process. Two commenters requested a delay in the implementation date for next-day availability to give banks time to update their computer systems before exposing themselves to liability for next-day availability. Due to the language of the Act requiring that all depositary banks provide next-day availability as provided in § 229.20 and that such availability is to be implemented on September 1, 1988, the Board has retained the requirements for next-day availability subject to the changes discussed above.

Sections 229.11 and 229.12 Temporary and Permanent Availability Schedules.

Section 229.11(a) and Section 229.12(a) Effective date. The proposed regulation provided that the temporary availability schedule is to be effective from September 1, 1988, through August 31, 1990, and the permanent availability schedule is effective September 1, 1990. The Act mandated these effective dates, but provided in sections 603(b)(4) and 603(c)(3) that the Board could accelerate the implementation of the permanent schedule. The Board requested comment on whether the permanent schedule should become effective earlier than September 1, 1990. Of the 260 comments received on whether the schedules should be implemented earlier, 248 were opposed. In view of the operational problems that banks would face if the schedules were to be implemented earlier than provided in the Act, the Board has decided not to change the effective dates of the availability schedules.

Nine commenters suggested that the Board eliminate the two-tiered schedule approach and implement one schedule, either the temporary or a compromise between the temporary and permanent, in 1989.

Twelve commenters opposed the schedules in general. Three of these commenters noted that the schedules are workable only for banks that have their own data processing capture system and that many thrifts and credit unions operate real-time and cannot capture float. The Board has not modified the final regulation in accordance with these comments because the statutory scheme includes a temporary *and* a permanent schedule and sets the latest possible dates by which each must be effective. The Board has attempted to minimize the disruption from moving to shorter schedules as much as possible in the regulation.

Three commenters asked if banks can, on their own, meet the statutory schedules before they become effective. Banks may provide better availability than mandated by the statute at any time.

Sixty-three commenters requested that the Board delay implementation of both the temporary and permanent schedules. Most of the commenters asked that the delay be for as long as it takes for the check return system to be improved. Others requested extra time to make software changes or to redesign their checks. Because of the requirements of the Act, the final regulation does not delay the implementation of the schedules.

Section 229.11(b)(1) and section 229.12(b) Local checks and certain other checks.

The proposed regulation provided that U.S. Treasury checks and U.S. Postal Service money orders that are not subject to next-day availability under § 229.10 and all local checks must be made available the third business day following the banking day of deposit during the temporary schedule and the second business day following the banking day of deposit under the permanent schedule.

The Board received two comments on the general local check provisions. One commercial bank pointed out that the local schedules should also apply to state and local government checks, Federal Reserve Bank and Federal Home Loan Bank checks, and cashier's, certified, and teller's checks that are not subject to next-day availability under § 229.10. The Board has amended §§ 229.11(b) and 229.12(b) to explicitly include these checks. (The Board also made similar amendments to the sections governing availability of nonlocal checks, §§ 229.11(c) and 229.12(c).)

One savings and loan institution requested that local availability should be given only to a local check deposited into an account of a payee of the check. The Board has not incorporated this suggestion into the final regulation because the Act (sections 603(b)(1) and 603(c)(1)) clearly does not intend that such a requirement be a prerequisite of availability under the local schedules.

Sections 229.11(b)(1) and 229.12(b) and the corresponding Commentary sections have been revised to clarify the treatment of next-day checks that are local checks and do not meet the requirements for next-day availability.

Section 229.11(b)(2) and section 229.12(d) Time period adjustment for withdrawal by cash or similar means.

Clearinghouse association rule. The proposed regulation provided that a depositary bank may extend by one business day the time that funds deposited into an account by a local check under the temporary schedule or by local or nonlocal check under the permanent schedule are available for withdrawal by cash or similar means. Under the temporary schedule, however, the extension would not apply to checks drawn on a paying bank that is a participant in the same check clearinghouse association as the depositary bank.

The Board received five comments on the same-clearinghouse provision. Three commercial banks and one savings and loan institution commented that it would be difficult for tellers and customers to determine whether the paying bank of a deposited check is in the same check clearinghouse association as the depositary bank and that this provision should be dropped. Depositary banks may, but are not required to, provide a list of the members of the bank's clearinghouse association to its tellers and customers.

A Hawaiian savings and loan institution commented that there is no difference in return times to Hawaiian depositary banks between a local check drawn on a mainland bank processed through a clearinghouse and a nonlocal nonclearinghouse check. The commenter suggested eliminating the clearinghouse limitation for nonmainland banks. The Board has retained the provision in the final regulation because it was included in the Act (section 603(c)(1)(B)(i)). A depositary bank can avoid having to make a clearinghouse/nonclearinghouse determination by not taking the one-day extension for cash availability. (See discussion of the definition of check clearinghouse association in the Comment Summary.)

Cash or similar means. The time period adjustment rules of §§ 229.11(b)(2) and 229.12(d) of the proposed regulation allowed, in certain cases, a one-day extension to the availability schedules for withdrawal by cash or "similar means." The Board included the phrase "similar means" to cover other irrevocable debits to the customer's account such as electronic payments, issuance of cashier's and teller's checks, certification of checks, and over-the-counter payment of checks to third parties.

The Board received 28 comments on the phrase "similar means." Twenty-six commenters approved of the "similar means" language. Two commercial banks asked whether "similar means" included cashing checks for third parties. The Commentary has been amended to clarify that cashing checks drawn on the customer's account may be included in "similar means."

$400 rule. The time period adjustment rules of §§ 229.11(b)(2) and 229.12(d) of the proposed regulation provided that although the depositary bank may, in certain cases, extend the availability schedule by one day for withdrawals by cash or similar means, the depositary bank must make $400 of these funds available for withdrawal by cash or similar means not later than 5:00 p.m. on the business day on which the funds are otherwise available under the applicable availability schedule. The regulation also provides that the $400 is in addition to the $100 available under § 229.10(c)(1)(vii).

The Board received 46 comments on the $400 requirement. Forty-five commenters opposed the rule. Many commenters stated that they did not have the technology to make a midday update to their computer system and therefore would have to make the entire $400 available at the start of the day. Others commented that the distinction between cash and check-writing availability would be confusing to customers. A few commenters predicted that banks will close earlier to avoid having to pay the $400 at 5:00 p.m. The Board has retained the provision in the final regulation because it was included in the Act (section 603(b)(3)(B) and (c)(1)(B)(ii)). The depositary bank can avoid having to make a midday update by providing availability by cash or similar means (of either the entire amount of the deposit or of the $400) earlier than is required by the Act and the regulation. The $400 rule remains available under the regulation for those depositary banks who can implement it.

One commercial bank noted that § 229.11(b)(2) of the regulation referred only to deposits of "a local check." The commenter noted that the language should be amended to include deposits of one or more local checks. The Board has amended the final regulation accordingly.

Section 229.11(c) and section 229.12(c) Nonlocal checks.

The proposed regulation provided that a depositary bank must make funds deposited by nonlocal checks available for withdrawal not later than the seventh business day following the banking day of deposit under the temporary schedule and the fifth business day after the banking day of deposit under the permanent schedule. These sections have been revised to clarify the treatment of next-day checks that do not meet the requirements for next-day availability.

The regulation also provided that nonlocal checks specified in the corresponding Appendix (B–1 for temporary schedule, B–2 for permanent schedule) must be made available for withdrawal not later than the times prescribed in that Appendix.

The Board received 11 comments regarding Appendices B–1 and B–2. Five commenters suggested that depositary banks should have to make one initial disclosure of the Appendix B schedules with update disclosures as the Appendix B schedules are revised. These commenters suggested that the Board should make changes to Appendix B at a specified time each year so that banks can plan their update notices. A related comment by a savings and loan institution asked whether, in fact, the Board would actually make changes to Appendix B. The Board does not anticipate making any changes to Appendix B–1 after publication of the final regulation. If the Board decides at a future date that frequent revisions to Appendix B–2 will be necessary, it will establish regular procedures to do so. Banks are only required to disclose the reduction in schedules, contained in Appendix B, to customers upon request.

Three commenters pointed out that Appendix B contained reduced schedules for certain processing territories but not for others that process checks just as fast. The Board has revised Appendix B to eliminate many of the inconsistencies.

One commercial bank noted that under the availability schedule, because of the clearinghouse rule, it would be possible that a depositary bank would have to make funds deposited by a nonlocal check available in full before funds deposited by a local nonclearinghouse check are available in full. The commenter suggested that the Board add language to § 229.11(c)(2) to provide that to the extent that the provisions of Appendix B–1 require that the proceeds of deposited checks be made available to depositors on the third business day, the time period adjustment as set forth in § 229.11(b)(2) would apply. The Board has revised Appendix B–1 so that no nonlocal schedule requires that funds be available for withdrawal earlier than the fourth business day after deposit.

Section 229.11(d) Deposits at nonproprietary ATMs.

The proposed regulation provided that, under the temporary schedule, funds deposited to a nonproprietary ATM by cash or check must be available for withdrawal not later than the seventh business day after the banking day of deposit. Two commercial banks commented that the Board should clarify that § 229.11(d) supersedes § 229.10 for such deposits. The Commentary has been amended to clarify that, under the temporary schedule, next-day availability does not apply to deposits to nonproprietary ATMs.

Section 229.11(e) and section 229.12(e) Extension of schedule for certain deposits in Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands.

The proposed regulation provided that the depositary bank may extend the time periods set forth in the temporary and permanent schedules by one business day in the case of any check that is deposited in an account at a branch located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands and is deposited by a check drawn on or payable through or at a paying bank not located in the same state as the depositary bank.

The Board received 39 comments on this extension provision. One trade association approved of the rule. Thirty-three commenters requested that the special extension rule apply in both directions, i.e., that depositary banks in the continental U.S. will also be able to extend the schedules an extra day for checks drawn on or payable through or at a paying bank located in Hawaii, Alaska, Puerto Rico, or the Virgin Islands. The Board did not include reciprocity of this provision in the final rule. The language of the Act (section 603(d)(2)) allowed the extension to work in one direction only. The Board believes that it would be inappropriate to expand on the statutory language.

One commercial bank commented that the extra day for Alaskan depositary banks is not necessary for checks drawn on banks in the state of Washington served by the same Federal Reserve office. A Hawaiian savings and loan institution commented that a local check deposited into a Hawaiian bank drawn on a mainland bank can never be returned before funds must be made available, even if the checks are handled expeditiously. The commenter requested a longer extension for these checks. Given the language of the Act, the Board did not either add to or

subtract from the extension as it appeared in the proposed regulation.

One savings and loan institution asked that the Board clarify that the extension applies only when the paying bank is located in a different state than the depositary bank branch where the deposit is made. The regulation and Commentary have been revised to clarify that deposits must be made in a branch located in one state and drawn on a paying bank located in another state. The Board also made clarifying changes in this provision of the regulation.

Other comments on sections 229.11 and 229.12. Six commenters asked that the Board allow banks to vary the availability schedules by agreement with business customers. The Board believes that such a practice would be inconsistent with the Act's intent to provide a ceiling for holds on deposited funds applicable to both consumer and business accounts. A depositary bank can give better availability than the schedules or can use calculated availability for nonconsumer accounts as provided in § 229.19(d). Neither the Act nor the regulation will allow a bank to provide worse than statutory availability, even if the customer agrees.

One commercial bank commented that if the regulation requires a bank to adopt a single hold policy for all its branches, it would give an unfair advantage to multiple-charter bank holding companies that can tailor hold policies based on a smaller area. The Board believes that regulation does not provide an unfair advantage to bank holding companies. Section 229.19(c) provides that a depository bank may provide different availability policies to different segments of its customer base.

Sections 229.10, 229.11, and 229.12 ATM issues.

In addition to the comments addressed to specific sections dealing with the availability schedules, the Board also received 286 comments on how the availability schedules in general would affect the use and operation of ATMs.

Eighty commenters discussed the problems with giving expedited availability to deposits at nonproprietary ATMs. The commenters stated that deposits at nonproprietary ATMs are usually processed before the bank that holds the account is notified. The commenters suggested that for nonproprietary ATM deposits that are verified off-premise, the depositary bank needs more time, particularly under the permanent schedule, so that the deposit information can be delivered.

The Board recognizes the problems faced by depositary banks that accept deposits at nonproprietary ATMs. The Act, generally provides that deposits at nonproprietary ATMs be accorded the same availability as deposits at proprietary ATMs under the permanent schedule. The Conference Report on the Act states that "the conferees believe it is reasonable to expect the owners and operators of such ATMs to develop the necessary technology to make such differentiations within a reasonably short time."

In related comments, 29 commenters stated that because ATMs cannot distinguish between cash and different types of checks, particularly Treasury checks, participants in ATM networks will have to increase their staff and upgrade their communications systems at a tremendous cost. Many commenters did not think that these changes could be made by the time the permanent schedule goes into effect. The commenters were concerned that if an ATM cannot distinguish between different types of deposits, the bank would have to make all ATM deposits available on the next day, when Treasury checks must be available for withdrawal under the temporary schedule. Seventy-four commenters predicted that most banks will discontinue taking deposits at nonproprietary, or in some cases all, ATMs.

The Board has revised the final regulation to require that cash, U.S. Postal Service money orders, Federal Reserve Bank and Federal Home Loan Bank checks, state and local government checks, and cashier's, certified, and teller's checks must be deposited to a staffed location to receive next-day availability. The Board has also interpreted the term "branch to exclude an off-premise ATM; thus on us checks deposited to an off-premise ATM would not have to be given next day availability. Treasury checks deposited to a proprietary ATM, however, must receive next-day availability.

In addition, former § 229.12(e) concerning availability of deposits at nonproprietary ATMs under the permanent schedule has been deleted as unnecessary due to changes in treatment of deposits of next-day checks at ATMs generally. This paragraph had provided for second-day availability for deposits of next-day checks at nonproprietary ATMs. Under the final rule these checks are subject to second-day availability when deposited at any ATM. (See § 229.20(c)(2).)

Section 229.13 Exceptions.

(a) New Accounts.—(1) Deposits to new accounts. The Act provides that in certain instances a depositary bank may delay availability of a deposit beyond the statutory schedules by invoking an exception. The first such exception is for new accounts. Section 229.13(a)(1) of the proposed regulation provided that a deposit in a new account is subject to the next-day availability requirements of § 229.10 (a) and (b) for cash and electronic payments. The proposed regulation also provided that new account deposits would be subject to the requirements of § 229.20(c)(1) (i) through (v) (governing next-day availability for Treasury checks, U.S. Postal Service money orders, Federal Reserve Bank and Federal Home Loan Bank checks, state and local government checks, and cashier's, certified, and teller's checks, and for the purposes of the new account exception only, traveler's checks) only with respect to the first $5,000 of funds deposited on any one banking day; any amount of the deposit over $5,000 must be available on the ninth business day following the banking day of deposit. The proposed regulation provided that deposits to new accounts would not be subject to the next-day availability requirements of § 229.10(c)(1) (vi) and (vii) (governing on us checks and the $100 rule), § 229.10(c)(2) (second-day availability), the temporary schedules of § 229.11, or the permanent schedules of § 229.12.

The Board received 306 comments on the new account exception. Sixty-four commenters questioned the inclusion of traveler's checks in the next-day availability requirement for the first $5,000 of the deposit. The commenters pointed out that this provision is inconsistent with § 229.10 because traveler's checks do not get next-day availability when deposited into established accounts. The Board recognizes the inconsistency, but has retained the traveler's check provision because it is a requirement of the Act (section 604(a)(1)(c)).

Thirty commenters objected to the next-day availability requirement in the new account exception. The commenters favored eliminating this requirement with respect to certain check deposits. One commercial bank favored eliminating next-day availability for cash and electronic payments under the exception as well. The Board did not amend these provisions in the final regulation because the language of the Act in section 604(a)(3) specifically provides for next-day availability for up to $5,000 of certain checks deposited to

new accounts, and section 604(a)(1) provides for next-day availability for deposits of cash and electronic payments to accounts subject to this exception.

Three commercial banks asked the Board to clarify whether the $5,000 refers to total deposits made throughout the new account period or for each day's deposits. The language of the regulation is clear in that it refers to "the first $5,000 of funds deposited *on any one banking day,*" not throughout the entire new account period. Although the Act is not explicit on this point, the Board believes that it was the intent of the Act to apply the $5,000 rule to deposits on any one banking day under the new account exception.

Two commercial banks and one savings and loan institution requested that the Board clarify the length of the hold period for deposits subject to the new account exception. As the regulatory language states, the depositary bank may institute a nine-day hold on portions of certain deposits for which $5,000 must be available on the day after deposit. For deposits covered by § 229.10(c)(1) (vi) and (vii) (on us checks and checks subject to the $100 rule), and checks subject to the temporary and permanent availability schedules of §§ 229.11 and 229.12, there is no schedule of availability for deposits to new accounts.

(2) When an account is considered new. Section 229.13(a)(2) of the proposed regulation provided that an account is considered new during the first 30 calendar days after it is established. The proposed regulation also provided that an account is not considered new if the customer had, within 30 calendar days before the account is established, another account at the depositary bank for at least 30 days.

One hundred eighty-six commenters indicated that a 30-day period is not long enough to determine the validity of a new account. Suggestions for the length of the new account period ranged from 60 days to six months. Many commenters requested that the depositary bank be able to lengthen the new account period if the account showed unusual activity indicating a potential for fraud, if the account had been overdrawn within the 30-day period, or for deposits made after the 30-day period that exceed the previous average balance. Twenty-six commenters stated generally that the depositary bank should have more discretion over the hold period.

Section 604(a) of the Act specifically requires a 30-day period for the new account exception, or such shorter period as the Board may establish. The Board, following the statutory provision, has retained the 30-day period for the new account exception in the final regulation.

Thirty-one commenters suggested that the regulation should consider an account to be new if *any* holder of the account is new, even if another joint holder is an established customer. One commercial bank commented that the opposite should be the case, i.e., that an account should not be considered new if any holder of the account is an established customer. The Board believes that the intent of the new account exception is to protect depositary banks from the risk involved when dealing with an unknown customer. As long as any holder of an account may withdraw funds from the new account, that customer presents the kind of risk that the Act intends to address. Therefore, the Board has amended the regulation and the Commentary to provide that an account is not considered new if *each* customer on the account has had another established account at the depositary bank within the previous 30 days.

Nine commenters suggested that if a previous joint account holder opens an individual account, the individual account should be considered new, because the behavior of the customer is different as a joint holder than as an individual holder. The Board did not incorporate this suggestion into the final regulation. The Board believes that the Act does not intend banks to invoke the new account exception when the customer on the account is not new. Section 604(a) of the Act provides that the new account exception applies to any account established at a bank by a new depositor. Under the statutory language, a new name on an account constitutes a new depositor, and the new account exception would apply, but the name of an existing account holder on an account, including a joint account holder, would not yield a new account.

Two trade associations asked whether a corporate account would be considered new every time there are new corporate signers on the account. Because the holder of the account is the corporation, not the individual signers, the account would not be new every time the signers changed. The commenters also asked whether an individual account opened by a corporate signer would be considered new if the corporate account had been established for at least 30 days. Because the corporate signer is not the holder of the corporate account, any individual account opened by the corporate signer could be considered new.

A bank holding company commented that if a customer's established account is not in good standing or not of the same type as the newly-opened account, the new account exception should apply. The Board believes this limitation of new accounts would be contrary to the intent of the Act.

Sixteen commenters favored elimination of all distinctions between new and established customers by treating every account as new when opened. The commenters complained that the exception involved too much technological complexity and that the new account periods would be difficult if not impossible to track under current computer systems. The Board has retained the customer distinctions due to the statutory language in section 604(a) of the Act, which applies the new account exception to accounts established by a "new depositor."

The Commentary has been revised to include a number of examples of when accounts are considered to be new accounts. In addition, other clarifying changes have been made to the Commentary.

Twenty-nine commenters requested that the Board allow banks to rely on the customer's representation as to whether the customer has had an established account within the last 30 days. The commenters explained that many banks can not cross-reference common names on accounts through their computer systems. The Board has clarified in the Commentary that the depositary bank can rely on the representation of the customer for this information.

One commercial bank suggested that a reactivated dormant account should be considered new. A dormant account that is reopened is not a new account, and the Commentary has been revised to clarify this point.

One banking-related corporation commented that the new account exception should apply to accounts held by escrow companies into which they deposit checks which they hold in escrow for clients who own the entire beneficial interest in the deposit. The commenter noted that while the escrow company, as account holder, is not a new customer, the clients who hold the beneficial interest in the deposits are generally new customers to both the escrow company and the depositary bank. Because the Act and regulation consider the actual account holder to be the depositor, the escrow company, not the escrow company's client, is the customer for the purposes of the regulation. Therefore, the escrow

company's accounts would not be subject to the new account exception.

In addition to these issues, clarifying changes were made to the language of the new account exception in the regulation.

(b) Large Deposits. The proposed regulation provided that the temporary and permanent schedules of §§ 229.11 and 229.12 would not apply to the aggregate amount of deposits by one or more checks that is in excess of $5,000 on any one banking day. The regulation also provided that for customers that have multiple accounts, a depositary bank may apply this exception to the aggregate amount deposited to all accounts of the customer if all the holders of each account are the same. The regulation did not allow a depositary bank to aggregate the deposits in both individual and joint accounts for the purpose of this exception.

The Board received 150 letters that contained comments on the large deposit exception. Five commenters opposed the exception in general on the grounds that it is too complex and is not workable given current technology. Sixty-five commenters requested that the Board allow a depositary bank to aggregate a day's deposits across all accounts on which the customer's name appears, regardless of the other names on the accounts. Only one commenter agreed with the provision as it appeared in the proposed regulation. The risk to the depositary bank associated with large deposits is similar whether the customer makes the deposit to one account or allocates the deposit over several accounts. The Board has amended the regulation and the Commentary to provide that the depositary bank may apply the large deposit exception to the aggregate amount deposited to all accounts of the customer, even if not all the holders of the customer's accounts are the same.

Fifty-six commenters requested that the large dollar exception apply to deposits subject to next-day availability. Four commenters asked whether next-day checks could count toward the $5,000 for aggregation purposes. The language of the Act (section 604(b)), however, clearly excludes next-day deposits from the large dollar exception. The Board, therefore, has not applied the large deposit exception to these next-day checks in the final regulation. Additionally, next-day checks cannot be counted toward the $5,000 aggregation because they cannot be held under the exception. The Commentary has been expanded to provide an illustrative example to clarify the operation of the large deposit exception.

Twenty-one commenters suggested that the Board lower the $5,000 cut-off point. Many of the commenters suggested that the cut-off should be $2,500, which is consistent with the large-dollar notice of nonpayment requirement of § 229.33(a). Section 604(b)(1) of the Act specifically provides that the large-dollar cut-off be set at $5,000. To be consistent with the Act, the Board has not lowered the dollar cut-off in the final regulation. For the same reason, the Board has not incorporated other suggestions by the commenters, such as applying the exception to the whole deposit rather than just the amount over $5,000 and aggregating funds deposited over a longer period of time than one banking day.

Two commenters requested that banks be able to vary the terms of the exception with corporate customers, and two other commenters requested that the exception not apply to corporate accounts at all. The Act clearly anticipates that the exceptions will apply to all accounts, both consumer and corporate, but the decision to invoke an exception is optional. A depositary bank may choose not to apply the large deposit exception to a corporate account with routinely large deposits.

(c) Redeposited checks. The proposed regulation provided that the temporary and permanent schedules of §§ 229.11 and 229.12 would not apply to a check that has been returned unpaid and redeposited by the customer or the depositary bank. The proposed regulation provided that this exception would not apply to checks that have been returned due to a missing indorsement and redeposited after the indorsement had been obtained, if the reason for return stamp on the check states that it was returned due to a missing indorsement; or to a check that has been returned because it was postdated, if the check is no longer postdated when redeposited.

The Board received 56 comments on the redeposited check exception. Three commenters agreed with the provision as it appeared in the proposed regulation, and two commenters opposed the exception on general terms because it would be too complex and costly for banks to implement.

Forty-two commenters asked that the exception be extended to checks returned because of a missing indorsement or because they were postdated. The commenters stated that checks may be signed imperfectly or postdated on purpose and that the regulation should discourage such practices. The Board believes that the exceptions in the Act were meant to address the risk problems of depositary banks rather than customer discipline. The final regulation retains the exclusion of postdated and misindorsed checks from the redeposited check exception because generally these two types of checks do not have as high a risk of return as do checks that have already been returned once for insufficient funds.

One commercial bank requested that if a check is returned because it is postdated, the reason for return should indicate so or else this exception could apply to that check. The regulation and the Commentary have been revised to state that a bank may rely on the reason for return indicated by the paying bank.

One commercial bank suggested that the Board clarify that the availability schedules for all redeposited checks should begin as of the date of redeposit. The Commentary has been amended to clarify this point.

Two commenters asked whether this exception applied to next-day availability checks, and two commenters asked whether the $100 rule applied to redeposited checks. Under section 604(b) of the Act, the redeposited check exception does not apply to any of the next-day availability provisions. The Commentary to the final regulation has been revised to clarify that a bank must give next-day availability to a redeposited check that falls under the schedules set out in § 229.10, and must provide up to $100 the next day for local and nonlocal redeposited checks. The depositary bank will have presumably charged back the customer's account when the check was first returned.

(d) Repeated Overdrafts. The proposed regulation provided that if any account or combination of accounts of a depositary bank's customer has been repeatedly overdrawn, then for a period of six months after the last such instance, the temporary and permanent schedules of §§ 229.11 and 229.12 do not apply to any of the accounts. The proposed regulation considered an account to be "repeatedly overdrawn" if there have been three or more instances within a given six-month period in which the balance of the account has become negative, or would have become negative if checks or other charges had been paid. The proposed regulation defined "instance" as a period of up to three consecutive banking days during which an account is negative due to overdrafts, or during which additional checks or other charges to the account are returned or rejected. The proposed regulation also provided that a separate

instance occurs if an account has a negative balance for more than three consecutive banking days or if charges or checks are rejected or returned over a period of longer than three consecutive banking days.

The Board received 263 letters that contained comments on the repeated overdraft exception. Sixteen commenters agreed with the exception as proposed, and 26 commenters opposed the exception in general terms. These commenters complained that the proposal was too confusing, difficult to implement, and in some cases, too lenient. Four commenters said that the definition of "instance" was unclear and asked for a simplified rule. Thirty-six commenters requested that each bank be able to use its own discretion in determining what accounts are repeatedly overdrawn. Many of these commenters were concerned that the proposed exception was too lenient for commercial accounts, for which three overdraft "instances" within six months would be excessive.

Other commenters offered suggestions as to how the definition of "repeated overdraft" should be changed. Sixty-five commenters suggested that the proposed six-month period in which the "instances" are counted should be lengthened to a one-year period. Fifty-nine commenters stated that it was impossible, under many current operating systems, for a bank to track groups of three consecutive days of overdraft. The commenters suggested that an "instance" should be one day, not a group of consecutive days. Similarly, 48 commenters suggested that each check that causes, or would have caused had it been paid, an overdraft should be regarded as an "instance."

Twenty commenters suggested that the overdraft exception contain a dollar-amount trigger (e.g., three instances of overdraft or one $5,000 overdraft would satisfy the exception). One commercial bank suggested a sliding scale of allowable number of overdrafts according to the age of the account.

The final regulation reflects changes in the overdraft exception which incorporate many of the commenters' suggestions and make the exception less confusing and easier to implement. The final rule retains the six-month period, following the language of the Conference Report on the Act, which states that a reasonable definition of a repeatedly overdrawn account is one that is overdrawn on three separate and distinct occasions within any six-month period. The final regulation no longer defines "instance" in terms of consecutive days, but instead focuses on the number of days and the amount of the overdraft. Specifically, the final regulation provides that a depositary bank may consider a customer's account to be "repeatedly overdrawn" if on six or more banking days within a six-month period, the balance of the account is negative, or would have become negative if checks or other charges to the account had been paid; or if on two or more banking days within a six-month period, the balance of the account is negative, or would have become negative if checks or other charges to the account had been paid, in the amount of $5,000 or more.

Seven commenters asked the Board to clarify whether an instance occurs when a customer writes a check overdrawing the account or when a customer's deposited check is returned and the consequent charge-back overdraws the account. Three commenters asked whether overdrafts caused by overdraft fees could be included. The revised Commentary explains that all of the instances described above would constitute an overdraft instance for the purposes of the repeated overdraft exception. Overdrafts covered by overdraft lines of credit may not be counted in determining whether the repeated overdraft exception applies.

Five commenters asked whether the initial six-month period for counting overdrafts starts on September 1, 1988, or six months before that date. The Commentary has been revised to clarify that the depositary bank may consider overdraft activity that occurred prior to September 1, 1988.

One commenter asked whether the six-month period in which deposits can be held is rolling or distinct, (e.g., once a six-month hold period starts, must the depositary bank wait until the six months is over before recalculating the number of overdrafts?). The regulation provides that the six months is a rolling period and that a bank may invoke the exception immediately after the last overdraft.

Three commenters asked whether an overdraft must exceed total deposited funds or only available funds. The Commentary has been revised to clarify that an overdraft occurs when either the total deposited balance or the available balance is exceeded.

Four commenters asked whether this exception applied to next-day availability checks. Under section 604(b) of the Act, the repeated overdraft exception does not apply to any deposits subject to next-day availability.

(e) Reasonable cause to doubt collectibility. Section 229.13(e)(1) of the proposed regulation provided that the temporary and permanent schedules of §§ 229.11 and 229.12 and the next-day availability provisions of § 229.10(c)(1)(iii) and (v) for Federal Reserve Bank and Federal Home Loan Bank checks and cashier's, certified, and teller's checks do not apply with respect to any deposited check that the depositary bank has reason to believe is uncollectible from the paying bank. The proposed regulation provided that the existence of facts that would cause a well-grounded belief in the mind of a reasonable person that the check is uncollectible is required, and that such belief shall not be based on the fact that the check is of a particular class or is deposited by a particular class of persons. The proposed regulation required that the reason for the bank's belief that the check is uncollectible shall be included in the notice required under § 229.13(g).

The Board received 158 letters containing comments on § 229.13(e)(1). Two commenters agreed with the provisions of the reasonable cause exception, and one commenter objected to the provision in general terms.

One hundred forty-three commenters opposed the requirement that the depositary bank must include the reason why it has reasonable cause to doubt a check's collectibility in the notice to the customer. The commenters pointed out that if the bank's reason for doubting collectibility is that it believes the depositor may be engaging in check fraud, to specify the reason in the notice could at worst expose the bank to liability in a libel suit and at best do severe damage to customer relations. The commenters also noted that if a bank doubts collectibility based on confidential knowledge of the possible failure of the paying bank, disclosure of the reason could cause a run on the paying bank. Many commenters asked the Board to provide model language that the depositary bank may use in the notice. A few commenters suggested that the depositary bank should have immunity from libel suits if it follows the Board's model language or acts in good faith using reasonable judgment.

The Commentary has been amended to clarify the situations in which the reasonable cause exception can be invoked and a depositary bank's responsibility to provide its customer with the reason that this exception is invoked. In certain limited cases, the depositary bank may indicate that the exception is being invoked on the basis of confidential information. Model notice form C–13A in Appendix C includes language that the bank may use in cases to describe the reason it believes a check is uncollectible. (See Commentary to § 229.13(e).)

A number of commenters made suggestions as to specific reasons why a depositary bank might believe a check is uncollectible. One commenter requested that counter checks and checks with the same maker and payee should be subject to the exception. The Board does not believe that either of these types of checks necessarily gives reasonable cause to doubt collectibility. One commenter suggested that a mutilated check should be covered by the reasonable cause exception. Damage to or loss of a check may give a bank reason to doubt the check's collectibility, and this reason is listed in model form C–13A.

Five commenters suggested that the depositary bank should be able to use a statistical base to determine the likelihood of collecting a particular check. Section 604(c)(2) of the Act provides that the determination to invoke a reasonable cause exception may not be based on any class of checks or persons. The final regulation tracks the Act's language. The Commentary has been amended to clarify that a depositary bank, however, may look at all the facts concerning a deposited check when determining whether to invoke an exception, as long as its decision is not based on the class of check or class of depositor.

Six commenters suggested that this exception should apply to all next-day availability checks. Similarly, five commercial banks commented that the $100 rule should not apply to checks held under the reasonable cause exception. Under section 604(c)(1) of the Act, the only next-day checks that can be held under the reasonable cause exception are cashier's, certified, and teller's checks. The regulation includes checks drawn on Federal Reserve Banks and Federal Home Loan Banks in the reasonable cause exception because the Board believes that in many cases, such checks are functionally equivalent to teller's checks. All other next-day availability checks, as well as the $100 rule, are not subject to the reasonable cause exception.

One trade association requested that the Board define "uncollectible funds." The Board does not believe that further definition of "uncollectible funds" is necessary.

Section 229.13(e)(2) of the proposed regulation provides that the depositary bank shall not assess any fee for any subsequent overdraft (including the use of a line of credit) or return of a check or other unpaid charge under the following conditions: the depositary bank has extended the time by which deposited funds will be available under the reasonable cause exception, the depositor was not provided with written notice of the extended hold required by § 229.13(g) at the time of deposit, the overdraft or return of the check or other unpaid charge would not have occurred except for the fact that the funds so deposited were not available but would have been available if the exception were not invoked, and the check was finally paid by the paying bank.

The Board received 93 comments on § 229.13(e)(2). All of the commenters suggested that the depositary bank should be allowed to assess a fee, then refund the fee if the conditions listed in § 229.13(e)(2) occur. The commenters noted that it is not feasible, under most banks' computer systems, to track overdraft fees as the proposed regulation would require. The final regulation makes the provision easier for the depositary banks to implement, yet preserves the customers' rights. The final regulation and Commentary have been revised to provide that the depositary bank may assess an overdraft fee under the conditions listed in § 229.13(e)(2) if it notifies the customer, in the notice of exception required under § 229.13(g), that the customer may be entitled to a refund of overdraft fees that were assessed due to the application of this exception if the check is paid and how to obtain such refund, and refunds any such fees upon request of the customer.

(f) Emergency conditions. The proposed regulation provided that the temporary and permanent schedules of §§ 229.11 and 229.12 do not apply to funds deposited by check in a depositary bank in the case of an interruption of communications facilities, or computer or other equipment failure; a suspension of payments by another bank; a war; or an emergency condition beyond the control of the depositary bank, if the depositary bank exercises such diligence as the circumstances require.

The Board received 100 comments on the emergency conditions exception. Seventy-four commenters suggested that the regulation should include an explicit exception for a weather-related emergency. Three commercial banks commented that the emergency exception should explicitly include transportation delays and equipment failures. Two commenters asked whether a lost cash letter constitutes an emergency. The final regulation does not specify the exceptions requested by the commenters because weather, transportation, equipment, and lost cash letter emergencies that are beyond the bank's control are already included in the emergency exception. The Commentary has been amended to clarify that a delay due to emergency conditions beyond the bank's control, such as severe weather, which causes delay in the collection of checks, may qualify for an extended hold under the emergency exception.

Fourteen commenters opposed the exclusion of next-day availability checks from the emergency exception. The regulation does not apply the emergency exception to next-day checks because section 604(d) of the Act provides that the emergency exception applies only to the temporary and permanent schedules. The Commentary has been revised to clarify that if next-day checks are not posted to a customer's account under certain emergency conditions, such as computer malfunction, the depositary bank may not be liable on those checks under the bona fide error provision of § 229.21(c).

Two commenters asked that the Board define "emergency" more clearly. The final regulation has not expanded the definition of "emergency." The language of the regulation tracks the Act's language in section 604(d), which the Board believes is sufficiently clear and flexible to meet most emergencies.

(g) Notice of exception.—(1) In general. Section 229.13(g)(1) of the proposed regulation provided that if a depositary bank extends the time for availability of deposits under the exceptions contained in §§ 229.13 (b) through (f), the depositary bank shall provide notice to the customer of the reason the exception was invoked and the day funds will be available for withdrawal. This paragraph also provides that the depositary bank need not include the day funds will be available for withdrawal in the notice if it in good faith does not know, at the time notice must be provided, the duration of the emergency and, consequently, when funds will be available for withdrawal.

The Board received 168 letters containing comments on § 229.13(g). Forty-two commenters objected to the requirement that if an exception is invoked, a notice must be given upon receipt of every deposit. The commenters suggested that, in many cases, a one-time notice would be sufficient. For example, a depositary bank could make one general disclosure of its hold policy for large-dollar deposits and redeposited checks, and could make one notice per six-month period in the case of a hold under the repeated overdraft exception. The Act, however, provides in section 604(f) that separate notice of an extended hold must be provided to the customer for each deposit that is subject to the hold.

except for those deposits held under the new account exception. The final regulation follows the Act's provisions and requires a notice upon each deposit held under § 229.13 (b) through (f).

Four savings and loan institutions commented that a notice of exception would not be necessary for deposits that are under $100 because the deposit would have to be available the next day under § 229.10(c)(1)(vii). The Board believes that if funds are not held under § 229.13, no notice is required.

One commercial bank asked whether documentation of the reason for invoking the exception must be included in the notice. The Act and the regulation only require that the reason for invoking the exception must be included, not extensive documentation of the facts which substantiate the reason. The depositary bank may, however, wish to retain such documentation for its own records. Furthermore, as explained in the Commentary to the § 229.21(g) record retention requirements, a bank must retain a copy of each notice of a hold under the reasonable cause exception, and a brief description of the facts that gave rise to the reasonable cause to doubt collectibility.

Two commercial banks suggested that the notice should include the name of the drawer instead of the payee as provided in model form C–7 of the proposed regulation. The model forms for hold notices in Appendix C (C–13 and C–13A) of the final regulation have been amended to specify the name of the drawer.

Section 229.13(g)(1) and the Commentary have been revised to clarify that other information required in this notice includes the customer's account number and the date of the deposit.

(2) Timing of Notice. Section 229.13(g)(2) of the proposed regulation required the depositary bank to provide notice of a hold in writing to the customer at the time of deposit, if the deposit is made in person to an employee of the depositary bank. The proposed regulation further provided that in the case of any other deposit, or if the facts upon which the bank bases its determination to invoke a hold only become known to the bank after the deposit is made, the bank shall mail the notice to the depositor as soon as practicable, but not later than the first business day following the calendar day the facts become known to the bank or the day the deposit is made, whichever is later. The regulation also provided, however, that for funds held under the emergency conditions exception, the depositary bank is not required to send notice if the funds will become available before the notice must be sent.

Under the proposed regulation, a depositary bank is deemed to have knowledge of the facts upon which the determination is made when the facts are brought to the attention of the person(s) responsible for making the determination, and, in any event, from the time when the facts would have been brought to their attention if the bank had exercised due diligence.

Thirty-four commenters stated that a teller should not be expected to make the determination of whether an exception should be invoked. The commenters said that hold decisions will always be made by officers and notice mailed by the end of the next business day as required in the regulation. Four commenters suggested that the teller should be allowed to inform the customer of a possible hold in the event a subsequent determination to place a hold is made by a bank official. Ten commenters were opposed to the notice requirement altogether because tellers are unable to make the hold determination, and the time frame allowed for ATM deposit and mail deposit determinations is not long enough.

The final regulation contains the same requirements regarding the timing of the notice as the proposed regulation. These requirements are based on section 604(f) of the Act. The Board believes that the notice requirements are flexible enough to allow the depositary bank to rely on its officers and not its tellers to make hold decisions and still meet the timing requirements.

Thirty-three commenters asked that the Board delete the phrase "as soon as practicable" because it is confusing and redundant. The final regulation retains the phrase "as soon as practicable" because it is a requirement of section 604(f)(3) of the Act.

Thirty-one commenters requested that the Board clarify that notice given at the time of deposit is sufficient if given to the person making the deposit, even if that person is not the account-holder. The Commentary has been amended to clarify that notice of a hold may be given to the person making the deposit.

A number of commenters were confused about when the notice must be sent in cases when the deposit is not made to an employee or when the facts upon which the hold is based become known after the deposit is made. Twenty commenters apparently confused the notice requirements of § 229.13(g) with those of § 229.16(b)(2) and requested that the bank be allowed to send notice by the next business day after deposit, which was permitted under the proposed regulation for purposes of § 229.13(g), but not for § 229.16(b)(2). Six commenters requested specifically that the timing of the notice requirements in the two sections be made consistent. Section 229.16(b) of the final regulation has been revised so that the timing requirements in § 229.16(b)(2) match those of § 229.13(g).

Thirty-one commenters asked that the depositary bank be allowed to mail the notice by the close of the next *banking* day as opposed to the next business day, when the bank might not be open. Some of the commenters based their request on the Commentary to the definitions of "banking day" and "business day," which states that when dealing with a bank's duty to perform some action, the focus should be on the banking day. The final regulation has retained the duty to send the notice on the next business day because it is important for customers to receive these notices as quickly as possible. If a bank knows it will be closed on a business day, it can mail out the exception notices on the day of deposit rather than the next business day.

Twelve commenters opposed the notice provision because the cost of compliance will be high. The commenters remarked that instead of invoking exceptions, banks will refuse to accept checks for deposit or will accept them on a collection basis. A bank's ability to send an item for collection, however, is limited by the definition of "noncash item." (See the discussion in the Commentary to the definition of "noncash item.") Nevertheless, the regulation does not prevent a depositary bank from refusing to take a check for deposit.

Four commenters requested that a depositary bank be able to give notice by telephone or by leaving a message on a telephone answering machine, if notice was not given to the customer at the time of the deposit. Two commenters asked whether a bank can place a hold after it has received the deposit if it is unable to contact the customer by telephone. While the bank may wish to notify the customer of a hold by telephone, such notice would be *in addition* to the written notice required by § 229.13(g). Both the Act and the regulation require a written notice to be given so that both the bank and the customer have an accurate record of exceptions to the availability schedules.

With respect to the requirement to use due diligence in ascertaining the facts on which a hold is based, four commenters asked that the Board either define or delete the phrase "due diligence." The final regulation retains

the phrase "due diligence" without a definition. "Due diligence" depends on the reasonableness of an action in particular circumstances. It would be inappropriate to define the term by regulation.

Five commenters suggested that when describing a deposit made to an employee of the depositary bank, the regulation's language is too broad and that the Board should add the word "appropriate" before employee. The Board believes that reference to a deposit to an employee of the depositary bank makes it sufficiently clear that the employee is an appropriate employee.

One bank holding company requested that the depositary bank be able to vary the time of notice by agreement with its customer. The Act provides that the notice rules apply to all accounts and does not allow variation of this, or other Subpart B requirements, by the depositary bank. The regulation follows the provisions of the Act and makes the notice requirement mandatory and not subject to variation by agreement.

(3) Record retention. Section 229.13(g)(3) of the proposed regulation provided that a depositary bank shall retain a record, in accordance with § 229.21(g), of each notice provided pursuant to its application of the reasonable cause exception under § 229.13(e).

Two commenters raised questions about the nature of the records a bank is required to keep. The final regulation and Commentary have been revised to provide that a bank must retain, in addition to each reasonable cause notice, a brief statement of the facts giving rise to the bank's reason to doubt the collectibility of the check. Such records must be kept for two years, or such longer time as provided in the record retention requirements of § 229.21(g).

(h) Availability of deposits subject to exceptions. The proposed regulation provided that if an exception applies under § 229.13 (b) through (e), the depositary bank may extend the temporary or permanent availability schedule by not more than four business days. The proposed regulation also provided that if a depositary bank invokes an exception with respect to a check that is subject to § 229.10(c)(1) (i) through (v), the depositary bank may extend availability by not more than four business days after the funds would have been available had the check been subject to the temporary or permanent schedules. Furthermore, the proposed regulation provided that if a depositary bank invokes a hold under the emergency conditions exception, it shall make the funds available not later than four business days after the emergency has ceased or after the day the funds must be available under the temporary or permanent schedules, whichever is later.

The Board received 78 comments that responded to proposed § 229.13(h). One savings and loan institution agreed with the provision as proposed. Most of the commenters suggested lengthening the four-day hold period. Twenty-three commenters suggested that the depositary bank should be allowed to extend the hold period upon receipt of a notice of nonpayment. Ten commenters requested that the four-day period be extended in all cases. The commenters, suggestions for the length of the hold period ranged from five to ten days; some commenters wished to leave the length to the depositary bank's discretion. Fifteen commenters suqgested that the hold period be based on a reasonableness standard rather than a prescribed number of days. The final regulation has been amended to reflect concerns raised by these commenters. The final regulation provides that the depositary bank may extend the hold on deposits under § 229.13 (b) through (f) for a reasonable period of time. Under the final regulation, four days is deemed to be a reasonable period of time; for holds longer than four days, the depositary bank must establish that such longer hold is reasonable.

The Commentary has been revised to clarify the application of the revised regulation and that § 229.13(h) does not apply to the new account exception.

Other commenters raised questions as to how the four-day hold should be implemented. Four commenters asked the Board to clarify that, even if a depositary bank usually gives next-day availability for all deposits, the four days are added to the statutory availability schedule when invoking an exception, not to the bank's usual availability schedule. Both the final regulation and the Commentary state that this is the case.

Seven commercial banks asked whether, when a depositary bank receives a notice of nonpayment, the bank can apply a hold even if funds have already been made available. As explained in the Commentary to § 229.13(h), a bank can apply a hold in such a case.

One commercial bank asked whether the hold period would apply to all of the customer's accounts. The Act and regulation allow the depositary bank to hold only that portion of the deposit that is subject to an exception. The rest of the deposit and funds in all other accounts of the customer must be made available according to the availability schedules. Subject to § 229.19(e), in certain cases a depositary bank may place a hold on funds in another account instead of on funds in the account to which the deposit was made.

Section 229.14 Payment of interest.

Section 229.14 of the proposed regulation provided that a depositary bank shall begin to accrue interest or dividends on funds deposited in an interest-bearing account not later than the business day on which the depositary bank receives provisional credit for the funds. The proposed regulation allowed a depositary bank to rely on the availability schedule of its Federal Reserve Bank, Federal Home Loan Bank, or correspondent bank to determine the time provisional credit is actually received. The proposed regulation also provided a special rule for credit unions based on section 606(b) of the Act. The special rule provided that the requirement that interest accrual be based on receipt of provisional credit does not apply to credit unions that begin accrual of interest at a later date with respect to all funds, including cash, deposited in the account and that provide notice of its interest or dividend payment policy in the manner required under § 229.18. The proposed regulation did not require a bank to pay interest or dividends on funds deposited by a check that is returned unpaid.

The Board received 80 comment letters that responded to proposed § 229.14. Two commenters favored the section as proposed.

Many of the commenters stated that they would have technological problems in implementing the rule. Five commenters complained that many computer systems can not make the distinction between when a check is available for withdrawal and when provisional credit has been received for a check, thus the depositary bank will have to pay interest based on the day of deposit, which would significantly increase costs. Some commenters stated that most computer systems are not able to distinguish between funds availability and interest availability, thus forcing banks to make all funds available as of the date of provisional credit. Five commenters suggested that interest should accrue on the day funds must be available, thereby allowing banks to compete on the basis of their availability schedules. Six commenters requested that the depositary bank be able to accrue interest according to a formula based on the fractional availability schedule under which the

depositary bank receives provisional credit.

The Board recognizes that some banks may be required to make software programming changes to implement the payment of interest rules. The provision that interest must accrue when the depositary bank receives credit is mandated by the Act (section 606) and remains part of the final regulation. The final regulation has been revised to allow accrual of interest based on fractional availability for all accounts. (Under § 229.19(d) of the proposed regulation, calculated availability was permitted for nonconsumer accounts.) A depositary bank may accrue interest on a uniform basis for all interest-bearing accounts based on the availability of funds the depositary bank usually receives from the paying or collecting banks to which it sends checks for payment or collection, without the need to track the type of check deposited to each account.

Four commenters noted that the date of provisional credit from a Federal Reserve Bank or from a correspondent bank often depends on which deadline the depositary bank's courier meets, which is not always known to the depositary bank. Thirty-four commenters requested that the Board allow the depositary bank to charge back the interest paid to accounts when the depositary bank misses the Federal Reserve Bank or correspondent bank deadline and subsequently does not receive provisional credit on the date on which the accrual of that interest was based. Similarly, one commercial bank asked whether the depositary bank can adjust the interest paid when provisional credit is delayed due to an equipment failure or weather delay. The final regulation requires that banks pay interest as of the day they receive credit. The Commentary has been amended to clarify that if a bank does not receive credit as soon as it expected, it may charge back the interest it paid before actually receiving credit. The final regulation and the Commentary have also been revised to refer to "credit" instead of provisional credit. Under revised § 229.36(d), credit given during the forward collection process is considered to be final credit.

Three commenters requested that the Board clarify that a depositary bank can begin paying interest sooner than the time specified in the regulation. Similarly, two commercial banks suggested that the interest provision should include savings and time deposits as well as accounts as defined in Subpart A. The commenters noted that it will be difficult to keep track of two types of interest payments. The language of § 229.14 and the Commentary to the final regulation clearly state that interest on accounts must accrue not later than the times specified and that a bank may voluntarily pay interest to accounts not covered by the regulation, such as savings and time deposits, at the same time as they pay interest to transaction accounts.

Three commenters asked the Board to clarify that accounts must continue to meet minimum or average balance requirements before interest will be paid. The Commentary has been amended to clarify that such requirements are not superseded by the regulation.

Two commenters asked whether "interest" includes earnings credits applied to non-interest-bearing accounts for balances maintained. The Commentary has been revised to clarify that "interest" does not include the absorption of expenses incident to providing a normal banking function or forbearance from charging a fee in connection with a banking service, and thus earnings credits are not interest payments.

One commercial bank asked when interest should accrue for deposits of on us checks (which the depositary bank does not send for collection), and another commercial bank asked when interest should accrue for ACH credits. The regulation has been amended to provide that the depositary bank must accrue interest on the day on which it receives credit. As explained in the Commentary to the final regulation, a bank receives credit on a cash deposit, an electronic payment, or an on us check on the day the cash, electronic payment, or check is received.

Some commenters were concerned that the payment of interest provision would give a competitive advantage to the Federal Reserve Banks. Seven commenters pointed out that the regulation will cause banks to value low per-item charges more than faster availability from correspondents because the advantages of faster availability will be passed along to the bank's customers. The commenters believed that the Federal Reserve Banks will gain an advantage because of their low per-item costs. The Board believes that one of the purposes of the Act is to require that this interest be passed back to customers and that the interest payment provision is mandated by the Act.

Four commenters suggested that if depositary banks must pay interest as of the provisional credit date, the Federal Reserve Bank or correspondent bank should also have to pay interest to the depositary bank as of that date. For the reasons explained under the definition of "account," the regulation does not apply to interbank accounts, and therefore, Federal Reserve Banks and other correspondent banks are not subject to § 229.14 for deposits made by other banks. Furthermore, a correspondent bank would be prohibited from paying "interest" because such payments would generally constitute payment of interest on a demand deposit.

Six commenters opposed the special rule for credit unions because it gives credit unions an unfair advantage over other banks. The special credit union rule is provided in section 606(b) of the Act and is part of the final regulation. The rule was included in the Act because the Congress, as stated in the Conference Report, intended "to accommodate the unique operating procedures of credit unions whose traditional accounting practices often [include] partial dividends on funds not on deposit for an entire dividend period." The Congress did not intend that individual credit unions change existing practices to avoid compliance.

One bank holding company requested that the depositary bank should be able to agree with the customer to waive the payment of interest rule in return for the bank's expenditures for transportation costs and other collection services. The Board does not believe it would be appropriate to allow such a waiver. Transportation and other collection expenses represent a cost of doing business for the depositary bank. The Act confers certain rights to bank customers, such as prompt payment of interest, which would be undermined should the Board allow banks to offset their operating costs against interest payments to customers.

One commercial bank suggested that the Board add the words "regardless for the reason for return" to the end of § 229.14(c), which provided that banks need not pay interest on "funds deposited by a check that is returned unpaid." The Board has not changed § 229.14(c) in the final regulation but has added this phrase to the Commentary for clarification.

The Commentary to this section has also been revised to clarify that this section is not intended to affect interest accrual or payment policies unrelated to the time that funds have been on deposit, provided that deposits are considered made in such accrual or payment policies based on the receipt of credit or as required by this section.

Sections 229.15–229.18 Disclosures.

Disclosures Generally

The proposed regulation required banks to make a number of disclosures to their customers. These disclosures were:

—Disclosure of the bank's specific availability policy to existing account customers, to customers prior to opening a new account, and to any person upon request;
—Reminder notices regarding availability on deposit slips, and at automated teller machines, and at all locations where bank employees accept deposits; and
—Notice when a hold is placed that varies from the policy normally followed by a bank on a case-by-case basis, or as a result of one of the exceptions to the regulation's availability schedules, and when there are changes in a bank's availability policy.

Approximately three-fourths of the 940 comments received on the proposed regulation addressed the disclosure requirements. Several commenters objected to the disclosure requirements generally. Twenty-eight commenters complained that too many disclosures were required and that requiring banks to make so many disclosures would result in a considerable cost burden. Fourteen commenters suggested that banks should be given additional time to prepare for compliance with the disclosure requirements. Ten commenters stated that customers would not understand the required disclosures because of the numerous conditions and exceptions in the regulation's availability schedules.

Even though the Board has made some changes to the disclosure requirements in the proposed regulation, the Board has not significantly reduced the disclosure requirements. The number of disclosures, the detail required as a result of the conditions and exceptions to the availability schedules, and the September 1, 1988 effective date, are all aspects of the disclosure scheme mandated by the Act and therefore have not been modified by the Board in the final regulation.

Section 229.15 General disclosure requirements.

Under the proposed regulation, banks are required to make disclosures clearly and conspicuously in writing. Except for the notices posted at branches and ATMs and printed on deposit slips, disclosures must be in a form that the customer may keep. (The final regulation substitutes the phrase "posted at locations where employees accept consumer deposits" for "posted at branches." See Comment Summary to § 229.18(b).) The proposed regulation also provided that the disclosures shall appear together, shall not contain information that is not directly related to information required by Subpart B, and shall be highlighted if they appear as part of a larger document. In addition, the proposed regulation required that banks utilize a prescribed uniform reference to the day of availability in their disclosures. Furthermore, the proposed regulation outlined the disclosure requirements for multiple account holders or accounts, and included an exception for disclosures for dormant or inactive accounts.

Fifteen commenters asked that the Board clarify in the regulation that banks using the model forms properly will be in compliance with the notice requirements of the regulation. The Board has revised Appendix C to include language that makes clear that banks are deemed to be in compliance if they make proper use of the forms.

Seven commenters were concerned about how banks should handle making the disclosures to customers who have specified that they want no mail sent concerning their accounts. The Commentary to the final regulation addresses this issue and makes clear that a special mailing is not required.

Four commenters stated that disclosures should not be provided to commercial account holders. The Act (section 605(c)) requires that disclosures be given to "customers," and does not distinguish between consumer and commercial customers for purposes of the disclosures generally.

Eight commenters asked the Board to clarify what accounts are intended to be covered by the dormant or inactive accounts exception. Two asked that banks be allowed to use their own standards for determining what accounts are dormant or inactive for purposes of this section. The Board has included material in the Commentary to the final regulation to indicate that whether an account is dormant or inactive for purposes of this section depends on whether the account is considered dormant or inactive by the bank for other purposes.

Section 229.16 Content of specific availability policy disclosure.

The proposed regulation outlined two alternative methods for banks to use in disclosing their specific availability policies. Section 229.16(a) addressed the situation where a bank imposes blanket holds on check deposits, with the length of the delays varying by the type of deposit. Section 229.16(b) was designed as an alternative disclosure method for banks that, as a general rule, provide customers with next-day availability, and place holds only on a case-by-case basis. The alternative provided for a somewhat simplified disclosure, but banks following this alternative would be required to notify the customer when a case-by-case hold was placed on a deposit. The bank was to either give notice of the hold at the time of deposit, or tell the customer at the time of the deposit that a hold might be placed and then notify the customer by the end of the day of deposit if a hold was placed.

Eleven commenters suggested that the Board should allow a bank to disclose, as its hold policy, the maximum delays that could be imposed on deposits under the regulation, even though the bank does not, in fact, have such a policy. The Board did not include this as a disclosure alternative in the final regulation. The Board believes that allowing banks to disclose something other than the policy that the banks actually follow in most cases would be inconsistent with the statutory requirement that banks disclose their "specific policy" as to when deposited funds will be available for withdrawal. (See section 605(c)(1) of the Act.)

The Board has added a disclosure requirement for banks that elect to impose longer delays on customers' deposits at nonproprietary ATMs than are imposed on deposits at proprietary ATMs. These banks must describe how customers can differentiate between a proprietary and a nonproprietary ATM. (See § 29.16(b)(5).) This disclosure requirement has been substituted in the final regulation for the proposed regulation's special notice at ATMs that are nonproprietary to certain banks, but at which customers of those banks could make deposits. (See the discussion of comments to § 229.18(c), regarding the notice at or on ATMs.)

With regard to the case-by-case disclosure alternative, two commenters asked whether this approach could be used by banks that normally give availability on the second business day after deposit (instead of just by those that give availability on the next business day), or by banks who might impose blanket holds only on certain categories, such as ATM deposits. One commenter asked that the Board clarify what bank policies would qualify as case-by-case policies.

In the final regulation, the Board has modified the disclosure provisions to clarify that any bank may choose to delay certain deposits on a case-by-case basis and thus provide a case-by-case

disclosure as part of their specific availability policy. (See §§ 229.16 (a), (b), and (c).) Under the revised provisions, any bank that generally makes funds available for withdrawal sooner than the time periods set as the federal maximums may make the case-by-case disclosures and impose case-by-case holds. The case-by-case disclosure is no longer a separate disclosure alternative; the disclosure of a case-by-case hold policy is part of the specific availability policy requirements. (See § 229.16(c)(1).)

The notice requirements that were part of the case-by-case disclosure alternative in the proposed regulation generated numerous comments. One hundred four commenters asked that the Board delete the requirement of a case-by-case hold notice on the same day a case-by-case hold is placed. Some of these commenters argued that banks using the case-by-case disclosure alternative are already making funds available to their customers in less time than required by the statutory time frames. Others stated that this notice requirement might encourage banks to implement the full statutory holds in order to avoid the requirement. Twenty-seven commenters wrote that the same-day notice requirement was too burdensome on banks when the decision to delay availability is made after the customer leaves the bank lobby. One commenter questioned the statutory basis for the notice requirement since the case-by-case hold would be within the time periods by which the Act and regulation require funds to be made available.

With regard to the details of the same-day notice requirement, 15 commenters expressed concern as to how often it would be possible to actually reach a customer by phone, and six asked how banks could prove that an attempt had been made. Twenty-six commenters suggested that a good-faith effort by the bank to reach a customer by phone (with a follow-up notice by mail suggested by 17) should be sufficient to satisfy the same-day notice requirement. Thirty-four commenters suggested that banks should be allowed to shift the burden to customers to check back to ascertain whether the bank decided to place a hold after the deposit is made and the customer had left the bank. Nineteen commenters suggested that notice by mail should be allowed, or that the case-by-case notice rules should mirror those rules applicable to exception holds. Ten commenters suggested that the deadline for the notice should be extended an additional day, because deposits are sometimes not processed until late in the evening.

The Board has made a number of revisions and clarifications in the final regulation and Commentary concerning the case-by-case notice. The most significant adjustment is that the requirements for the case-by-case hold notice are now the same as the requirements for the exception hold notice under § 229.13, except that no reason for the case-by-case hold need be given. (See § 229.16(c)(2).) The requirement that the customer be told of the possibility of a hold at the time of a deposit has been eliminated, as has the requirement of same-day notice of an actual hold if the customer is not told of a hold at the time of deposit. As with the exception hold notice provisions in § 229.13, a provision has been added to the case-by-case provisions stating that a bank that fails to provide a customer with a notice of a case-by-case hold at the time of deposit may be prohibited from imposing overdraft or returned check fees that result from the hold being placed. (See § 229.16(b)(c)(3).)

Among the other comments on the case-by-case notice requirements in the proposal, six commenters asked that the language in § 229.16(b)(2) of the regulation, which provides that notice should be sent on the "banking" day the deposit is made, be changed to refer to the "calendar" day on which the "banking" day occurs since the definition of "banking" day includes only a portion of a day on which a bank is open for business. The changes to the notice rules discussed above eliminate the problems raised by these commenters. Six commenters also asked that the Board clarify that banks may provide the required notice to whomever makes the deposit, even if that person is not the account holder. The Board has clarified in the Commentary that a bank may give notice to whomever makes the deposit. Four commenters asked that deposits by armored car be clarified to be mail deposits, not in-person deposits for notice purposes. The Board has clarified this point in the Commentary. Two commenters suggested that the generic deposit slip notice required on all deposit slips should satisfy the requirement of notice of hold at the time of deposit. The Board believes that the notice requirements for a case-by-case hold are clear, and that a generic notice is not sufficient.

The specific availability policy disclosure provisions also called for disclosure of a bank's cut-off hours. Three commenters expressed confusion as to whether banks with different business cut-off times at different locations or ATMs must state all of their cut-off times in their disclosure. The Board has clarified in the Commentary that such banks need only disclose the cut-off time that generally applies, and indicate that other cut-off times may apply and state the earliest cut-off time that might apply.

In the final regulation, the disclosure required by § 229.14(a), of a credit union's interest payment policy when the credit union does not accrue dividends on cash or check deposits from the date of receiving credit on a deposited check, has been added to § 229.16 as paragraph (d). In the proposed regulation, the disclosure was included as an additional disclosure requirement in § 229.18. The Board believes that since the disclosure must be included in the credit union's initial disclosure of its specific availability policy, it is most appropriately included in § 229.16.

A number of commenters asked that additional model forms be created by the Board for all of the requirements of § 229.16. Three suggested that the Board create a form for banks that place holds on a selective basis if holds are placed only on a small percentage of checks and customers are told when holds are placed. Eleven commenters expressed interest in a form that would allow disclosure of the maximum availability schedule while indicating that actual availability might be faster. One commenter suggested that the Board create a version of model form C–4 that would incorporate the new accounts exception (as found in proposed model forms C–6 and C–7). The Board has revised model form C–4, modified the other model forms, and added model clauses to address some of the concerns raised by commenters.

Section 229.17 Initial disclosures.

This section of the regulation addressed when banks must provide the specific availability policy disclosure discussed in § 229.16. Under the Act and final regulation, the disclosure must be given to all existing account holders no later than October 31, 1988, and prior to opening an account.

Some of the comments received reflected confusion as to whether it was permissible to send the disclosure out prior to the September 1, 1988 effective date. One commenter asked that the deadline for providing notices to existing customers be extended until November 30, 1988. The final regulation and Commentary allow banks to send notices out prior to September 1, 1988.

The Board has revised the Commentary to clarify that if the

required disclosures are sent to the customer separate from the first scheduled mailing to the customer after September 1, 1988, such as the mailing of the customer's statement, the separate mailing must be made prior to the statement being mailed. The Board has also revised the Commentary to clarify that a bank may disclose in its availability policy disclosure both the policy that it will follow from September 1, 1988 to August 31, 1990, and the policy that it will follow on September 1, 1990 and beyond. The Board did not make changes to the deadline for notices being sent because the October 31, 1988 date is set by the Act.

Five commenters asked that institutions be exempted from the requirements of this section if their state law has already required them to provide an availability policy disclosure that they believe is similar to the one required by the Act. The Board has indicated that disclosures that meet the requirement of this section can satisfy the required disclosure to existing accounts even if they were previously given, and that banks must review their disclosures and make their own determinations.

Several commenters asked for clarification as to when disclosures need be given when an account is opened and, particularly, when the account is being opened due to a telephone request. The Board has clarified the timing requirements in the Commentary.

Section 229.18 Additional disclosure requirements.

(a) *Notice on deposit slips.* This section of the proposed regulation required a bank that delays availability on deposits to include a notice on all preprinted deposit slips furnished to its customers that deposits may not be available for immediate withdrawal.

The overriding concern expressed in the comments on this section was the banks' responsibility for the deposit slip disclosure when customers obtain deposit slips from third parties. Twenty-two commenters asked that the final regulation clarify that banks are only responsible for the notice on deposit slips that they supply their customers.

Nine commenters asked the Board to clarify what exact language is required on the deposit slip, where the language should appear on the slip, and the type-size. Two commenters asked that this notice be standardized so that printing costs could be minimized. The model form in the proposed regulation included optional language and used the term "banks" instead of the more generic "financial institutions."

Eleven commenters argued that this disclosure is unnecessary. Four commenters were unclear as to whether this notice requirement would apply to banks using the case-by-case alternative. Six commenters stated that this requirement would be expensive to implement, and nine asked if customers may exhaust their existing stock of deposit slips before they start using slips carrying the notice. A few commenters thought that the Board was requiring that a bank's entire availability policy be printed on deposit slips.

The Board revised the Commentary to clarify various aspects of the deposit slip disclosure requirement, such that supplies of deposit slips held by customers need not be replaced and that banks have no disclosure responsibility as to slips ordered from third-parties. The Board has also standardized the model notice.

(b) *Notice at branch locations.* This section of the proposed regulation required a bank to post at each location where its employees receive deposits to consumer accounts, a notice that sets forth the time periods applicable to the availability of funds deposited in a consumer account.

Four commenters wrote that this disclosure will be burdensome, costly, and counterproductive. Two commenters questioned whether this notice had to be at each drive-in bay or at night depository locations. In addition, two asked that the regulation specifically indicate that this notice is not required at each teller window in a branch. The final regulation makes clear that a notice is not required at drive-in windows or night depositories and that a notice is not required at each teller window in a branch.

Two commenters asked what type of notice must be given by banks using the case-by-case alternative disclosure, and the Board was asked to provide a model form for such banks. The final regulation includes a model form for the case-by-case alternative.

One commenter noted that while the proposed regulation referred to disclosure at all "branch locations," the Act (Section 605(d)) and the Commentary refer to "each location where deposits are accepted by employees" and that in unit-banking states, such as Colorado, locations where deposits are accepted are not considered to be branches. The Board has made clarification to this notice and has substituted the Act's language of "locations where employees accept deposits" for "branch" locations. The Board also has created a model form to accommodate banks using the case-by-case alternative.

(c) *Notice at or on ATMs.* This section of the proposed regulation required the owner or operator of an ATM to post or provide a notice at the ATM stating that funds deposited in the ATM may not be available for immediate withdrawal. The proposed regulation also required an additional disclosure if an ATM could be used for deposits by customers of banks to whom the machine is considered nonproprietary. In those situations, the proposed regulation required that the bank to which the ATM is proprietary be identified at or on the ATM and a notice be posted stating that funds may not be available until the seventh business day after deposit.

The requirements of this section generated a number of comments. Most of the commenters were critical of the additional notice requirements for nonproprietary ATMs. Nine expressed concern regarding the requirement that ATMs be identified because such identification would directly contradict some state laws. One commenter suggested that a product or trade name be allowed for identification purposes instead of the institution's name.

Twelve commenters criticized the requirement that the possibility of a seven-day hold be disclosed, on the grounds that posting such a notice at ATMs would confuse and mislead customers who may not be sure whether the hold applies to them or not, and who may, as a result, be discouraged from using ATMs altogether. Some of these commenters asked that there be a uniform notice for proprietary and nonproprietary machines. Four commenters suggested that the ATM disclosure be required to be on the ATM deposit envelopes so that proprietary and nonproprietary machines would look the same. Two commenters suggested requiring banks to list all proprietary ATMs in their initial disclosure instead of having a special notice at the ATMs. Three commenters were confused as to whose responsibility it would be to post the ATM notice in a shared network situation.

The Board eliminated the requirement of a special notice at all ATMs that accept deposits to accounts in banks for which the ATM is considered nonproprietary. A bank that imposes longer delays on deposits at nonproprietary ATMs must, however, make the disclosure required in § 229.16(b)(5). (See the previous discussion of this point in the Comment Summary to § 229.16.)

The final regulation has been revised to provide that a depository bank that

operates an off-premises ATM from which deposits are removed not more than two times each week shall disclose at or on the ATM the days on which deposits made at the ATM will be considered received. See § 229.18(c)(2).)

(e) *Change in policy notice.* This section requires banks to send notices to customers at least 30 days before implementing a change to the bank's availability policy, unless the change expedites the availability of funds, in which case the change must be disclosed not later than 30 days after implementation. Three commenters suggested that the Board should require notice only when there is a material change in policy because, with regard to commercial accounts, minor changes in availability are frequently made and the disclosure requirement could prove to be a disincentive to banks to make these adjustments for faster availability. One commenter also asked that notice not be required if a change is the result of the Board's updating of Appendix B. In the final regulation, the Board has clarified that only consumer account holders need to receive the change in terms notice. In addition, the Commentary makes clear that no notice is required when a change is due to a Board change to Appendix B.

The Commentary to the final regulation discusses a bank's change-in-terms responsibilities when it has disclosed the ATMs that are proprietary or nonproprietary to it for purposes of its customers making deposits, as required by § 229.19(b)(5). The Commentary states that a bank must provide a change-in-terms notice only when a machine that was proprietary becomes nonproprietary, or if the bank had previously disclosed the nonproprietary machines that would result in a longer delay in availability and a new nonproprietary machine is added. In any event, the Commentary states that a notice concerning ATMs is required only once per year.

(f) *Interest policy disclosure.* This section of the proposed regulation required that if a credit union begins to accrue interest or dividends on all deposits made in an interest-bearing account later than the business day on which it receives provisional credit for the funds, its full availability policy disclosure must contain an explanation of when the credit union begins to accrue interest or dividends on deposits. The three comments received on this requirement suggested that the Board clarify whether the disclosure must be made when interest is accrued based on the Reserve Bank's or correspondent banks' availability schedule.

As discussed previously, the Board has moved the credit union interest payment policy from § 229.18 to § 229.16(d).

Section 229.19 Miscellaneous.

(a) When deposits are considered made. Section 229.19(a) of the proposed regulation provided that a deposit mailed to the depositary bank is considered made when it is received by the depositary bank. The section also provides that a deposit is considered made on the next banking day in the case of a deposit that is made on a day that is not a banking day for the depositary bank or after a cut-off hour set by the depositary bank for the receipt of deposits of 2:00 p.m. or later. The proposed regulation allowed different cut-off hours to be established for receipt of different types of deposits or for receipt of deposits at different locations.

The Board received 175 comment letters in response to proposed § 229.19. Of those 175 letters, 93 contained comments on § 229.19(a). Thirty-eight commenters said that the 2:00 p.m. cut-off hour is too late for ATM deposits. The commenters stated that the 2:00 p.m. cut-off does not allow the depositary bank enough time to collect and process deposits in off-premise ATMs by the end of the banking day. The commenters were especially concerned with giving next-day availability to checks which have not been verified. The final regulation addresses this problem by permitting an earlier cut-off hour (12 noon) for deposits to ATMs and other off-premise facilities. (The next-day availability problem has also been addressed in part by the changes to § 229.10 regarding deposits to unstaffed facilities.)

Three commercial banks made similar comments regarding remote branches of depositary banks. The commenters explained that some remote branches send their deposits to a central processing facility where they are processed the following day. The commenters pointed out that, in cases of next-day availability, the branches would have to make funds available before they are posted to the customer's account. The final regulation has not changed the cut-off hour for deposits to staffed locations, even if the location is a branch that is far from its central processing facility. Section 603(a) of the Act specifically provided for next-day availability on certain deposits at staffed locations. The Board believes that to allow an early morning cut-off hour for staffed branches would be contrary to the intent of the Act. If a branch uses a central processing facility to post deposits, it must be responsible for transmitting and receiving information to and from that facility to meet the statutory availability schedules.

Twenty-three commenters suggested that night depositories and lock boxes should not be subject to a 2:00 p.m. cut-off hour because they are generally meant to be used as overnight depositories and are emptied out early in the morning. The Board has amended the final regulation and Commentary to provide that funds deposited to a night depository, lock box, or similar facility are considered deposited on the day on which the deposit is removed from such facility and is available for processing by the depositary bank.

Eleven commenters suggested that mailed deposits be considered made when they are received at a particular location specified or permitted by the depositary bank. The final regulation provides that funds mailed to the depositary bank are considered deposited on the day they are received by the depositary bank. The Commentary to the final regulation explains that funds are received at the depositary bank at the time the mail is delivered to the bank, even if it is initially delivered to a mail room, rather than a check processing area.

Three commenters asked whether the 2:00 p.m. cut-off applies to mailed deposits. If a depositary bank receives a mailed deposit after 2:00 p.m., it may consider that deposit received on the next banking day as provided in § 229.19(a)(5) of the final regulation.

Eight commenters requested that the Board allow an earlier cut-off hour (or later starting hour) in emergency situations. The Board did not include such a provision in the final regulation because the regulation already permits a bank to close any of its facilities before the § 229.19(a) cut-off hour or open any of its facilities after the § 229.19(b) starting hour. The regulation only requires that if any facilities are open at or after the cut-off hour or at or before the starting hour, those deposits at those facilities are subject to the cut-off or starting hour. Furthermore, deposits that are not posted due to an emergency situation may be subject to the emergency exception contained in § 229.13(f).

Three commenters asked whether a depositary bank is required to remain open until 2:00 p.m. on all of its banking days. Section 229.19(c)(3) of the final regulation expressly provides that the regulation does not require a bank to open on any particular day. The Commentary to § 229.19 has been

revised to clarify that a bank does not have to remain open to any particular hour.

One bank holding company explicitly approved of the provision that different cut-off hours may be established for different types of deposits or for different locations. One commercial bank asked whether, if a depositary bank establishes different cut-off hours at different locations, it must disclose the cut-off hour at every location. The final regulation does not require a bank to post the cut-off hour at each ATM. Disclosure of ATM cut-off hours may be in the form of a written notice as provided in § 229.16(b).

One commercial bank suggested that § 229.19(a), which describes when a deposit is considered received, should go in the definitions section (§ 229.2). The Board did not move paragraph (a) because it contains substantive provisions which are not appropriate for the definitions section.

Section 229.19(a) and the Commentary have also been revised to clarify when funds deposited at staffed facilities and ATMs are considered deposited.

(b) Availability at the start of business day. Section 229.19(b) of the proposed regulation provided that, except for deposits subject to the time period adjustments of §§ 229.11(b)(2) and 229.12(d), funds that must be available on a business day must be available by the later of 7:00 a.m. (local time) or the time the depositary bank's teller facilities (including ATMs) are available for customer account withdrawals.

The Board received 84 comments on § 229.19(b). One trade association approved of the 7:00 a.m. starting hour. One commercial bank objected to requiring funds to be available at the opening of the business day. The Act, however, provides that when funds must be available for withdrawal on any business day, such funds shall be available at the start of such business day (section 607(b)). The final regulation includes this requirement as well.

Sixty-one commenters complained that the 7:00 a.m. starting hour is too early for the banks to be able to update ATMs in time to make funds available. The final regulation and Commentary have been amended to change the 7:00 a.m. starting hour to 9:00 a.m.

Fifteen commenters asked the Board to clarify that "local time" means local time at the branch that holds the customer's account. The regulation and Commentary have been amended to clarify that 9:00 a.m. refers to local time of the branch of the depositary bank that holds the customer's account.

Five commercial banks suggested that the 7:00 a.m. (now 9:00 a.m.) rule should not apply to deposits that must be made available on a business day which is not a banking day for the depositary bank. The final regulation does not incorporate this suggestion because the Act and regulation require funds to be available based on business days, not banking days. (See Commentary and Comment Summary of "business day" and "banking day" definitions.) The regulation does not require a bank to be open on every business day, but only to update its ATMs by the start of every business day.

(c) Effect on policies of depositary bank. Section 229.19(c) of the proposed regulation provided that the regulation does not prohibit a bank from providing better availability than is required by the regulation. The paragraph also provided that the regulation does not affect a bank's right to accept or reject a check for deposit; to revoke provisional settlement of a check; charge back the customer's account for a check based on return of the check or receipt of a notice of nonpayment; or claim a refund of provisional credit; and to charge back funds made available to a customer for an electronic payment for which the bank has not received actually and finally collected funds. Furthermore, the paragraph provided that the regulation does not require a bank to open or otherwise make its facilities available for customer transactions on a given business day. In addition, the proposed regulation provided that § 229.19(c) does not supersede any policy of a bank that limits the amount of cash a customer may withdraw at an ATM or staffed teller station on any one day, as long as that policy is applied without discrimination to all customers, is not dependent on the time the funds have been deposited in the account, as long as the funds have been on deposit for the time periods specified in the regulation's schedules, and is related to security requirements or bonding limitations of the bank.

The Board received 48 comments on § 229.19(c). Forty-six commenters objected to the nondiscrimination requirements of the paragraph. The commenters stated that banks impose different ATM withdrawal limits on customers based on creditworthiness, account history, or other similar factors. The commenters asked that the regulation continue to allow banks to give higher withdrawal limits at ATMs for established good customers. The Board has revised the regulation and Commentary to provide that the nondiscrimination requirements apply only to withdrawal requests made in person to an employee of the depositary bank, not to withdrawals from ATMs. In addition, the final regulation and Commentary have been revised to allow a bank to limit, for operational reasons, cash withdrawals made over the counter.

Two commenters asked whether a bank's common law right to close an account is affected by the regulation. Similarly, one commenter asked whether the regulation preserved a bank's right of set-off. Nothing in the regulation revokes these rights.

(d) Use of calculated availability. Section 229.19(d) of the proposed regulation provided that a depositary bank may provide availability to, and begin to accrue interest on, its nonconsumer accounts based on a sample of checks that represents the average composition of the customer's deposits, provided that the terms for availability or interest payment based on the sample are equivalent to or more prompt than the availability and interest payment requirements of the regulation.

The Board received one comment, from a commercial bank, on § 229.19(d). The commenter asked that the Board provide guidelines on how often a bank should revise its calculated availability and how a proper check sample should be selected. The Board does not believe more specificity is required, as long as the depositary bank bases its calculated availability on the customer's typical deposit mix and updates its calculations if the typical deposit mix changes.

This paragraph has been revised by deleting references to payment of interest, which is now covered by § 229.14(d). The Commentary has been revised to reflect the limitation of this paragraph to availability.

(e) Holds on other funds. Section 229.19(e) of the proposed regulation provided that a depositary bank that receives a check for deposit in an account or purchases a check for cash, other than a check drawn on that bank and presented over the counter for payment in cash, may place a hold on any funds of the customer at the bank if the amount of funds that are held do not exceed the amount of the check, and the funds are made available for withdrawal within the times specified in the availability schedules.

The Board received eight comments on § 229.19(e). Three commenters agreed with the provision. Five commercial banks asked the Board to clarify that the provision does not apply to holds that a bank puts on funds for reasons other than protecting itself from returned checks. Under the definition of "available for withdrawal" in § 229.2(d),

funds are considered available for withdrawal even though they cannot actually be withdrawn due to a court order or other legal process. (See Commentary discussion on § 229.2, the definition of "available for withdrawal.")

(f) Employee training and compliance. Section 229.19(f) of the proposed regulation required each bank to provide a statement detailing the requirements of Subpart B to all employees who perform duties relating to the requirements of Subpart B. The proposed regulation also required each bank to establish procedures to ensure that the bank complies with the requirements of Subpart B and to provide each employee who performs duties relating to Subpart B with a statement of the procedures applicable to that employee. In addition, the proposed regulation required each bank to conduct an internal review, at least once each year, to determine its employees' compliance with the procedures the bank has established under § 229.19(f).

The Board received 79 comments on § 229.19(f). Forty commenters requested that the Board eliminate the requirement that a bank must provide a statement to employees of both the requirements of the regulation and the procedures established by the bank to comply with the regulation. The commenters asked that the banks be given more discretion in training their staff. The final regulation requires only that a bank inform employees how they should comply with the regulation but need not provide a separate statement describing the provisions of the regulation.

Twenty-seven commenters requested that the Board eliminate the internal review requirement because such a requirement is burdensome and not required by the Act. To accommodate banks' needs for flexibility in monitoring compliance with this regulation, the final regulation does not include the internal review provision.

Twelve commenters asked the Board to provide a model statement which the banks could give to their employees. The Board has not provided such a statement because it believes that each bank needs to tailor its employee statements to its own operating system.

(g) Effect of merger transaction. A new paragraph has been added providing for a one year transition period for certain sections of Subpart B for merged banks. (See discussion in Commentary to definition of "merger transaction," § 229.2(t).)

Section 229.20 Relation to state law.

(a) In general. The proposed regulation provided that a state law in effect on or before September 1, 1989, that requires funds deposited in an account at a state-chartered bank to be made available for withdrawal in a shorter time than is provided by the regulation, shall supersede the provisions of the regulation to the extent that the state law's provisions relate to the time by which deposited funds are available for withdrawal. The proposed regulation also provided that such a state law shall apply to all federally-insured banks located within the state. In addition, the proposed regulation provided that no state funds availability law that becomes effective after September 1, 1989, shall supersede the Act and Subparts A and B of the regulation, but that unamended provisions of state law shall remain in effect.

The Board received 27 comments in response to proposed § 229.20. Three commenters requested that the federal law govern in all cases to avoid confusion. One trade association pointed out that if the federal law did not preempt all state laws, banks with multi-state operations would be forced to acquire separate computer systems for each state. The intent of the Act is to provide customers with prompt funds availability; it would be contrary to this intent to allow the federal law to preempt state laws which provide faster availability. The Act explicitly provides (in section 608(a)) that state laws in effect on September 1, 1989, that improve on the federal availability schedules, shall supersede the federal schedules. Therefore, the final regulation has retained this provision.

One savings and loan institution commented that all federally-insured banks should be required to follow federal law, regardless of state law provisions. A trade association stated the opposing view that all banks within one state, both state and federally-insured, should be subject to the same laws. Section 608(a)(2) of the Act and § 229.20(a)(2) of the regulation explicitly provide that federally-insured banks are subject to the provisions of state law that supersede federal law. The Commentary to § 229.20 has been revised to clarify that if a state law provides shorter availability only for deposits in accounts in certain categories of banks, such as commercial banks, the superseding state law continues to apply only to those categories of banks, rather than to all federally-insured banks in the state.

Four commenters pointed out that some state availability laws cover nontransaction accounts. The commenters predicted that having a state law that applies to some accounts and a federal law that applies to others would create much confusion for banks and customers. The Act and the regulation provide the states with one year after the Act and regulation take effect to make changes to state laws governing transaction accounts. A state may make amendments to availability laws governing nontransaction accounts, such as savings or time deposits, at any time.

(b), (c), and (d) Preemption of inconsistent state law and preemption standards. The proposed regulation provided that except as provided in paragraph (a), the Act, Subpart B, and, in connection therewith, Subpart A of the regulation supersede any inconsistent provision of state law. The proposed regulation also provided that any interested party may request that the Board make a preemption determination. The regulation then defined an inconsistent state law, for the purposes of preemption determinations, as one that provides for longer availability schedules than those required by the Act or one that provides an exception that addresses the same type of risk as the exceptions in the regulation, but is a different exception or allows a different exception hold period.

One commercial bank commented that federal law should preempt state disclosure provisions as well as availability schedules. The Board believes that the disclosure provisions of the Act and regulation supersede state disclosure provisions with respect to accounts. Section 608(b) of the Act provides that, except for state availability laws in effect by September 1, 1989, the Act and regulations prescribed under the Act shall supersede any provision of the law of any state which is inconsistent with the Act or such regulations. The Board has revised the regulation and Commentary to provide that a state law may be inconsistent with federal law if it provides for disclosures or notices concerning availability provisions of state law relating to accounts. As explained in the Commentary, however, state disclosure laws that apply to deposits other than accounts, such as savings or time deposits, are not inconsistent with the Act or the regulation.

Two commercial banks commented that the proposed regulation was unclear about whether an entire body of state law would be preempted or just

that part that contained an inconsistency. One of the commenters preferred the former interpretation and one the latter. Under the final regulation, if a provision of any state law is inconsistent with the Act and the regulation under certain circumstances, the entire provision of state law is superseded. The Board realizes that, in some cases, a state law might provide faster availability than the federal law for some deposits and slower for others and that preempting the entire state law will eliminate the faster availability. The Commentary to the final regulation explains that superseding these state laws in their entirety avoids the necessity of forming very complex hybrids of state and federal law that could not have been contemplated by the state or federal legislatures.

One trade association asked the Board to clarify that shorter state holds should supersede federal law only as to categories of checks defined by federal law. It would be possible for a state law to give faster availability than federal law to a certain type of check (e.g., an in-state check) that is not a separate category of check under the federal law. Such a state law would supersede federal law for all in-state checks, whether the checks are local or nonlocal under the federal law.

The Commentary has also been revised to indicate that state law may supersede federal law even if no preemption determination has been issued by the Board.

Section 229.21 Civil liability.

The proposed regulation provided that a depositary bank that fails to comply with Subpart B or any state law that supersedes Subpart B would be subject to civil liability for damages to the injured party or for class action awards. In addition, the proposed regulation provided that a bank is not liable if it demonstrates by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. The proposed regulation also provided that any actions under § 229.21 could be brought in any U.S. District Court, or in any other court of competent jurisdiction, within one year after the violation occurred. Furthermore, under the proposed regulation, a bank would not incur liability if it acted in good faith reliance on a Board rule, regulation, or interpretation. Section 229.21 would not apply to claims arising under Subpart C or to actions for wrongful dishonor. Finally, § 229.21 would require banks to retain records evidencing their compliance with Subpart B for at least two years.

The Board received 17 comments in response to proposed § 229.21. One commenter asked that the liability provisions be delayed for one year to allow the banks to have a transition period to adapt to the new schedules. The Act (section 613) specifies, however, that the civil liability provisions are to take effect on September 1, 1988, at the same time as the rest of Subpart B. The regulation follows the effective dates as set forth in the Act.

One commercial bank asked if the Federal Reserve Banks are subject to the same liability provisions as depositary banks under Subpart B. As explained in the definition of "bank" and the accompanying Commentary, a Federal Reserve Bank is not a bank for purposes of Subpart B, and therefore, is not subject to the liability provisions of § 229.21. The Federal Reserve Banks do not receive a competitive advantage vis-a-vis other correspondent banks because the regulation does not apply to interbank accounts held by correspondent banks other than the Federal Reserve Banks.

One commercial bank requested that the Board delete the reference to state law in the liability section because the federal government cannot create a private right of action under a state law. The reference to state law remains in the final regulation, and the Commentary has been revised to clarify that the regulation creates liability only for those state laws that supersede federal law and thereby become, in effect, the federal law.

Two commercial banks asked that the Board give additional guidance on what constitutes a bona fide error. The Board believes that the determination of a bona fide error is based on the facts of each particular case, but has expanded the Commentary to include an example of a bona fide error.

One commenter asked that the Board clarify that the regulation confers subject matter jurisdiction, not personal jurisdiction or venue. The Commentary has been amended accordingly.

Seven commenters responded to the record retention requirement. Five commenters asked that the Board specify what records should be kept. One commenter believed that the requirement was overly burdensome for the banks, and another suggested that the burden of proof for violations be on the customer so that the bank can avoid costly documentation and record retention. The Board believes that depositary banks are better suited to keeping records of their compliance with the regulation than are the customers of the depositary bank. The regulation is not specific as to what records must be kept to allow each bank to tailor its record retention to its own operations. The Commentary to the final regulation explains that a bank's records should show that its procedures reasonably ensure the customer's receipt of required notices and disclosures.

One savings and loan institution made several comments on § 229.21. The commenter asked that the Board define "preponderance of the evidence." Because the phrase is a legal term of art, the Board believes that such a definition is unnecessary.

The commenter also requested that the Board not allow a plaintiff to recover against a bank under both federal and state law. As explained above, if a state law preempts the regulation, the state law becomes, in effect, the federal law. Therefore, there can be no duplicative violations as described by the commenter.

The commenter also raised two other issues. One issue was whether a defendant sued in state court under § 229.21 can remove the case to a federal court. The other issue was whether a person may use a bank's failure to comply with Subpart B defensively in the bank's collection suit where the bank's action is commenced more than one year after the occurrence. The Board believes that the resolution of these issues depends on the facts of the particular case and that such questions are best left to the courts.

The final regulation has been revised to apply the provisions of § 229.21 to any bank, rather than any depositary bank.

Effective Date of Subpart C. Forty-one commenters requested that the effective date of Subpart C of Regulation CC be delayed beyond September 1, 1988. Of the 41 commenters who requested a delay in the effective date, nine specifically stated that additional time would be necessary to comply with the indorsement standard, and four indicated that it would be difficult and expensive for banks to modify their return item operations by September 1, 1988. Six commenters suggested that Subpart C should be extended by one year, two requested 90 days, one suggested six months, and one suggested 60 days.

In response to the specific concerns raised by the commenters, the Board adopted a modified indorsement standard on April 4, 1988, so that banks would have more lead time to comply with the new requirements. The final standard is more flexible than the proposed standard, thereby minimizing

the operational and cost impact. The objective of the September 1, 1988, effective date is to implement improvements to the check return system simultaneously with the implementation of the funds availability schedules, in order to reduce the risk to the depositary bank that a check would be returned after funds have been withdrawn. Therefore, the Board decided to implement Subpart C, as well as Subparts A and B, of Regulation CC, on September 1, 1988.

Section 229.30 Paying bank's responsibility for return of checks.

(a) Return of checks.—Expeditious Return Rule. A total of 155 comments were received on the proposal to require the paying bank to return unpaid checks expeditiously. The proposed standard for determining whether return of a check was expeditious was based on how a "similarly situated bank" would handle a forward collection check of the same dollar amount drawn on the depositary bank. The Board requested comment on whether the duty of the paying bank should be stated in a more concrete manner, e.g., a paying bank must return a check so that it reaches the depositary bank on the second business day following the day of presentment for local checks and the third business day following the day of presentment for nonlocal checks.

Fifty commenters supported the rule as proposed, with the forward collection test as the standard for expeditious return, rather than basing the standard on returning the check in a specified number of days. Many commenters indicated that a standard based on a specific number of days for the return to reach the depositary bank would be inappropriate because the paying bank loses control of the timing of the return process after the returned check is dispatched by the paying bank.

Most of the commenters who expressed concern with the proposed regulation believed that the concept of requiring a paying bank to complete the return process in an expeditious manner was not clear. Thirty-nine commenters suggested that the standard be more specific in order to avoid possible litigation for claims of late return against the paying bank.

Twenty-five commenters suggested that the concept of return by expeditious means could be retained, but that an alternative be provided that would incorporate a more specific time frame for completing the return process. The provision of a specific time frame would provide a "safe harbor" within which a paying bank could plan and conduct its return item operations. Commenters suggested several different alternatives. Twelve commenters suggested that the standard require the paying bank to select a method and route of return so that the returned check ordinarily would reach the depositary bank within two business days following the date of presentment for local checks and four business days for nonlocal checks. Thirteen commenters suggested a two business day/three business day standard for local and nonlocal checks, respectively. Several commenters suggested that, even when the standard specifies a set number of days for the returned checks to reach the depositary bank, the standard should not impose a duty on the paying bank for actions beyond the control of the paying bank.

In response to the commenters' concerns about the uncertainty of the forward collection test contained in the proposal, the final rule provides a two-day/four-day test as an alternative which the paying bank may use to comply with its duty to return a check in an expeditious manner. This test specifies time limits within which the depositary bank must receive a returned check after the check has been presented for payment to the paying bank. The two-day/four-day test provides that a paying bank must return the check so that it would normally be received by the depositary bank within specified times, depending on whether the paying bank is a local paying bank or a nonlocal paying bank with respect to the depositary bank. For a local paying bank, the check is returned expeditiously if it is returned to the depositary bank by 4:00 p.m. (local time of the depositary bank) of the second business day after the banking day on which the check was presented to the paying bank. For a nonlocal paying bank, the deadline to complete the return is 4:00 p.m. of the fourth business day after the banking day on which the check was presented to the paying bank. The rule retains the forward collection test from the proposal with certain modifications so that a paying bank satisfies its duty of expeditious return if it meets either the two-day/four-day test or the forward collection test.

Thirty-one commenters believed the "similarly situated bank" concept was confusing, ambiguous, or vague. One commenter stated that the similarly situated bank standard is at best ambiguous and at worst not determinable because in many areas there are no other banks of similar size. Some commenters stated that use of such a standard would create the kind of uncertainty that is likely to result in dispute and litigation. A trade association stated that the similarly situated bank criterion was unclear and would prove to be unworkable. It was suggested that the standard should be based on how the paying bank, not a similarly situated bank, would handle a forward collection check of the same dollar amount drawn on the depositary bank.

Under the forward collection test, the determination of what constitutes expeditious return is based on a community standard for the handling of forward collection checks. Under the proposal, if a bank handled forward collection checks less expeditiously than the community standard, it must improve its procedures for handling returns, but a bank that uses a more expeditious means of handling forward collection checks could not use the less efficient community standard. Commenters stated that this rule penalized banks that use highly efficient means for forward collection, such as direct send arrangements, that are not used by similarly situated banks, by holding these banks to a higher standard for returns. The final regulation provides that banks with highly efficient means of forward collection of checks drawn on a particular depositary bank are not required to use that means for returned checks, if similarly situated banks use less efficient means.

In order for paying banks to determine what the expeditious return rule means for a particular check, the proposed rule indicated that returned checks be handled like a check received for deposit by the paying bank before noon on the day following presentment. Some commenters suggested the "before noon" language be deleted because it is difficult for banks to determine whether checks were deposited before or after noon for establishing compliance with the expeditious means standard in case of a disputed return. Other commenters suggested that "before noon" be modified to state "by noon." One commenter stated that the noon requirement penalized banks with early afternoon dispatch of forward collection checks because the processing time available to them is compressed. The regulation has been revised to state "by noon."

Some commenters suggested clarification as to how the paying bank would receive compensation from the returning bank, and the methods by which returning banks would compensate each other. One commenter suggested, in light of the concerns raised, that this section of the regulation be monitored and revisited, if necessary, before 1990. Payment for returned

checks by returning banks is addressed by § 229.31(c).

Return to a Collecting Bank. The proposal permitted a paying bank to return a check to a bank that handled the check for forward collection. Commenters objected to imposing expeditious return responsibilities on banks that do not agree to offer returned check services. In the final regulation, the Board added paragraph 229.30(b), *"Unidentifiable depositary bank."* This paragraph limits the right of a paying bank to return a check to a prior collecting bank that does not hold itself out as a returning bank to circumstances in which the paying bank cannot identify the depositary bank with respect to a given check, or where the bank cannot obtain payment for the returned check from the depositary bank. (See discussion of § 229.35(b).) This paragraph also clarifies the duties, rights, and responsibilities of paying banks when they cannot identify the depositary bank from the indorsements on the returned check. The Board expects these cases to be infrequent. Return of checks under this section is not subject to the requirements for expeditious return by the paying bank, although the returned check remains subject to the midnight deadline.

Notice of Nonpayment. The proposed regulation allowed the paying bank to meet its expeditious return duty by sending a notice of nonpayment and then returning the physical check in a reasonably prompt manner. The Board requested comment on whether this option should be available as an alternative to expeditious return of the physical check.

One hundred ninety-one commenters commented on allowing notice of nonpayment as an effective alternative to expeditious return of the physical check. One hundred twenty commenters objected to this alternative, based on the fact that these notices would be insufficient to meet the needs of the depositary bank. Forty-two commenters indicated that, although the notice would be a beneficial addition, it should not replace an expeditious return of the check itself. The inaccuracy of notices was an underlying reason for opposition, expressed explicitly by 17 commenters. One commenter stated that 30 percent of all notices currently received are inaccurate, and another commenter indicated that 20 percent of notices received today are inaccurate. Three commenters stated that notice as a means of expeditious return would unnecessarily clutter the nation's wire notification systems. Twenty-four commenters stated that these notices would result in settlement problems between banks and their customers or between returning and depositary banks. Two commenters requested that banks be allowed to place extended hold periods on funds until the physical check is received. Thirty respondents commented that notices should only be allowed for exception circumstances. Sixteen commenters expressed a fear that allowing notice would remove the incentive for a paying bank to deliver the returned check in a timely manner. Eleven commenters indicated that notice should only be permitted on large-dollar checks.

Thirty-eight commenters were in favor of notice as a means of expeditious return, and 33 had mixed reactions. Twenty-eight of the commenters that had mixed reactions specifically stated that notice as a means of expeditious return would only be acceptable if the returned check followed within a specified time period, usually two to four days. One commenter supported the provision because it allows for a cheaper but timely return of the physical check; one commenter favored the provision because it compensates for unavoidable delays in the return of the physical returned check; one commenter favored the incentive that these notices create for conversion to truncation; one commenter stated that depositary banks do not need the returned check at all and that the notice alone is sufficient; and two commenters supported the provision because it gives paying banks options as to a means of return.

Many of the comments made on notice of nonpayment as an alternative to expeditious return also referred to § 229.30(f), *"Notice in lieu of return."* There appeared to be some confusion between the two provisions. Notice as an alternative to expeditious return offers paying banks the opportunity to notify the depositary bank, in an expeditious manner, of a returned check rather than send the physical returned check in the same expeditious manner; the returned check would follow in a reasonably prompt manner. Notice in lieu of return, on the other hand, allows for notice to be delivered when a check is lost or otherwise unavailable. See discussion of § 229.30(f), *"Notice in lieu of return."*

Public comment on notice of nonpayment as a means of expeditious return indicated that such a provision would impose operational burdens on depositary banks, such as settlement problems, delays in receiving the physical returned check, and inaccurate information. The comments indicated that these inefficiencies would not be offset by the benefits of allowing such notification. Because the benefits of the notice alternative are uncertain, the Board eliminated notice of nonpayment as an option for meeting the duty of expeditious return.

Paying bank's preparation of Qualified Returned Checks (QRCs). A total of 131 comments were received on the question of whether the paying bank should be required to prepare QRCs for returns being sent through a returning bank. Seventy-one of the commenters opposed requiring paying banks to prepare QRCs. Most commenters based their opposition on the cost involved, and stated that the paying bank should be allowed to make its own decision to minimize costs. Smaller banks in particular noted that such a requirement could prove operationally infeasible and exceptionally expensive.

Some commenters noted that it may not be necessary to prepare a QRC in order to return a check expeditiously. One commenter opposed the requirement that paying banks be required to prepare QRCs because it believes that the regulation should avoid all potential delays in seeking to fashion an expeditious return system.

There were 54 responses in favor of requiring paying banks to prepare QRCs for all returned checks sent to returning banks. Many of the commenters, especially smaller banks, responded favorably on the premise that preparation of QRCs by paying banks would expedite the return process. One commenter noted that most banks have some type of encoding equipment, and because QRCs speed the return process, paying banks should be required to qualify returned checks. Some commenters noted that the indorsement standard must be in place before such a requirement is imposed. Some commenters argued that an extra day should be granted to paying banks to prepare QRCs, similar to the extra day proposed in § 229.31 to allow returning banks to prepare QRCs destined to other returning banks.

Under the final regulation, a paying bank may, but is not required to, convert the returned check to a qualified returned check. The Board believes that requiring all paying banks to prepare QRCs is not warranted at this time. When the indorsement standard is fully implemented, the preparation of QRCs will be less difficult. Further, the importance of preparing QRCs early in the return process may increase when the statutory schedules are reduced in 1990.

Eight commenters suggested that the paying bank should be allowed an extra

day to prepare a QRC, because it is immaterial to the depositary bank which institution prepared the QRC as long as the returned check is not delayed in transit. One commenter noted that the paying bank is the first bank in the return chain and should logically be the first bank provided with an incentive to create a qualified return.

Although paying banks may wish to prepare qualified returned checks because they will be handled at a lower cost by returning banks, the extension is not available to paying banks because a paying bank has more time available to dispatch the check. Ordinarily, paying banks will be able to convert a check to a qualified returned check any time after the determination is made to return the check until late in the day following presentment, while a returning bank may receive returned checks late on one day and be expected to dispatch them early the next morning. The Commentary has been revised extensively to reflect the changes to the paying bank's duty to return checks expeditiously. This paragraph also has been amended to specify the MICR-encoding requirements of QRCs. These requirements were previously in the definition of QRC. The Commentary also clarifies that an encoding error does not result in failure to create a QRC.

(b) Extension of deadline for small-dollar checks. A total of 187 comments were received on the proposal that paying banks be given the option to retain checks of $100 or less, which were to be returned, for two business days in an effort to obtain payment. Under the proposal, the paying bank must reexamine the basis for nonpayment before actually returning the check. The objective of this proposal was to reduce the number of returned checks that must be handled by the check collection system.

There were 45 comments in favor of the proposal. One trade association stated that it had no objection to this general concept, but was not confident that the two-day extension would be lengthy enough to make a significant difference in the volume of returned checks. Some of the commenters that favored the proposal suggested that a returned check held in an effort to obtain payment should be stamped "Presented twice—do not redeposit" if it was eventually returned to the depositary bank.

One hundred twenty-eight commenters opposed the proposal, and strong opposition was voiced by several smaller banks. One commenter stated, "Community banks are strongly opposed to allowing paying banks the option to hold checks of $100 or less. This practice could expose the small business customer of the depositary bank to undue risk if the paying bank is allowed this option. Automatic redeposit by the depositary bank is the only acceptable alternative."

Nine commenters said this procedure should be either mandated or eliminated, but should not be optional because of the uncertainty regarding whether and when returned checks may be returned to them. One commenter suggested that the dollar limit of the returned checks to be held should be raised to $150; one commenter suggested that the limit be reduced to $50; and one commenter suggested that the period of hold be extended to three days. Some commenters suggested that banks should not hold multiple checks deposited in the same account at the same bank.

The proposed regulation's provision to extend the deadline for return of small-dollar checks did not generate a great deal of support among the commenters. There appeared to be some hesitation, even among the supporters of the concept, with respect to the practical benefits to be gained at this time from implementation of this provision. Based on the comments received, the Board believes that extension of the midnight deadline for these small-dollar checks is not warranted at this time, and that elimination of this provision will not adversely affect the efficiency of the returned check system. Thus, this provision has been deleted from the final regulation. (The paragraph on returns involving unidentifiable depositary banks has been substituted in its place.) The Board believes that the concept of holding small-dollar checks has the potential to reduce the volume of returned checks that must be handled and will work with the banking industry to explore alternative solutions.

(c) *Extension of deadline for expedited delivery.* Seventeen comments were received on the proposal that paying banks be allowed to extend the midnight deadline in order to send returned checks by courier provided that such action does not delay the return process. All of the commenters generally supported the proposal. One commenter suggested that the exception should only apply when a bank qualifies the returned check for high-speed processing.

One commenter asked that the Board explain what constitutes a "highly expeditious means of transportation," for the purposes of the extension of the midnight deadline requirement. The Commentary addresses this issue, clarifying that highly expeditious means of transportation pertains primarily to air courier arrangements from west coast banks to east coast banks.

(d) *Identification of returned check.* A total of 45 responses were received on the proposal to make mandatory the practice of indicating the reason for return on the returned checks. All of the commenters generally were in favor of the proposal to identify returned checks as returned checks. Three commenters stated that it was unnecessary to require a returned check to indicate on its face that it is a "returned check" because the reason for return is adequate indication that it is a returned check.

The major issue raised by the commenters was whether "refer to maker" constituted a "reason" and was, therefore, an allowable reason for return under this section. Most of the 22 commenters that addressed this subject believed that "refer to maker" was an acceptable reason for return; however, five commenters were opposed to allowing the use of "refer to maker" as an acceptable reason for return. One commenter recommended that a check being returned for cause have that cause clearly identified and that the regulation prohibit "refer to maker" or some similar wording that does not precisely identify the problem to the depositary bank and its customer. One commenter opposed banning the use of "refer to maker" because it saw no benefit to such an action. Another commenter pointed out potential liability problems with affixing a specific reason for returning a check and stated that, if this proposed requirement is adopted, the regulation should specifically provide that "refer to maker" is acceptable.

One commenter requested that a list of acceptable reasons be included in the Commentary. The Board believes that such a list is unnecessary and might prove to be restrictive. Another commenter asked what a bank could do if there is no reason stamped on a returned check when it is received. Under § 229.38, a paying bank may be liable for damages, if any, due to its failure to include the reason for return on a returned check.

The Board adopted the regulation as proposed. The Commentary has been modified to provide that a check is identified as a returned check by a reason for return stamp, even though the stamp does not specifically state that the check is a returned check. A reason such as "refer to maker" is permissible in appropriate cases.

(e) *Depositary bank without accounts.* Two comments were received on the proposal that checks being returned to banks without accounts need not be returned expeditiously. One commenter

concurred with the proposal as stated. One commenter pointed out that paying and returning banks will rarely be certain that a particular depositary bank does not maintain accounts. Accordingly, banks will not be able to use this exception, except perhaps as a defense after the fact. The Board believes that paying and returning banks in a given local area, who would be most likely to encounter checks being returned to a bank without accounts, would probably be aware of the fact that the bank has no accounts and would benefit from the proposed rule.

The Commentary has been modified to reflect that the expeditious return requirements apply to checks deposited into a Federal Reserve Bank, Federal Home Loan Bank, certain industrial banks, and private banks, which are not depositary banks within the meaning of Subpart B of the regulation, but do maintain accounts.

(f) *Notice in lieu of return.* The proposed regulation provided that if a check is unavailable for return, a paying or returning bank can send in its place a notice in lieu of return. The depositary bank must treat this notice as it would a returned check. The proposed regulation permitted electronic notices in lieu of return. Two hundred fourteen respondents commented on the regulation's provision allowing notice in lieu of return. One hundred ninety-nine commenters opposed this provision as proposed, and five commenters had mixed reactions. Sixty-eight commenters indicated that all notices must be followed by the physical checks, indicating that copies are insufficient, and 75 commenters specified that notices should be followed by either the returned check or a copy. Sixteen commenters specifically opposed allowing notices to carry dollar value. Other specific comments are discussed in conjunction with the summary of comments on § 229.30(a), *"Return of checks or notice of nonpayment,"* because there was some confusion among commenters regarding the distinctions between the two provisions.

Forty-six commenters responded to the question on whether electronic notice in lieu of return would create accounting problems. Thirty-four commenters indicated that electronic notices would lead to significant accounting and reconciliation problems. Most commenters indicated that the returned check or at least a copy was necessary when settling for returned checks. Since the returned check would not be available in circumstances where notice in lieu of return is permitted, some commenters noted that the regulation should require the return of a copy of the check, in order to ease the burden on paying banks.

The Board modified the notice in lieu of return requirement in the final regulation and Commentary such that if a check is lost or otherwise unavailable for return, it may be returned by sending a copy of both sides of the check or, if such a copy is not available to the paying bank, a written notice of nonpayment containing the information specified in § 229.33(b). Thus, electronic notice has been excluded.

(g) Reliance on routing number. A total of eight comments were received on the proposal to permit paying banks to rely on any routing number of the depositary bank as it appears on the check in the depositary bank's indorsement, or in magnetic ink in a QRC. The paying bank must act in good faith but does not have to resolve any inconsistency.

All of the commenters agreed with the proposal. The rule was adopted as proposed, but the Commentary has been modified to delete the reference to routing numbers appearing on QRCs in magnetic ink, since the paying bank does not receive checks drawn on it which have already been qualified.

Section 229.31 Returning bank's responsibility for return of checks.

(a) *Return of checks.* Twenty-two comments were received on the requirement that a returning bank handle returned checks in an expeditious manner. The proposed rule provided the same "similarly situated bank" standard proposed in § 229.30(a) for paying banks.

Eight commenters supported the requirement as proposed. One trade association commented that the proposal was an appropriate standard for returning banks, even if the paying bank rule was modified to provide that a check is returned expeditiously when it is returned to the depositary bank within a specified number of days. This commenter believed that a fixed schedule standard should not apply to returning banks. Another trade association, which suggested that a fixed return schedule should be established for paying banks under § 229.30(a), suggested that the returning bank's responsibility should be to meet its published schedule, thereby allowing paying banks to choose a returning bank based on the returning bank's stated ability to meet a schedule.

Four commenters specifically objected to the reference to similarly situated banks in this section for the same reasons commenters opposed this standard for paying banks. Several other commenters expressed their overall opposition to the similarly situated bank standard in their comments on § 229.30(a).

One commenter stated that returning banks should be required to have formal agreements with paying banks in order to be considered a returning bank. Four commenters favored a rule which would specify that sending a returned check through a Federal Reserve Bank would satisfy the returning bank's duty of expeditious return. Another commenter suggested a provision allowing a correspondent bank to accept both forward collection and returned checks, without designating itself as a returning bank. This bank then could send the returns to a Federal Reserve Bank without processing and without incurring the duties and liabilities of a returning bank. Two commenters wanted to retain the right of charge-back, primarily because of expected accounting difficulties.

One commenter stated that the expeditious return standard should correspond to the U.C.C. and be based on dispatch of the returned checks by midnight of the day following receipt of the return by the returning bank. Another commenter urged that expeditious return be defined to mean return of a check by any means resulting in receipt of the check by the receiving bank earlier than if the check had been mailed to that bank prior to the midnight deadline.

The Board revised this paragraph so that the standards for return of checks by returning banks are similar to those for paying banks. Returning banks are required to return checks expeditiously. As in the case of a paying bank, a returning bank's return is expeditious if it meets either the two-day/four-day test or the forward collection test, which are similar tests to those set out in § 229.30(a). While a returning bank will not have first-hand knowledge of the day on which a check was presented to the paying bank, returning banks may, by agreement, share liability with paying banks for late return based on the delays caused by each. The Board also clarified the similarly situated bank standard for returning banks.

A clarification was added to the Commentary noting that a returning bank agrees to handle a check for expeditious return if it: (1) publishes an availability schedule for return of checks and accepts the check for return, (2) handles a check for return that it did not handle for forward collection, or (3) otherwise agrees to handle a check for expeditious return.

One commenter was concerned about the effects of rejects and holdovers on the "expeditious" return standard. Although some rejects and holdovers are common in the check collection process, the Board believes that whether these are the result of negligence must be determined on a case-by-case basis and therefore did not address this issue in the final regulation and Commentary.

The Board did not adopt a standard for expeditious return that was based on the returning bank returning checks within its published availability schedule. Such a standard would allow a returning bank not to meet the regulation's requirements without acting in an expeditious manner and would slow the overall return process. It is important that returning banks participate in accelerating the check return system.

2:00 p.m. Cut-Off. Fifty-five comments were received on the proposal that the returning bank may set a cut-off hour for receipt of returned checks earlier than its cut-off hour for forward collection checks, but no earlier than 2:00 p.m. Thirty-one commenters agreed that the proposed 2:00 p.m. cut-off time was appropriate and would not restrict the flow of returned checks. One commenter noted that any later cut-off hour could be detrimental to operations at a returning bank and could contribute to either delays in dispatching return letters or a reduction in quality and accuracy. Twelve other commenters preferred a later cut-off time. Suggested cut-off times were generally between 3:00 p.m. and 5:00 p.m. Three commenters preferred an earlier deadline (noon). One commenter did not want the regulation to specify an earliest cut-off time for the acceptance of returned checks.

The Board adopted a cut-off hour for returning banks of 2:00 p.m. or later, as proposed. The Commentary was modified to clarify the setting of cut-off times for returned checks.

Extension of Deadline for Qualified Returned Checks. Ninety-six respondents commented on paragraph (b) of proposed § 229.31, which provided the returning bank a day beyond the time otherwise required to handle a returned check in order to prepare a QRC, if the returned check is being sent to another returning bank. The Board requested comment on whether returning banks should also be permitted a day to create QRCs for checks being returned directly to depositary banks.

Thirty commenters generally supported the proposal that returning banks be allowed an extra day to qualify any returned check, including returned checks going directly to the depositary bank. Many of these commenters discussed the operational difficulty of separating the returned checks going to other returning banks from those going directly to depositary banks. There was some sentiment among a few of the commenters that the extra time to prepare QRCs for returned checks going to depositary banks would be acceptable, provided the overall time it takes to complete the return process is not lengthened. Forty-nine commenters were opposed to providing the returning bank an extra day to qualify those returns being returned directly to the depositary bank, because qualifying these returns would not speed the return process.

The Board adopted, as part of § 229.31(a), a modified rule that a returning bank may extend its deadline for return of checks to other returning banks by one day in order to prepare QRCs under the forward collection test, but the extra day to qualify returns does not extend the time for the return under the two-day/four-day test. The Board did not provide an extra day to qualify all returned checks, because the benefits that accrue from qualifying returned checks (i.e., the ability of subsequent banks to process the returns on an automated basis), do not apply to returns that are sent directly to the depositary bank. Therefore, the Board concluded that expanding this provision to all returned checks would delay the return of many checks, without providing sufficient offsetting benefits.

(b) Unidentified depositary bank. Two comments addressed proposed § 229.31(c), which provided that a collecting bank may not refuse to accept the return of a check that it handled for forward collection.

One commenter was concerned that this paragraph would allow a paying or returning bank to send all of its returned checks to the collecting bank. The collecting bank then is put in the position of a returning bank, even if it does not offer returned check services. It was suggested that the collecting bank not be required to accept the return, although it remains liable as an indorser. Three commenters suggested that the regulation specify the returning bank's responsibility for handling returned checks if it was not involved in the forward collection process for that check and cannot determine the depositary bank.

The right of a returning bank to send a returned check to a bank that collected the check has been restricted to instances in which it is unable to identify the depositary bank. The final regulation clarifies the returning bank's responsibilities when a returning bank that was not involved in the forward collection of a check cannot identify the depositary bank from the indorsements on the returned check. This section is similar to § 229.30(b), but is applicable to returning banks.

(c) *Settlement.* Three comments were received on the requirement for a returning bank to settle for a returned check in the same way that it would settle for a forward collection check. One commenter stated that the proposal was appropriate. Another commented that the removal of the right of charge-back was the best incentive to expedite the return process. One commenter was opposed to the requirement because it would create a new class of deferments with a resulting increase in the number of entries to "cash items in process" accounts and transactions to reconcile. This commenter wanted to allow the continuation of the current practice of charging when returns are shipped, and where there are no accounts to charge, to use an ACH debit.

One commenter wanted clarification as to how and when the paying bank is paid by the returning bank for a returned check, and how returning banks compensate each other.

This paragraph was adopted as proposed, except that it provides that settlement is final when made, rather than provisional until receipt of the returned check by the depositary bank. (See Commentary to §§ 229.31(c) and 229.35(b) for a discussion of the elimination of the concept of provisional credit.) The Commentary was modified to note that a returning bank may settle by means of availability schedules and may vary the settlement method it uses by agreement with paying banks or other returning banks.

(d) Charges. This paragraph proposed to permit any returning bank to impose a fee on the paying bank for its services. Several Illinois banks requested that the Board clarify that this provision preempts a nonuniform provision in the Illinois Uniform Commercial Code prohibiting Illinois banks from charging any person other than the drawer a fee on a returned check for insufficient funds or no account. These commenters stated that if Illinois law is not preempted, Illinois banks would be placed at a competitive disadvantage in providing returned check services. Although under § 229.40, *"Relation to State Law,"* the Illinois statute appears to be clearly preempted, the Commentary was modified to acknowledge that this paragraph preempts state laws that prevent returning banks from charging fees for

handling returned checks. The Commentary was revised to indicate that a depositary bank may not impose a charge for honoring its obligations under § 229.35(b).

(e) *Depositary bank without accounts.* No comments were received on this section, which is similar to § 229.30(e), and relieves the returning bank of the duty to return expeditiously to banks without accounts. This section was adopted as originally proposed. The Commentary was modified to reflect that the expeditious return requirements apply to checks deposited in a Federal Reserve Bank, Federal Home Loan Bank, certain industrial banks, and private banks.

(f) *Notice in lieu of return.* This paragraph of § 229.31 for the returning bank was modified to be consistent with § 229.30(f), which contains a similar rule for the paying bank.

(g) *Reliance on routing number.* One comment was received on this paragraph, which is similar to § 229.30(g), and permits a returning bank to rely on the routing number of the depositary bank appearing on a returned check. The commenter stated that it believed the proposal was appropriate. This section was adopted as proposed (renumbered from § 229.31(f) to § 229.31(g)).

Section 229.32 Depositary bank's responsibility for returned checks.

(a) *Acceptance of returned checks.* Forty-three comments were received on this paragraph, which defined the places a depositary bank must accept returned checks and written notices of nonpayment. The proposal provided four options where a bank must receive returned checks: (1) At any office consistent with the address in the bank's indorsement; (2) if no address appears in the indorsement, at any office associated with the routing number in the indorsement; (3) if no routing number or address appears in the indorsement, at any office of the bank; and (4) at any location at which the bank accepts checks as a paying bank.

Twenty-four commenters recommended that option 4 be deleted from the locations a bank must accept returned checks. Commenters believed that this provision could be interpreted to require a bank to accept returned checks at any branch at which it accepts checks presented over the counter for payment, which would be very difficult, if not impossible, for many banks to administer. Commenters wanted to be able to designate where they would receive returned checks, by designating in their indorsement the location where checks should be returned. Thrift institution and small bank commenters asked that the rule be clarified to permit return to a processing center or a third-party agent. Two commenters objected to receiving returns without a preexisting arrangement with the returning bank.

The Board modified the list of places where a bank must accept returned checks and written notices of nonpayment to clarify that the depositary bank may specify a location, either through an address or a routing number, in its indorsement. In addition, the regulation was clarified to require that returned checks must be accepted at the location at which the bank requests presentment of forward collection checks, rather than any location the bank pays checks as a paying bank. The Commentary was modified to reflect that returns cannot be presented at every branch of a bank, merely because checks are paid over the counter. Delivery of returned checks to the bank's forward collection presentment point furthers the efficiency of the check return process by enabling banks to send returned checks by the same means of transportation as forward collection checks. Two commenters recommended that the regulation prohibit a paying bank or returning bank from delivering QRCs intermixed with forward collection checks, except by agreement with the depositary bank. The final regulation provides that a depositary bank may require that returned checks must be separated from forward collection checks.

Fifteen commenters suggested that the Federal Reserve develop, maintain, and distribute a directory of locations at which banks will accept returns. The Board believes that, in most cases, banks should be able to tell from the indorsement where the depositary bank prefers to accept returned checks. Failing that, the paying or returning bank may contact the depositary bank to determine where the depositary bank would prefer to accept returned checks.

(b) *Payment.* Twenty-five comments were received on the proposal that the depositary bank must pay for a returned check at the close of business on the day on which it receives the check. The proposal provided that payment must be made by debit to an account of the depositary bank on the books of the returning bank, cash, wire transfer, or any other form of payment acceptable to the returning or paying bank.

Six commenters expressed agreement with the proposal as stated, and most commenters supported the proposal generally. Five commenters wanted to include net settlement as an optional form of payment. One commenter stated that the Board should encourage payment to be made by net settlement at the Federal Reserve because it is the most cost effective and expeditious means of payment. Another commenter was concerned that errors in return letters paid by net settlement arrangements could cause account balance problems. Net settlement is an optional form of payment for returned checks, and a bank need not enter into net settlement arrangements if it is concerned about errors. Both the proposed and final Commentary include net settlement as an option for payment by the depositary bank. The Commentary was modified to state that a wire transfer should indicate the purpose of the payment.

Four commenters wanted to be able to delay payment for a day if there is no preestablished agreement between the returning bank and depositary bank. The Board noted that the provision of prompt payment, combined with the elimination of the right of charge-back, is necessary to provide an incentive to the returning bank to speed the return process.

One commenter suggested limiting same-day payment requirements to amounts over $20,000, with lesser amounts being paid through the ACH system. Five other commenters suggested that next-day ACH credits be allowed as a means of payment. They stated that the ACH mechanism provides a low-cost, effective means that would be particularly appropriate for low-dollar value payments such as returned checks. The Commentary states that a returning bank may agree to accept payment later than the day it delivers the returned checks to the depositary bank. Thus, payment could be made through the ACH system, by agreement with the returning bank. Two commenters discussed fees and questioned which party should pay the cost of settlement for returned checks.

One commenter stated that it was unable to send a wire transfer after 12:30 p.m., and would have problems making same-day payment after that time if returned checks were received. The Board recognizes that in some cases it may be difficult for depositary banks to meet their payment responsibilities. Depositary banks may establish a cut-off hour for receipt of returned checks, generally not earlier than 2:00 p.m., and treat returned checks received after that hour as being received on the next banking day. In addition, the Commentary provides that if the depositary bank is unable to make

payment on the day that it receives returned checks, because the paying or returning bank is closed due to a holiday or because the time when the depositary bank received the check is after the close of Fedwire, payment can be made on the next banking day.

A large commercial bank suggested that the concept of prompt payment proposed for returned checks should be expanded to apply to payment for forward collection checks presented by private sector banks. The Board incorporated this suggestion in the concept of same-day payment, which was issued for public comment on April 4, 1988 (**Federal Register**, April 11, 1988).

The Board requested comment on whether a penalty provision is required to ensure that payment for returned checks is made as required. There were 68 comments received on this question.

Thirty-three commenters supported the concept of establishing a penalty provision in the regulation in order to encourage prompt payment by depositary banks. Two commenters suggested that the penalty for lost funds should be computed by the formula contained in the New York Clearing House Compensation Rules; however, claims valued at less than $100 per day should not be pursued.

Thirty-three commenters were opposed to establishing provisions for a penalty for late payment. Several commenters believed a penalty would not be necessary and recommended a wait-and-see approach. These commenters recommended that, if problems develop, a penalty provision could be adopted at a later time. One trade association did not believe a penalty provision was necessary, particularly because most payments will be made via net settlement arrangements. One commenter stated that a penalty requirement was unnecessary, but that the returning bank should have an option to request an interest adjustment when excessive delays occur.

The Board believes that an explicit penalty provision in the regulation is not needed at this time. A bank that does not make same-day payment without making a good faith effort to do so may be liable for damages suffered as a proximate consequence under § 229.38(a). Language indicating that a depositary bank becomes accountable for the amount of a returned check has been deleted as unnecessary in light of the bank's duty to pay.

(c) *Recovery by depositary bank from collecting bank.* There was one favorable comment received on the proposal that the depositary bank can recover any payment not yet received from a collecting bank if it pays for the returned check. This section was deleted as unnecessary because changes to the final regulation eliminate the concept of provisional credit. Subsequent paragraphs have been renumbered.

(c) *Misrouted returned checks and notices of nonpayment.* Section 229.32(d) of the proposal required a bank that received a misrouted returned check to act as a returning bank and send the returned check to the depositary bank, if it can be identified, or to the presenting bank. (This paragraph was renumbered as § 229.32(c).) Twenty-six comments were received on this paragraph.

Three commenters generally supported this proposal. Thirteen commenters stated that the bank that received a misrouted returned check should always have the option of returning the check to the sending bank. One of those commenters suggested that the regulation should require the receiving bank to return the misrouted returned check to the sending bank. Two additional commenters stated that a bank that received a misrouted returned check should be allowed to send the check to the local Federal Reserve office.

Two commenters objected to holding the bank receiving a misrouted returned check to a standard of expeditious return, including liability for failure to handle the check in accordance with § 229.31. One commenter believed it was inappropriate to demand a bank to pay for and process misrouted returned checks as proposed. This commenter maintained that if the receiving bank chooses to forward the returned check, it should be relieved of any associated liability, with the exception of gross negligence. One commenter suggested that a bank should be compensated for the cost of researching and rerouting a returned check incorrectly returned to it.

One commenter asked that the regulation clarify the liability of the paying bank, depositary bank, and the bank that received the misrouted returned check. One commenter requested clarification on settlement for misrouted returned checks. Another commenter suggested that banks be provided an incentive to expedite return if they receive a misrouted returned check.

One commenter suggested that a misrouted return check be sent back to the paying bank. The paying bank is readily identifiable on the check, whereas the sender may not be. Also, the check ultimately may have to go back to the paying bank so it can be returned through the forward collection chain. Thus, sending misrouted returned checks directly to the paying bank would expedite the return process.

The Board modified this section to provide that the recipient of a misrouted returned check shall either promptly forward the returned check to the depositary bank (either directly or through a returning bank) or send the returned check back to the sender. The Board believes that it is inappropriate to impose the responsibilities of a returning bank on the bank that receives a misrouted return, and has clarified that the bank receiving a misrouted returned check is required to act promptly but is not required to meet the expeditious return requirements of § 229.31(a). The Commentary also clarifies the duty of a bank receiving a misrouted returned check.

(d) *Charges.* In response to a number of comments requesting clarification with respect to the fees banks may charge other banks for handling returned checks, a new paragraph was added to provide that a depositary bank may not impose a charge for accepting and paying checks being returned to it. The Commentary for this paragraph notes that a returning bank may charge a fee for handling returned checks received in a mixed return letter even though some checks contained in the return letter are being returned to the returning bank.

Section 229.33 Notice of nonpayment.

(a) *Requirement.* Two hundred sixty-three respondents commented on the appropriate dollar limit for notice of nonpayment. Two hundred thirteen commenters indicated that the $2,500 limit that is contained in the Regulation J notice of nonpayment requirement should be maintained; 46 opposed retaining the $2,500 limit; and four had mixed reactions. Twenty-eight of the commenters opposing the $2,500 limit suggested that a higher limit be implemented to decrease the number of notices that must be provided, and 21 commenters supported lowering the limit in order to protect depositary banks from the potential increase in fraud that may result from shorter availability schedules.

Based on the strong preference of the commenters, the Board has adopted a $2,500 limit for notices of nonpayment. The Board believes that a higher limit of $5,000 would significantly increase the risks to banks while not providing significant relief operationally, since only a small portion of returns are between $2,500 and $5,000. A $1,000 limit would greatly increase the number of returned checks subject to the notice of

nonpayment rule beyond the increase in the volume of notices that will result from the expansion of the rule to cover all large-dollar returned checks, rather than only those returned checks that were collected originally through the Federal Reserve. Seven commenters requested that the dollar limit be reexamined within the next two to three years in order to ensure the validity of the limit chosen.

Ten commenters supported expanding the notice of nonpayment requirement to all large-dollar returned checks, rather than retaining the current requirement, which is limited to checks processed through the Federal Reserve. No commenters opposed this provision, and one gave a mixed comment. The Board adopted the requirement contained in the proposed regulation that all large-dollar checks be subject to the notice of nonpayment requirement.

Forty-six respondents commented on the requirement that large-dollar notices of nonpayment be received by the depositary bank by 4:00 p.m. on the second business day following presentment, compared to the requirement in Regulation J that the notice be received by midnight of the third day following presentment. Forty commenters either opposed or had mixed reactions to this requirement. Twenty-seven of these commenters suggested shortening the time frame to the day following presentment, in order to increase the likelihood that the notice will arrive before the depositary bank must make funds available for withdrawal. Of those 27 commenters, 16 premised their suggestion by requiring that all institutions have an electronic connection with the Federal Reserve for the purpose of receiving notices of nonpayment. The Board does not believe that it would be appropriate to require by regulation that all banks have electronic connections with the Federal Reserve. Four commenters specifically requested that the time frames be extended so that banks with branches who use one returned check processing center, or smaller institutions that utilize an outside processor for return services, have adequate time to review their returned checks before sending notices.

The Board adopted the time requirement for notice of nonpayment as proposed. The regulation's time frame provides more than a one-day improvement in the receipt of notices of nonpayment compared to the current requirement. This offers a significant improvement, and addresses the concerns of commenters that stressed the need for an acceleration in the timing of the notice requirement. Although these commenters requested even further reductions in the time frames, shorter time frames would be difficult for smaller institutions at this time. The Commentary has also been revised to clarify that in many cases the return of a check will constitute adequate notice and to refer to the new warranties for notices.

(b) *Content of notice.* Seventy respondents commented on the requirement in § 229.33(b) that "if a paying bank cannot identify the depositary bank, it should send the notice of nonpayment to the first bank that it can identify that handled the check during forward collection." Forty-four commenters opposed this provision, citing that it would be more efficient to return the check or a copy through the forward collection indorsement chain, rather than increasing the volume of notices of nonpayment with incomplete notices that are of questionable value. Twenty-three commenters favored this provision since it would encourage an expeditious return of the returned check information.

Because notices of nonpayment that are sent to collecting banks when the depositary bank cannot be identified are of questionable usefulness, the Board has eliminated this requirement in the final regulation. The Commentary indicates that a paying bank may wish to send a notice to a prior collecting bank in these cases, since the collecting bank may be able to identify the depositary bank, or may in fact be the depositary bank.

Eighty-seven commenters provided varied comments regarding the content requirements of the notice. Nine commenters requested exemptions from the notice of nonpayment requirements. Three commenters suggested that banks in a clearinghouse arrangement be exempt from the notice requirements and six commenters requested exemption from providing notice in instances where the minimum amount of information cannot be determined. Because the return of the check itself may serve as the required notice of nonpayment, in many cases no notice other than the return of the check will be necessary. This may be the case for large-dollar checks that are returned through a clearinghouse arrangement, if the check will normally be received by the depositary bank within the time limits for notice. With regard to providing notice where not all required information is available, the Board believes that it is important to require notice of nonpayment regardless of the discernible information so that banks do not become lax about determining information. In addition, an incomplete notice may still be useful to the depositary bank in determining the check that is being returned. Therefore, the final regulation does not excuse a paying bank from providing notice of nonpayment if not all required information is available. The final regulation requires banks to provide all available information and, if there is doubt, provide the information to the extent possible and identify that uncertain information with question marks.

Thirty-one commenters requested that a standardized form be used for all notifications. The regulation specifies the standard information to be included in all notices, but does not dictate a particular format for the transmission of such notices.

(c) *Acceptance of notice.* Sixty-one commenters opposed the provision regarding acceptance of notice. The proposed requirement, adopted from Regulation J, was for acceptance of all nonwritten notices of returned checks at either the telephone or telegraph number of the head office or branch designated in the indorsement, at the number of the return item unit, or any other number held out by the bank for receipt of notice of nonpayment. No priority rule was provided regarding acceptance at these locations.

Commenters were concerned that costly delays might result from notifications being received by the bank at locations where the bank was unable to handle them, especially if delivery is allowed to any branch. Forty-seven commenters filed identical comments stating that notice should be given only to the location specified in the indorsement. Seven commenters requested that paying banks be required to notify the return item unit designated in the indorsement and, only if no such number exists, provide the notice to another location specified in the regulation. Two commenters recommended that notices of nonpayment be required to be in writing, except by agreement of the depositary bank and paying bank. Three commenters specifically requested that the reference to telephone receipt of notice be removed from this paragraph because they opposed the provision allowing telephone notification.

The proposed regulation required depositary banks to accept telephone notification. One hundred seventeen commenters supported telephone notification, while 16 opposed and nine expressed mixed opinions. Of those opposing telephone notification, two commenters cited that phone

notification offers no legal proof of notice, another demanded that only certain language be permitted, and two indicated that these notices create incomplete and unreliable information. Of those commenters with mixed reactions, four commenters indicated telephone notices should only be allowed if a previous agreement has been made between the returning and the depositary banks; two commenters suggested that phone notification only be permitted for large-dollar returns; and five indicated that the returned check or a written notice should follow the telephone notification. Telephone notification is an important tool for returning banks who must notify quickly, especially those who do not have on-line notification capabilities.

One hundred nine commenters requested that there be a requirement for telephone notification to be made to a specific area of the bank or to a specific employee. The proposed regulation does not indicate any specific location or person at which a depositary bank must accept telephone notices. Commenters who requested that notification be made to the location specified by the bank expressed concern that, under the proposed regulation, the wrong area of a bank could receive the notice, which may result in late or misplaced notifications.

The regulation continues to require banks to accept telephone notices because many banks rely on the ability to give telephone notice. To address the concerns raised by these commenters, the final regulation allows a bank to limit the locations at which notices of nonpayment may be given to those designated by the depositary bank, either in its indorsement, or at any other location held out by the bank for receipt of notices. If no telephone number appears in the indorsement, or if the number is illegible, notices can be given at the general purpose telephone number of the bank's head office or branch indicated in the indorsement. Depositary banks are required to accept written notices as specified in § 229.32(a). The Commentary clarifies that banks may establish agreements to vary the location and manner in which notices are received.

Five commenters suggested that the Federal Reserve establish a directory of locations at which depositary banks wish to receive notices of nonpayment. Since the provision of a telephone directory is not a regulatory issue, it is not addressed in the final regulation. The Federal Reserve will work with the industry to determine the need for such a directory service.

(d) *Notification to customer.* The proposed regulation included a paragraph addressing the liability of a depositary bank to its customer resulting from failure to charge back based on a notice, if the notice contained sufficient information for charge-back.

The fourteen commenters who addressed this paragraph either opposed the rule, or expressed concern regarding how the rule would operate. Five commenters who opposed this paragraph indicated that a depositary bank should await the receipt of the physical check prior to charge-back. Four commenters requested that a provision be added stating that a depositary bank is only liable for loss if the notice complies with the minimum notice requirements under § 229.33(b). Three commenters suggested modifying the provision so that the bank delaying the charge-back or failing to send notice is liable to the customer for actual damages, rather than for "any loss" as is currently suggested.

The paragraph and the Commentary have been modified to require a depositary bank that receives a returned check or notice of nonpayment to notify its customer by its midnight deadline or a later reasonable time. In addition, a warranty provision for notice of nonpayment was added based on concerns raised by the commenters. (See § 229.34(b).) No liability is imposed by the final rule for failure to charge back the customer's account based on the receipt of a notice of nonpayment. Receipt of a notice alerts the customer of the pending return of the check, and thus provides the benefits of expedited return to the customer. The Commentary has also been revised to note that this notice may be combined with a notice that the bank is invoking the reasonable cause exception.

Section 229.34 Warranties by paying bank and returning bank.

(a) *Warranty of returned check.* The proposed regulation incorporated the warranties of timely return of § 210.12(b) of Regulation J (12 CFR 210.12(b)) and added warranties that the paying or returning bank is authorized to return the check and that the returned check has not been materially altered.

Fifty-five commenters commented on this paragraph of the proposed regulation. Of these, 51 commenters favored this paragraph with suggested clarifications and/or modifications; three had mixed reactions to this paragraph; and only one commenter was opposed to this paragraph as proposed.

Of those that commented favorably, 17 suggested that the reference in subparagraph (a)(3) to "returned check" should be clarified to indicate: "The warranty should only apply during the time the check being returned is in the possession of the paying or returning bank. The warranty should not cover alterations made in the collection process."

Twenty-six commenters suggested that the Board require the same warranties for notice in lieu as it required for the physical return of a check. Twelve other commenters requested that this paragraph be amended to provide for warranties with respect to a notice in lieu similar to those provided for a returned check and with respect to the accuracy of information contained in such notice.

In addition, one commenter believed that paying and returning banks should be required to provide warranties with respect to encoding errors, such as in connection with the preparation of a QRC. Another commenter suggested that this paragraph require that the paying bank warrant the information contained on the notice of nonpayment and the notice in lieu of return.

One commenter suggested that the regulation include the applicable statute of limitation periods for making breach of warranty claims and a provision indentical to U.C.C. § 4–207(4) should be added with respect to losses caused or resulting from delays (even within the statute of limitations period) in making claims.

One commenter was concerned with the returning bank's warranty that the paying bank returned the check timely and stated that such a warranty would inappropriately shift the risk of litigation of late return claims from the paying bank to the returning bank. It was further argued that, while the returning bank could recover under the warranty provision from a prior returning bank or the paying bank, many of these claims would result in negotiated settlements, particularly as they often involve a multi-party, multi-state bank collection chain. The commenters also stated that this result would be inconsistent with repeated assurances contained elsewhere in the proposed regulation that a bank is not responsible for default or misconduct of another bank.

This commenter further indicated that paragraphs (a) (2) and (3) also required clarification. The following questions were raised as points of confusion:

- What kind of circumstances would constitute a breach of warranty that the returning bank is "authorized" to return the check?
- Does the warranty concerning material alteration apply with respect to alteration which occurred at any time.

alteration which occurred only after the check entered the bank collection system, or alteration which occurred after the check was presented to the paying bank?

• Does material alteration refer only to the traditional information (e.g., payee amount, date) or does it include, for example, obliteration of indorsement information that would identify a bank as having handled (and perhaps mishandled) the check?

Another commenter stated that the creation of warranties on the part of the paying or returning bank is a significant change in the payment system. While these warranties would basically track the warranties of the forward collection process, the commenter believed analysis of the impact of such warranties on the return process deserved further study prior to their becoming effective. This commenter further argued that payable through banks should not be placed in the position of making the warranties for or on behalf of the credit union on which a check is drawn. This commenter requested that the Board conduct a thorough study of the impact of this new warranty scheme prior to it becoming effective.

The Board believes that the regulation's warranty system enables banks to make claims against prior banks in the return indorsement chain to the party responsible for the breach of warranty, and has retained the proposed warranties. This process is similar to that which occurs in the forward collection process, and the laws and procedures applicable to these warranties address many of the issues raised by the commenters. The Commentary clarifies that the warranty of timely return only warrants compliance with the paying bank's midnight deadline and does not extend to whether a paying bank has complied with the expeditious return requirements of § 229.30(a). The Board added a warranty for notice in lieu in § 229.34(a)(4), that the check itself has not and will not be returned, to provide protections to the depositary bank similar to those ordinarily provided through a separate indemnity agreement. The Board did not extend the warranty to encoding errors in preparing QRCs because paying and returning banks preparing a QRC may be liable for these errors under the liability provisions of § 229.38.

(b) *Warranty of notice of nonpayment.* Seventy-nine commenters requested clarification of the paying bank's liability for notice of nonpayment. The comments indicated that the regulation should state that if a depositary bank receives a notice of nonpayment, it is entitled to rely on that notice in dealing with its customers unless and until a notice of cancellation is received, whether or not the returned check is received in a timely manner.

Three commenters specifically suggested that warranties should be provided in the context of the notice of nonpayment to ensure that depositary banks may rely on such notices. Such warranties would parallel those applicable to the return of a check including (1) the notice is accurate based on information obtained from the check; (2) the party providing the notice is authorized to do so; and (3) the notice is timely and complies with the requirements of the Board's regulations. Similar warranties would also apply to a cancellation of a notice of nonpayment. In the case of the return of a returned check in the amount of $2,500 or more, one commenter suggested the paying bank should warrant that notice has been given in accordance with the requirement of the large-dollar notice.

The proposed regulation included a provision in § 229.33(e) that required a paying bank that gives notice of nonpayment and subsequently determines to pay the check to provide a second notice as soon as reasonably possible indicating that it is a second notice cancelling the previous notice. Nineteen commenters were in favor of adding to this provision a clarification of the liabilities associated with cancellation. Such a statement would indicate that a paying bank that cancels a notice of nonpayment is responsible for loss suffered by the depositary bank that acted in good-faith reliance on such cancellation.

In response to the comments received, the Board adopted a new warranty of notice of nonpayment that the paying bank will return the check, that it is authorized to send the notice, and that the check has not been materially altered. This warranty does not include a warranty that the notice is accurate and timely under § 229.33, rather the accuracy and timeliness of the notice are subject to the liability provisions of § 229.38. The Commentary to § 229.33(a) clarifies that the paying or returning bank that sends a notice of nonpayment and subsequently decides not to return the check might wish to send a cancellation of that notice to mitigate damages.

(c) *Damages.* The proposed regulation adopted the warranty damages of U.C.C. § 4–207(3), which states that damages for breach of these warranties shall not exceed the consideration received by the paying or returning bank plus finance charges and expenses related to the returned check, if any.

Eight commenters supported this paragraph of the proposed regulation. Six commenters indicated that this paragraph should clarify the extent that "expenses" includes reasonable attorneys' fees and court costs. These commenters indicated that given the damage limitation contained in the regulation and the dollar amounts that will often be involved, if reasonable attorneys' fees and court costs are not permitted, the loss in many instances will be borne by the party initially incurring the loss, regardless of the merits, because it will not be cost-justified for that party to pursue the issue. Moreover, it was believed that failure to provide for reasonable attorneys' fees and court costs will have a disproportionately discriminatory impact on individuals and smaller banks.

Other commenters supported the inclusion of reasonable attorneys' fees for other reasons as well. One commenter indicated that in many cases, the paying bank returns a check "late" to "see if it can get away with it." The commenter explained that, if the depositary bank challenges the timeliness of the return under Regulation J, the Federal Reserve has a mechanism to process and resolve these claims on a timely basis. However, no similar mechanism exists for returned checks cleared outside the Federal Reserve System, where paying banks often return checks late and then refuse to reimburse the depositary bank for its loss. In essence, the commenter suggested that paying banks take a "sue me" position. For small-dollar checks drawn on paying banks located in other parts of the country, the cost and expense of litigation might exceed the amount of the check at issue. The commenter believed the threat of a paying bank having to pay the attorneys' fees and costs of suit to the depositary bank will likely cause the paying bank to honor the breach of warranty claim without the need for litigation. Similarly, the depositary bank will not be reluctant to bring suit to enforce the breach of warranty if the depositary bank knows that the court must award attorneys' fees and costs of suit as part of the damages. Another commenter believed that "finance charges" should be defined to mean, at a minimum, interest charged at the legal rate.

The Board adopted this paragraph as proposed such that damages for breach of these warranties shall not exceed the consideration received by the paying or returning bank plus finance charges and

expenses related to the returned check, if any. This limits the amount of damages that may be claimed to the dollar value of the returned check plus finance charges and expenses related to the returned check. The Commentary references U.C.C. 4–207(3) to provide courts guidance in interpreting this provision. The official comment 5 to U.C.C. § 4–207(3) indicates that in appropriate cases expenses could include attorneys, fees.

(d) *Tender of defense.* The proposed regulation provided that, if a returning bank is sued for breach of a warranty under this section, it may give a prior returning bank or the paying bank written notice of the litigation, and the bank notified may then give similar notice to any other prior returning bank or the paying bank. If the notice states that the paying or returning bank notified may come in and defend and that if the paying or returning bank notified does not do so, it will, in any action against it by the paying or returning bank giving the notice, be bound by any determination of fact common to the two litigations; then, unless after reasonable receipt of the notice the paying or returning bank notified does come in and defend, it is so bound.

Four commenters commented on this paragraph of the proposed regulation; two commenters supported this provision and two had mixed reactions. The commenters that favored adoption of this paragraph indicated that "seasonable" should be substituted for "reasonable" before "receipt of notice" in the second sentence. The Board corrected the typographical error noted by the commenters.

Both commenters with mixed reactions indicated that under § 229.34, paying and/or returning banks are required to warrant to subsequent returning banks and the depositary bank that the paying bank made a timely return. The commenters believed that this would give the depositary bank and its customer a cause of action against the last returning bank, but that bank may have difficulty obtaining jurisdiction over the paying bank in the same action. The commenters requested clarification of whether the tender of defense provision will be effective against a paying bank in another jurisdiction.

The Board believes that although a depositary bank may bring an action against the last returning bank, the tender of defense provisions will permit claims to be asserted against paying banks.

Section 229.35 Indorsements.

(a) *Indorsement standards.* This paragraph of the proposed regulation required a bank, Federal Reserve Bank, or Federal Home Loan Bank other than a paying bank that handles a check during forward collection or a returned check, to indorse the check according to the indorsement standard provided in Appendix D.

Five hundred fifty-nine commenters commented on the indorsement standard. Five hundred forty-one commenters agreed that an indorsement standard is necessary to expedite the return process; however, 346 commenters expressed concern that the standard as proposed was too rigid. One hundred nineteen commenters indicated that it would be difficult to implement the proposed standard by September 1, 1988, due to the extensive equipment changes required to comply with the technical requirements of the proposed standard. In addition, commenters indicated that the technical modifications required by the proposed indorsement standard were unnecessarily burdensome and would be expensive for the banking industry to implement.

In response to these comments, the Board adopted technical modifications to the proposed indorsement standard to make the standard more flexible and to minimize both the operational and cost effects of the technical requirements of the standard. In making these modifications, Board staff consulted with banks, equipment manufacturers, and check printers to ensure that the modifications adequately addressed the specific concerns raised by the commenters. These modifications were adopted by the Board on April 4, 1988.

After distribution of the indorsement standard adopted by the Board on April 4, 1988, the Board subsequently modified the indorsement standard to delete the reference to avoiding the MICR clear band in the depositary bank indorsement standard. This change was made as a result of telephone inquiries received by Board staff. The reference to avoiding the MICR clear band was adopted from the draft standards currently under review by the American National Standards Institute ("ANSI"). It was discovered that ANSI's intent is to retain this area for future use, but that no current use for this area exists. In order to decrease the burden of complying with the standard, the Board has eliminated reference to avoiding the MICR clear band. If a future use for this area is developed, the Board will consider modifying the standard to avoid the MICR clear band at that time.

(b) *Liability of a bank handling a check.* Section 229.35(b), *"Contract of indorser,"* of the proposed regulation provided that a paying or returning bank makes the contract of indorser and may have the rights of a holder with respect to each returned check it handles. No comments were received on this paragraph.

The paragraph on contract of indorser has been replaced by a new paragraph entitled *"Liability of a bank handling a check."* This paragraph is similar to the corresponding paragraph in the proposal, but it does not incorporate the U.C.C. contract of indorsement.

(c) *Indorsement by a bank.* This paragraph was added because commenters were concerned that the term "pay any bank" commonly used in bank indorsement was not part of the propbsed standard. The "pay any bank" language is intended to limit the transfer of a check to banking channels unless it is returned to the original depositor or a bank takes specific action to transfer the check to a nonbank. This restriction is thought desirable to protect the interests of the depositor or any collecting bank that has a security interest in the check in case the check is lost or stolen and transferred to an innocent party who becomes a holder in due course. In these cases, the restrictive indorsement "pay any bank" gives notice to third parties of potential adverse claims against the check. While the limitation on transfer to banking channels may be desirable, there does not appear to be any need to rely on specific words to accomplish this result. Because banks routinely place restrictive indorsements on the checks they handle, a new paragraph 229.35(c), *"Indorsement by a bank,"* has been added to the final regulation to provide that any bank indorsement would be considered restrictive unless a bank takes specific action otherwise. Thus, third parties would be placed on notice of potential adverse claims by the bank indorsement itself without additional language. Accordingly, "pay any bank" is not part of the standard, and the use of this language in indorsements is discouraged for depositary banks and prohibited for subsequent collecting banks.

(d) *Indorsement for depositary bank.* This paragraph was added to address issues raised by the commenters with regard to who must indorse checks.

Twenty-five commenters expressed concern over who must indorse the checks. Several commenters questioned whether small banks (particularly credit unions) must indorse checks as the depositary bank. They suggested that a small bank be permitted to act as a

corporate depositor and agree with its correspondent to have the correspondent place the correspondent's indorsement on the back of the check as the depositary bank indorsement. This approach could be beneficial to both the depositary bank and returning banks, particularly if the depositary bank wants its returned checks to be delivered to the correspondent. Similar comments were raised with regard to bank holding companies that want the returns destined to their subsidiary banks to go to one location rather than to each subsidiary. This issue also arises in the context of nonproprietary ATMs or lock box arrangements whose operators process checks for which they are not the bank of account.

Because the indorsement standard is being proposed to expedite the return process, the Board believes that the indorsement placed on the check as the depositary bank indorsement should reflect the location where the returned checks and notices of nonpayment under § 229.33 should be directed. If the bank of account agrees with another bank (a correspondent, ATM operator, or lock box operator) to have the other bank accept returns and notices of nonpayment for the bank of account, the indorsement placed on the check as the depositary bank indorsement may be the indorsement of the bank that acts as correspondent, ATM operator, or lock box operator. A paying or returning bank sending a returned check or notice of nonpayment to the bank indorsing the check as the depositary bank in accordance with the regulation will have complied with its expeditious return and notification responsibilities. The bank of account that handles the check but agrees to the placement of another bank's indorsement as the depositary bank may physically indorse the check in an ink color other than purple outside of the area designated for the depositary bank. Otherwise, the bank of account and the bank indorsing as the depositary bank may agree that the bank of account will be responsible for the check without requiring the bank of account to place an indorsement on the check itself.

Section 229.36 Presentment of checks.

(a) *Presentment of checks.* Sixteen commenters commented on the proposed provision that a check payable at or through a paying bank is considered to be drawn on that bank for the purposes of determining the time for return or notice of nonpayment. (The majority of comments on the payable through issue were submitted under § 229.2.) Nineteen respondents opposed the treatment of a payable through bank as a paying bank; three commenters supported the rule; and four had mixed reactions. Twelve commenters specifically stated that payable through drafts should not be subjected to the duties of expeditious return. See the Commentary to § 229.2 for a summary of the Board's action on this issue.

The final rule treats the payable at or through bank as the bank on which the check is drawn for the purposes of the expeditious return and notice of nonpayment under Subpart C, but not for purposes of a payor bank's midnight deadline or wrongful dishonor under the U.C.C.

(b) *Receipt at bank office or processing center.* Fourteen respondents commented on the proposal that a check is considered received by the paying bank when it is received at any branch or head office identified on the check by name without address, at any branch or head office consistent with the name and address on the check, at any address of the bank associated with the routing number on the check, or at a location to which delivery is requested by the paying bank. Commenters were unsure whether this paragraph referred to only the receipt of forward collection checks or to the delivery of returned checks as well. This paragraph governs only the receipt of forward collection checks by the paying bank.

Eight commenters opposed the provision as written, three were in favor, and three had mixed reactions. The commenters opposing this provision cited the need to set a priority for the locations for receipt so that checks are not delivered to any location affiliated with the institution. Three commenters requested that the first priority for receipt be locations identified by the routing number of the paying bank on the check. Three commenters suggested that it be clearly stated that the regulation will override provisions in the U.C.C. which deal with the receipt of presentment.

The Board has modified this paragraph so that receipt at a location to which delivery is requested by the paying bank is the first location defined for presentment. The Commentary also suggests that paying banks, concerned with presentment to specific locations, specify particular addresses on their checks rather than just general addresses or the name of the bank.

(c) *Truncation.* Seven commenters commented on the provision to permit truncation by agreement with the paying bank, given that truncation does not extend the paying bank's time for return. Two commenters supported the provision as written, two were opposed, and three expressed mixed opinions. Two commenters indicated that the definition of truncation is too narrow and should be extended to more than just depositary and collecting banks so that there is a degree of flexibility in potential participants. One commenter cited that truncation would only be effective if aspects of the U.C.C. governing liabilities associated with indorsements, signatures, etc., were changed to encourage the use of truncation.

The Board believes that this paragraph, as proposed, provides flexibility to allow potential participants to implement truncation agreements. Therefore, the Board adopted this paragraph as proposed. The Board plans to continue to evaluate these provisions in the future to determine whether they are adequate to facilitate the development of truncation programs.

(d) *Liability of bank during forward collection.* A new paragraph has been added to provide that settlements during the forward collection process are final when made instead of provisional. This change is consistent with the treatment of settlements for returned checks under § 229.31(c), including the removal of charge-back under that section. It is also consistent with the scheme of the expeditious return system under §§ 229.30(a) and 229.3l(a) under which checks are not returned up the forward collection path. This paragraph also clarifies that this finality of settlement does not affect a bank's liability under certain provisions of the U.C.C.

Section 229.37 Variation by agreement.

A number of commenters asked that the Board include a provision in the final regulation authorizing banks to vary the requirements of the regulation by agreement. They stated that such variations are explicitly authorized by the U.C.C., and that similar authority is needed in this regulation, because many provisions of the regulation relate to U.C.C. requirements.

This section was added to parallel U.C.C. § 4–103(1). The Board emphasizes that agreements varying this subpart that delay the return of a check beyond the times required by this subpart may result in liability under § 229.38 to entities not party to the agreement. This section is consistent with the limits on truncation agreements in § 229.36(c). The Commentary to the regulation includes examples of situations where variation by agreement is permissible. Variation by agreement is not authorized with respect to the requirements of Subpart B of the regulation.

Section 229.38 Liability.

(a) *Standard of care; liability; measure of damages.* The proposed regulation established a standard of care that applies to any bank covered by the requirements of Subpart C and is similar to the standard imposed by U.C.C. §§ 1–203 and 4–103(1). A bank not fulfilling this standard of care is liable to the depositary bank, the owner of the check, or another party to the check. The measure of damages stated was derived from U.C.C. §§ 4–103(5) and 4–202(3). This paragraph also stated that it did not affect a paying bank's liability to its customer. The Board requested specific comment on whether a bank's liability under this paragraph should be limited to the depositary bank and owner of the check.

Ninety-eight commenters commented on this paragraph of the proposed regulation. Among these commenters, 53 generally favored the Board's proposal with technical changes, while 19 had mixed reactions, and 26 opposed this part of the proposal as written. Eighty-seven commenters addressed the issue of whether a bank's liability under this paragraph should be limited to the depositary bank and owner of the check. Forty-five commenters stated that liability should apply to the depositary bank, owner of the check, or another party to the check. On the other hand, 42 commenters indicated that the bank's liability should be limited to the depositary bank and owner of the check.

One commenter indicated that because a bank is liable under the Act and regulation only if it failed to exercise ordinary care or act in good faith, a bank's failure to comply with the requirements of the regulation would not necessarily result in liability. Accordingly, the commenter believed there would be a certain degree of uncertainty for other parties as to whether recovery will be realized against a particular bank that violated the regulation. Moreover, the commenter indicated that losses will be shifted from banks failing to comply with the requirements of the regulation (albeit not in a negligent or bad faith manner) to innocent parties that have fully complied with the regulations.

At the state level, the commenter believed it was important that the Board's regulations be interpreted consistently by the state courts in each state. In this regard, it was suggested that the Board consider including language in the regulation encouraging state courts to certify to the Board issues concerning the interpretation of this regulation. In addition, the Board was encouraged to indicate in the regulation that it is prepared to file, and will file, amicus briefs in state courts to ensure consistent interpretation of its regulation across the country. This commenter believed that such Board involvement in state court proceedings was particularly appropriate, because Subpart C represented a significant new federal overlay applicable to legal relationships previously governed primarily by state law and regulated by state courts.

Another commenter indicated that one of the most critical issues currently facing California banks is the recent influx of "bad faith" suits in which punitive damage awards of, for instance, $20 million have been made as a result of a bank's alleged breach of its "implied warranty of good faith and fair dealing" to its customers. The commenter indicated that the California legislature recently amended California law to slow the pace of similar cases, which represented a true crisis to the California banking community. According to this commenter, California law (Financial Code § 866.4) currently limits banks' liability for failure to comply with California's funds availability laws to actual damages plus additional action and the lesser of $500,000 or one percent of net worth. In view of this information, the commenter made three requests:

(1) That no reference be made anywhere in the regulation to a standard of "good faith," rather, that the negligence, reasonableness and/or due diligence standard be used;

(2) That the regulation state specifically that it does not establish a standard of or otherwise impose an implied or express warranty of good faith and fair dealing not otherwise existing under applicable state law;

(3) That § 229.38 explicitly state that the amount of damages will be subject to applicable state law.

Of those commenters opposed to this section as proposed, one commenter believed that the proposal imposed liability for consequential damages upon a showing of "lack of good faith." The commenter believed that this is different language from that found in U.C.C. § 4–103(5) which requires an affirmative finding of "bad faith" before subjecting a bank to liability for consequential damages and from the language in the Act which provides for such damages only "where there is bad faith." (See section 611(f) of the Act.) The commenter asked if this change in language was intentional and recommended that the language in the regulation parallel that of the Act.

Another commenter believed that an "ordinary care" standard does not provide banks with a clear standard by which they may measure their conduct, and suggested that the Board adopt a "good faith" standard instead. Another commenter indicated that under U.C.C. §§ 1–203 and 4–103(1), standards of care are imposed upon each bank handling the check. This should not change, and liability should be assigned to any bank causing a delay in the handling of the check.

Another commenter indicated that it may be very difficult to comply 100 percent of the time considering the complexities of the Act. Consequently, it was noted that the following questions should be addressed in the regulation or commentary. What will "ordinary care" mean? What will "good faith" mean? If a returned check is lost, how is the determination of whether the bank exercised care made?

Another commenter was concerned that the Federal Reserve may be the responsible party for delaying a returned check and would not be subject to the liability provisions of this section. The Board notes that the Federal Reserve is subject to the same duties and liabilities under the regulation as any returning bank.

One commenter failed to see the need for § 229.38, since the U.C.C. already establishes a standard of care for check return obligation. This standard has been clarified by a large number of judicial decisions. The commenter believed that, by combining this proposed regulation with the expeditious return requirement of Subpart C, an issue of fact will be created in every lawsuit seeking damages under its terms.

Another commenter believed that liability should not be imposed on a bank that misroutes a returned check due to the inaccurate identification of the depositary bank. Another commenter indicated that good faith encoding errors in processing QRCs should not create liability on the part of the bank that encoded the check. Another commenter indicated that "standard of care" should be a responsibility of all institutions involved in the returned check process.

Of those that supported this provision, nine indicated that under the QRC process, a misrouted return is a definite liability of the paying bank and agreed that this liability should extend at the very least to the depositary bank, the depositor, and the issuer of the check. Three commenters indicated that in order to clearly determine the identity of the paying/returning bank that has misencoded a QRC, the bank creating a QRC be required to encode its routing

number on the front of the check. These commenters indicated that liability for actual and direct damages (including court costs and attorneys' fees) should extend to all injured parties. Six other commenters generally agreed that the provisions of paragraph (a) were adequate. Fifteen commenters recommended this paragraph contain a provision similar to the following: "provided the bank had handled the return of an item in a manner consistent with standard industry practices, the fact that the bank has not returned the item in strict accordance with this regulation shall not be deemed to create a presumption that the bank has failed to exercise ordinary care or to act in good faith."

One commenter recommended that the regulation clarify that qualifying banks are responsible for losses caused by delays due to improper qualification. Improper qualification may cause a check to be misrouted, delaying its return to the depositary bank. The commenter suggested that, if the depositary bank shows that the check would have been returned before it released funds but for the delay caused by the improper qualification, the qualifying bank should be held liable for the resulting loss.

Another commenter suggested clarification in that the U.C.C. states that a collecting bank exercises ordinary care if it acts by its midnight deadline. A similar standard should be adopted by this paragraph so that "ordinary care" is not left to interpretation. Likewise, good faith should be tied to the U.C.C. definition of "good faith," which is "honesty in fact." Another commenter supported this paragraph but indicated that it should be limited to the depositary bank and its customer. However, other banks may share in the paying bank's liability if they failed to exercise ordinary care.

Two other commenters suggested that the liability under § 229.38(a) should be restricted to the depositary bank or the owner of the check and that the Commentary be expanded to state that in the fifth sentence the term "notice" in the phrase "for loss or destruction of a check or notice in transit" refers to a notice of nonpayment or notice in lieu of return.

One other commenter suggested that the Board modify this provision so as to discourage litigation by (1) placing the burden of proof on the party seeking to recover; (2) where a party seeks to recover a sum in excess of the amount of the check, establish a high evidentiary standard such as "clear and convincing evidence;" (3) include the U.C.C. definition of "good faith" (i.e., honesty in fact) and emphasize in the commentary that an error in legal judgment, gross negligence, or other circumstances not involving actual dishonesty do not constitute a lack of good faith; (4) identify in the Commentary some of the most prevalent factual circumstances arising in check collection litigation and clarify whether a loss has been incurred and whether such loss is attributable to delayed returns under those circumstances; and (5) clarify that the depositary bank cannot refuse to make full settlement by offsetting alleged losses from alleged late returns against the settlement due.

Another commenter agreed that a bank's liability for failure to use reasonable care in handling a check should apply only in favor of the depositary bank or owner of the check. This would eliminate the requirement to involve intermediary banks in such disputes.

Other commenters questioned how the depositary bank would revoke settlement should a dispute arise when settling directly with a drawee bank when an account relationship did not exist. Another commenter indicated that interpretation and limits of liability to determine "fault" must be considered (e.g., unreadable indorsements). It was suggested that returns delivered in error to a financial institution should be under special consideration.

The Board believes that it is important to the expeditious return requirements of this regulation for banks to be liable for any losses due to their negligence in handling checks. This approach is consistent with the current treatment of collecting bank liability under the U.C.C. The Board also believes that it is important to return the liability for other damages in laws where a bank fails to act in good faith. The Commentary indicates that these standards are derived from U.C.C. standards, and therefore U.C.C. case law will provide guidance in their interpretation. The Board also recognizes that litigation under these standards will often involve complex fact situations and does not believe that it can address the variety of situations that may arise. Nevertheless, the Commentary has been revised in an attempt to clarify a depositary bank's duty to seek recovery from its customer and that a depositary bank is generally not negligent for making funds available to its customer. The Board will monitor developments in liability under this standard to see if future revisions are necessary.

Bona fide errors. Under the proposal, a depositary bank was shielded from liability under this paragraph for a violation of a requirement of this subpart if it could demonstrate, by a preponderance of evidence, that the violation resulted from a bona fide error and that it maintains procedures designed to avoid such errors. An error in legal judgment, however, would not constitute a bona fide error.

Nine commenters commented on this paragraph. Of these, one comment was favorable, three were mixed, and five were opposed to the paragraph as proposed. One commenter suggested that the Board broaden the interpretation of bona fide error recognizing the manual processing and training issues involved in complying with the regulation's requirements. One commenter stated that errors in legal judgment should be included in the definition of bona fide error. Another commenter requested that the Board establish procedures to answer questions via telephone and to promptly respond to written ruling requests concerning Regulation CC and affected Regulation J provisions because banks are not shielded from errors in legal judgment.

Another commenter questioned the applicability of the bona fide errors provisions to Federal Reserve Banks, given the fact that the Act limits this shield to depository institutions. One commenter stated that this provision was somewhat unclear and confusing, and suggested that it should describe the liability for bank errors or omissions in each case covered by Subpart C, particularly the liability of a bank for failure to properly indorse a check. One commenter recommended that this provision be deleted from the final rule.

On further review, the Board believes that the bona fide error provision is not necessary under Subpart C, as the standards for negligence liability incorporate the purpose of the bona fide error provision. Therefore, the Board has deleted this provision from the final regulation.

(b) *Paying bank's failure to make timely return.* Section 229.30(a) of the proposed regulation imposed requirements on the paying bank for expeditious return of a check and left in place the U.C.C. time limits, which may allow return at a different time. This paragraph clarified that the paying bank could be liable for failure to meet either standard but not for failure to meet both.

Eight commenters commented on this paragraph of the Board's proposal. Five commenters favored the proposal as written, and three commenters suggested clarifications to the proposal. One commenter indicated that this paragraph should be clarified to ensure that litigants may plead in the

alternative under both the U.C.C. and the Board's regulation.

Another commenter indicated that under current laws, the definition of late return is explicit. The proposed regulation removed the standards for judging what constituted a late return. The commenter believed that disputes over expeditious return and late returns are inevitable and suggested that the Board clarify this definition in the final regulation and/or Commentary. One other commenter questioned the liability of other returning banks when holding a returned check causes the returned check to be late. The Board notes that the current U.C.C. midnight deadline requirement is explicit only in the case of paying banks.

Of those generally supporting this paragraph as proposed, two commenters favored a charge-back to the customer's account even if the returned check is not returned timely, upon receipt of the physical check or a copy. One commenter recommended that the proposed regulation be amended to authorize a check of $2,500 or more be charged back against the reserve account of the drawee bank, if a depositary bank submits an affidavit proving this loss was a result of failure to receive a notice, if such notice as now required by Regulation J was not given by the drawee bank. The Board believes that automatic charge-back would be inappropriate, because the determination of liability would involve the review of the facts of each case.

This paragraph is designed to shield a bank from double liability under the U.C.C. and this regulation for a single error. It has been adopted substantially as proposed.

(c) *Comparative negligence.* This paragraph of the proposed regulation established a "pure" comparative negligence standard for liability under Subpart C of the regulation. This comparative negligence rule may have particular application where a paying or returning bank delays returning a check because of difficulty in identifying the depositary bank. Nine commenters commented on this paragraph. Of those that commented, three were opposed, five had mixed reactions, and one commenter supported this paragraph as proposed.

Of those opposed, one commenter indicated that this rule created a nightmare in resolving disputes. For example, if a bank returned a returned check late and the depositary bank suffered a loss, the depositary bank would make claim on the paying bank for a late return. The paying bank would invariably claim that the depositary bank was negligent in allowing its customer to withdraw the money and, therefore, the paying bank would not be liable for the late return. In essence, the commenter believed that this proposed comparative negligence section introduced an alien "personal injury" concept into the laws governing commercial paper, bank deposits, and collections.

Another commenter indicated that the Board was circumspect in exercising its authority by proposing such a comparative negligence rule, and only time will tell how the adoption of the comparative negligence doctrine will affect predictability, speedy dispute resolution, and efficiency in the check collection system. One other commenter believed the comparative negligence standard is unworkable as it eliminated the clear framework of liability, which characterizes the current system. The commenter indicated that rather than help resolve disputes, comparative negligence will result in the introduction of too many variables to enable resolution without costly litigation. The commenter believed that the prevailing party in any dispute under this paragraph should be entitled to both costs and reasonable attorneys, fees.

One commenter stated that the concept of comparative negligence, if applied in all instances, will result in much needless litigation between banks with the attendant costs and delays involved in adversary proceedings. This commenter suggested that losses of $5,000 or less resulting from indorsement, returned check, or notice problems be shared equally by the banks handling a returned check, and allocation of losses exceeding $5,000 be determined by a comparative negligence standard. Another commenter indicated that it was unclear how the comparative negligence and "bona fide errors" provisions interrelate.

Another commenter indicated that it would be difficult to determine when a returned check was late. The commenter questioned whether a paying or returning bank must establish proof that a returned check was qualified, delayed by research for a routing number, sent on a courier after midnight, or held for two days as a small-dollar item. It was suggested that the Federal Reserve set a standard for reasonableness on claims of late returns to better manage potential disputes.

One commenter suggested that the Board undertake a thorough analysis of the comparative negligence standard in cooperation with the National Conference of Commissioners on Uniform State Law before adoption of this provision. One commenter agreed that comparative negligence is a fair standard which is generally used today in settlements, although the commenter foresaw possible problems in determining percentages of negligence and bad faith.

Today, under a general negligence standard, a party may not be liable if the other party was negligent; therefore comparative negligence is not a new concept in commercial law. The Board believes that a comparative negligence standard equitably balances the interests of all parties, and provides greater incentives for compliance with the requirements of this subpart, particularly the indorsement standards. Therefore, the Board adopted this paragraph of the regulation as proposed.

(d) *Responsibility for back of check.* This paragraph was added to clarify the responsibility for damages under paragraph (a) when the condition of the back of the check adversely affects the ability of a bank to indorse the check legibly in accordance with § 229.35.

(e) *Timeliness of action.* This paragraph incorporated the standard of U.C.C. § 4–108(2) with the addition of "failure of equipment" and "interruption of computer facilities" as causes of delay. Seventeen commenters commented on this portion of the proposed regulation. Of these, one commenter supported, and 16 opposed, this paragraph as proposed. Commenters opposed to this provision indicated that the causes of delay for "equipment failure" and "interruption of computer facilities" are too vague and requested that more specific definitions be provided in the Commentary in order to prevent abuses.

The Board adopted this paragraph of the regulation essentially as proposed. No examples were included in the Commentary concerning equipment failures because to do so might have the effect of establishing equipment standards for the banking industry and would therefore be beyond the scope of the original proposal.

(f) *Exclusion.* This paragraph of the proposed regulation provided that the civil liability and class action provisions, particularly the punitive damage provisions of sections 611(a) and 611(b) of the Act (12 U.S.C. 4010 (a) and (b)) do not apply to regulatory provisions adopted to improve the efficiency of the payments mechanism. Two commenters commented on this paragraph—one favored and one opposed. The Board revised this paragraph to exclude the bona fide error provisions of the Act from Subpart C.

(g) *Jurisdiction.* The proposed regulation provided for the jurisdiction and statute of limitations for civil

actions for violations of this subpart. Four commenters commented on this paragraph. Two supported the paragraph as proposed, and two had mixed reactions to the proposal.

One commenter questioned whether it was appropriate to use the limited resources of the federal courts to resolve disputes concerning small-dollar checks. Another commenter believed that this provision indicated that any action "may" be brought within one year. If the intent is to preclude any action brought after one year, the commenter preferred to remove any ambiguity by stating that no action *shall* be brought after one year. The commenter was also concerned that the provision made no exception for cross claims and third-party claims, which are prevalent in check collection litigation. The commenter indicated that in view of the warranty and comparative negligence provisions contained in the proposed regulation, it appears that the defendant in an action brought under § 229.38 should have an additional 60 to 90 days to bring in a third party or file an independent action, after the defendant is served.

One commenter supporting this paragraph indicated that it would be helpful if the Board clarified jurisdiction (or the lack thereof) and whether the appropriate long-arm statute is applicable. In addition, it was recommended that, to the extent already not incorporated, the exceptions to providing notice of dishonor found in U.C.C. § 3–511 apply under the regulation as well (i.e., check return rules, notice of nonpayment).

This paragraph was revised to refer to action under this subpart instead of this section in order to include actions brought under other sections of this subpart such as § 229.35(b). The Commentary has been revised to clarify that this paragraph covers subject matter jurisdiction.

(h) *Reliance on Board rulings.* This paragraph of the proposed regulation shielded banks from civil liability if they act in good faith in reliance on any rule, regulation, or interpretation of the Board, even if it were subsequently determined to be invalid. In addition to the regulation, banks may also rely on the Commentary of this regulation, which will be issued as an official Board interpretation. One commenter commented in support of this paragraph. The Board adopted this paragraph essentially as proposed.

Section 229.39 Insolvency of bank.

Two respondents commented on this provision of the proposed regulation dealing with instances in which banks fail without having made final settlement for checks. One comment supported the provision. One commenter opposed this rule, citing doubt as to whether the Federal Reserve Board has the right to preempt federal statutes on the insolvency of banks.

The Board believes that this provision is consistent with the Board's authority to regulate the check collection system under the Act. Therefore, the Board has adopted this section essentially as proposed. The Commentary to this section has been expanded to clarify its operation.

Section 229.40 Effect of merger transaction.

Several commenters stated that it would be extremely difficult to comply with certain requirements of the regulation for a period of time following a merger or acquisition of a bank. These difficulties arise from having to treat the banks that have merged as one entity before the operations of the banks have been consolidated. This section has been added to the regulation to provide a one-year transition period for merged/acquired banks, during which they may be treated as separate banks.

Section 229.41 Relation to state law.

This section of the proposed regulation specified that state law relating to the collection of checks would be preempted to the extent that it is inconsistent with this regulation. Thus, the proposed regulation was not a complete replacement for state laws relating to the collection or return of checks. Sixteen commenters commented on this section.

Of these, 14 supported this section as proposed with suggestions for clarification and/or modification, while two of the commenters opposed the proposed section. Five commenters urged that the regulation and/or Commentary define explicitly those provisions of the U.C.C. that are preempted and those that are not.

One commenter suggested that this section include a standard defining the extent to which any "inconsistency" must exist before it is deemed preempted, which would include examples and descriptions of such inconsistencies. Of specific concern was the interrelationship between the accountability rules under the U.C.C. and the liability rules under the proposed regulation. In addition, two commenters suggested that the procedures applied in Subpart B to resolve inconsistencies between the proposed regulation, the U.C.C., and other state laws should be equally applicable to issues arising in this subpart. One commenter opposed to the proposed section suggested that the Board examine the laws of each state for conflicts with the regulation and encourage respective state legislators to change the laws and/or ensure that banks within each state are aware of any inconsistencies.

One commenter suggested that, once the regulation is implemented, the Board seriously consider consolidating Regulation CC, Regulation J, and the U.C.C. into one comprehensive regulation governing check collection and return, seeking input from banking, consumer, and other interested groups, such as the National Conference of Commissioners on Uniform State Law.

The Board believes that the preemption determination procedures established in § 229.20 with respect to Subpart B requirements are not warranted with respect to state law determinations under Subpart C, because this subpart does not impose punitive damages for violations in contrast to the liability provisions of Subpart B. The Commentary to the various sections of this subpart generally address the relation between these requirements and provisions of the U.C.C.

Section 229.42 Exclusions.

This section of the proposed regulation specified that checks drawn upon the account of the United States Treasury, or indorsed by the Treasury, and U.S. Postal Service money orders are excluded from the coverage of the expeditious return requirements of Subpart C of this regulation. Twenty-six commenters commented on this section of the proposed regulation. Twenty-two commenters opposed and four supported the section as proposed.

The majority (16) of commenters opposed to this provision stated that it is not appropriate to exclude checks drawn on the U.S. Treasury, checks indorsed by or to the credit of the U.S. Treasury, or U.S. Postal Service money orders from the expeditious return requirements of this subpart. One commenter believed that government checks should have the same statute of limitations as other checks for returns due to indorsement problems, etc. In addition, several other commenters indicated that government entities whose checks must be made available in one day should be required to comply with all provisions of Subpart C as well as the midnight deadline of the U.C.C., or be given the same availability as nonlocal checks, because under the regulation such checks represent potentially the greatest risk to banks.

Other commenters suggested that there should be no differentiation between the rules applicable to Treasury checks, cashier's checks, certified checks, and teller's checks, and that the issuers of any of these checks should be required to provide notice to the depositary bank of the pending return. One commenter suggested that all governmental entities (city, local, state, and federal) be required to comply with the expeditious return rules contained in this subpart. The Board did not subject Treasury checks to the expeditious return requirements, due to the fact that return of these checks is currently subject to Treasury rules rather than the U.C.C. midnight deadline requirement applicable to the return of checks. The Board has also excluded checks drawn on a state or unit of general local government that are not payable through or at a bank from the expeditious return and notice of nonpayment requirements of Subpart C, because the Board's authority under the Act to regulate these checks is not clear.

Three commenters stated that depositary banks that do not hold transaction accounts should also be excluded from the Subpart C requirements. These banks, however, would not be subject to the expeditious return or notice of nonpayment requirements, since they do not act as a paying bank.

At the request of the U.S. Treasury, the Board eliminated the exclusion for checks indorsed to or for credit to the account of the U.S. Treasury.

Inquiry to Paying Bank. The proposed regulation required paying banks to respond promptly to a telephone or telegraph inquiry from a depositary bank with respect to whether a cashier's or certified check drawn upon it had been issued, certified, or payment stopped thereon, or whether the check had been paid, returned or notice of nonpayment given, and confirm information on the face of the check including the amount and payee. With respect to a teller's check, the proposed regulation required the drawing bank to respond to such an inquiry. Under the proposal, the paying or drawing bank did not guarantee payment of the check by responding to an inquiry.

A total of 310 commenters responded to this section of the proposed regulation. One hundred ninety-three favored the concept of requiring paying banks to respond to inquiries but suggested certain conditions and modifications. Fifty commenters indicated mixed reactions to this provision, and 67 commenters generally opposed this section as unworkable operationally. Specifically, 78 commenters indicated that the provision would not protect depositary banks completely because many forgeries and counterfeits would go undetected. In addition, if a stop payment was issued after the inquiry had been made, the depositary bank would be unaware of that fact. Furthermore, depositary banks would not know where to direct the inquiry within the paying bank to obtain reliable information, or may not be able to contact or receive a response from the paying bank within a reasonable time. Twenty-five commenters recommended that issuers of cashier's, certified, and teller's checks be required to print a telephone number on the face of the check and require all verification inquiries to be directed to that specific telephone number.

Sixty-one commenters were also concerned that differing time zones and the requirement that cashier's, certified, and teller's check proceeds be made available at the opening of business on the day after deposit may result in the depositary bank making funds available before it had the opportunity to contact the paying bank and obtain a response. Seventy-nine commenters further indicated that the information provided by the paying bank should not be guaranteed because of problems with recordkeeping and proof, and because telephone messages are too unreliable. Fifty commenters indicated that having access to reliable information at the paying bank may be difficult because many banks do not have the sophisticated systems necessary to centralize all information from branches that issue cashier's, certified, or teller's checks. Designing and implementing such a system could be very expensive and many banks could not do it by September 1, 1988. On the other hand, several other commenters indicated that currently such systems are maintained and could be expanded to meet this requirement.

Because a significant number of banks would have difficulty complying with this inquiry requirement by September 1, 1988, the Board eliminated this provision from the regulation. The Board expects that many banks will respond to inquiries absent a regulatory requirement to do so. The Board may consider, however, adopting this or a similar provision at a later date.

Final Regulatory Flexibility Analysis. Of the items required to be contained in a final regulatory flexibility analysis by 5 U.S.C. 604(a), the first (a statement of the need for and objectives of the rule) and second (a summary of the issues raised by the commenters, the Board's assessment of the issues, and the changes made to the proposed rule in response to the comments) are contained elsewhere in this preamble.

The third item required for a final regulatory flexibility analysis is a description of significant alternatives to the rule consistent with the objectives of applicable statutes and designed to minimize any significant economic effect of the rule on small entities considered by the Board, and why these alternatives were rejected. In the initial regulatory flexibility analysis, which was published with the proposal (52 FR 47112, 47148 (Dec. 11, 1987)), the Board noted that it had considered exempting very small banks, those that fall below the threshold for filing reports of deposit under the Board's Regulation D (12 CFR Part 204), from Regulation CC's requirements, but did not do so because the availability schedules (which by statute apply to all banks regardless of size) and the expeditious return requirements could be made to work only if all banks were subjected to the same rules.

Of all the comments received, only 20 mentioned the burden on small banks. These commenters, however, did not offer any significant alternatives other than to suggest that the Board exempt small banks from the regulation. As noted previously, the Board had considered this approach and rejected it. No commenters specifically addressed the difficulties in exempting small banks identified by the Board in the initial regulatory flexibility analysis: that the Act does not provide any exemptions for small banks from its availability and disclosure requirements; in order to minimize the risks to all banks (large and small) that must make funds available to their customers according to these expedited schedules, all paying banks, regardless of size, must be subjected to the expedited return provisions of Subpart C. Exemption of small banks from the expeditious return requirements would mean that small banks would be permitted to continue to use inefficient manual processing of returns. When this inefficient return process is combined with the expedited availability mandated by the Act, the result could be increased losses for banks that accept for deposit checks drawn on small banks. Accordingly, the Board has determined to implement Regulation CC without any exemption for small banks.

The Board notes that some very small institutions, especially credit unions, do not maintain accounts as that term is defined in Regulation CC. These institutions are not subject to the expedited availability and disclosure requirements of the Act or of the

regulation. Further, any institution that does not offer accounts subject to check or draft (again, primarily small credit unions) would not be subject to the expeditious return requirements of Subpart C of the regulation. Finally, the Act provides relief to certain credit unions, generally those that are small and lack sophisticated operations, from certain interest accrual requirements.

A number of small businesses other than banks requested that the Board specifically address the effect of its proposed indorsement standard on small businesses that use or make checks with a carbon band. This issue was addressed in the final regulatory flexibility analysis that accompanied the Board's adoption of the indorsement standard in April. (53 FR 11832, 11836 (Apr. 11, 1988).)

Paperwork Reduction Act Notice. The Board has submitted the disclosure requirements and model forms of Regulation CC to the Office of Management and Budget (OMB) for clearance under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) and OMB's regulation on Controlling Paperwork Burdens on the Public (5 CFR Part 1320). (OMB Docket number: 7100–0234.)

A detailed description of the disclosure requirements, including why the Board has adopted them, the institutions that will be subject to them, and how frequently disclosures will be required, is contained elsewhere in this notice. The model forms are set forth in Appendix C to Regulation CC.

The Board estimates that the disclosure requirement will result in a one-time reporting burden of 3.2 million hours and an annual reporting burden of 2.3 million hours for all institutions subject to the requirements. State member banks and other institutions subject to the Board's jurisdiction under § 229.3 will incur a reporting burden of approximately 375,000 hours (one-time) and 218,000 hours (annual); the balance of the reporting burden will be included in the information collection budgets of the other agencies identified in § 229.3 of Regulation CC in proportion to the burden associated with the institutions subject to their jurisdiction.

List of Subjects in 12 CFR Part 229

Banks, Banking, Federal Reserve System.

For the reasons set out in the preamble, effective September 1, 1988, Title 12, Chapter II, Part 229 of the Code of Federal Regulations is revised to read as follows:

PART 229—AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS

Subpart A—General

229.1 Authority and purpose; organization.
229.2 Definitions.
229.3 Administrative enforcement.

Subpart B—Availability of Funds and Disclosure of Funds Availability Policies

229.10 Next-day availability.
229.11 Temporary availability schedule.
229.12 Permanent availability schedule.
229.13 Exceptions.
229.14 Payment of interest.
229.15 General disclosure requirements.
229.16 Specific availability policy disclosure.
229.17 Initial disclosures.
229.18 Additional disclosure requirements.
229.19 Miscellaneous.
229.20 Relation to state law.
229.21 Civil liability.

Subpart C—Collection of Checks

229.30 Paying bank's responsibility for return of checks.
229.31 Returning bank's responsibility for return of checks.
229.32 Depositary bank's responsibility for returned checks.
229.33 Notice of nonpayment.
229.34 Warranties by paying bank and returning bank.
229.35 Indorsements.
229.36 Presentment of checks.
229.37 Variation by agreement.
229.38 Liability.
229.39 Insolvency of bank.
229.40 Effect of merger transaction.
229.41 Relation to state law.
229.42 Exclusions.
Appendix A—Routing Number Guide to Local Checks and Certain Checks That Are Subject to Next-Day Availability.
Appendix B–1—Reduction of Schedules for Certain Nonlocal Checks Under the Temporary Schedule.
Appendix B–2—Reduction of Schedules for Certain Nonlocal Checks Under the Permanent Schedule.
Appendix C—Model Forms, Clauses, and Notices.
Appendix D—Indorsement Standards.
Appendix E—Commentary.

Authority: Title VI of Pub. L. 100–86, 101 Stat. 552, 635, 12 U.S.C. 4001 et seq.

Subpart A—General

§ 229.1 Authority and purpose; organization.

(a) *Authority and purpose.* This part (Regulation CC; 12 CFR Part 229) is issued by the Board of Governors of the Federal Reserve System ("Board") to implement the Expedited Funds Availability Act ("Act"), which is contained in Title VI of Pub. L. 100–86.

(b) *Organization.* This part is divided into subparts and appendices as follows—

(1) Subpart A contains general information. It sets forth—

(i) The authority, purpose, and organization;

(ii) Definition of terms; and

(iii) Authority for administrative enforcement of this part's provisions.

(2) Subpart B of this part contains rules regarding the duty of banks to make funds deposited into accounts available for withdrawal, including both temporary and permanent availability schedules. Subpart B of this part also contains rules regarding exceptions to the schedules, disclosure of funds availability policies, payment of interest, liability of banks for failure to comply with Subpart B of this part, and other matters.

(3) Subpart C of this part contains rules to expedite the collection and return of checks by banks. These rules cover the direct return of checks, the manner in which the paying bank and returning banks must return checks to the depositary bank, notification of nonpayment by the paying bank, rules regarding indorsement and presentment, the liability of banks for failure to comply with Subpart C of this part, and other matters.

§ 229.2 Definitions.

As used in this part, unless the context requires otherwise:

(a) "Account" means a deposit as defined in 12 CFR 204.2(a)(1)(i) that is a transaction account as described in 12 CFR 204.2(e). As defined in these sections, "account" generally includes accounts at a bank from which the account holder is permitted to make transfers or withdrawals by negotiable or transferable instrument, payment order of withdrawal, telephone transfer, electronic payment, or other similar means for the purpose of making payments or transfers to third persons or others. "Account" also includes accounts at a bank from which the account holder may make third party payments at an ATM, remote service unit, or other electronic device, including by debit card, but the term does not include savings deposits or accounts described in 12 CFR 204.2(d)(2) even though such accounts permit third party transfers. An account may be in the form of—

(1) A demand deposit account,

(2) A negotiable order of withdrawal account,

(3) A share draft account,

(4) An automatic transfer account, or

(5) Any other transaction account described in 12 CFR 204.2(e).

"Account" does not include an account where the account holder is a bank, where the account holder is an office of an institution described in

paragraphs (e)(1) through (e)(6) of this section or an office of a "foreign bank" as defined in section 1(b) of the International Banking Act (12 U.S.C. 3101) that is located outside the United States, or where the direct or indirect account holder is the Treasury of the United States.

(b) "Automated clearinghouse" or "ACH" means a facility that processes debit and credit transfers under rules established by a Federal Reserve Bank operating circular on automated clearinghouse items or under rules of an automated clearinghouse association.

(c) "Automated teller machine" or "ATM" means an electronic device at which a natural person may make deposits to an account by cash or check and perform other account transactions.

(d) "Available for withdrawal" with respect to funds deposited means available for all uses generally permitted to the customer for actually and finally collected funds under the bank's account agreement or policies, such as for payment of checks drawn on the account, certification of checks drawn on the account, electronic payments, withdrawals by cash, and transfers between accounts.

(e) "Bank" means—

(1) An "insured bank" as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or a bank that is eligible to apply to become an insured bank under section 5 of that Act (12 U.S.C. 1815);

(2) A "mutual savings bank" as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(3) A "savings bank" as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(4) An "insured credit union" as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) or a credit union that is eligible to make application to become an insured credit union under section 201 of that Act (12 U.S.C. 1781);

(5) A "member" as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422);

(6) An "insured institution" as defined in section 401 of the National Housing Act (12 U.S.C. 1724) or an institution that is eligible to make application to become an insured institution under section 403 of that Act (12 U.S.C. 1726); or

(7) A "branch" of a "foreign bank" as defined in section 1(b) of the International Banking Act (12 U.S.C. 3101).

For purposes of Subpart C and, in connection therewith, Subpart A, the term "bank" also includes any person engaged in the business of banking, including a Federal Reserve Bank, a Federal Home Loan Bank, and a state or unit of general local government to the extent that the state or unit of general local government acts as a paying bank. Unless otherwise specified, the term "bank" includes all of a bank's offices in the United States, but not offices located outside the United States.

(f) "Banking day" means that part of any business day on which an office of a bank is open to the public for carrying on substantially all of its banking functions.

(g) "Business day" means a calendar day other than a Saturday or a Sunday, January 1, the third Monday in January, the third Monday in February, the last Monday in May, July 4, the first Monday in September, the second Monday in October, November 11, the fourth Thursday in November, or December 25. If January 1, July 4, November 11, or December 25 fall on a Sunday, the next Monday is not a business day.

(h) "Cash" means United States coins and currency.

(i) "Cashier's check" means a check that is—

(1) Drawn on a bank;

(2) Signed by an officer or employee of the bank on behalf of the bank as drawer;

(3) A direct obligation of the bank; and

(4) Provided to a customer of the bank or acquired from the bank for remittance purposes.

(j) "Certified check" means a check with respect to which the drawee bank certifies by signature on the check of an officer or other authorized employee of the bank that—

(1) (i) The signature of the drawer on the check is genuine; and

(ii) The bank has set aside funds that—

(A) Are equal to the amount of the check, and

(B) Will be used to pay the check; or

(2) The bank will pay the check upon presentment.

(k) "Check" means—

(1) A negotiable demand draft drawn on or payable through or at an office of a bank;

(2) A negotiable demand draft drawn on a Federal Reserve Bank or a Federal Home Loan Bank;

(3) A negotiable demand draft drawn on the Treasury of the United States;

(4) A demand draft drawn on a state government or unit of general local government that is not payable through or at a bank;

(5) A United States Postal Service money order; or

(6) A traveler's check drawn on or payable through or at a bank.

The term "check" does not include a noncash item or an item payable in a medium other than United States money. A draft may be a "check" even though it is described on its face by another term, such as "money order." For purposes of Subpart C, and in connection therewith, Subpart A, of this part, the term "check" also includes a demand draft of the type described above that is nonnegotiable.

(l) "Check clearinghouse association" means any arrangement by which three or more participants exchange checks on a local basis, including an entire metropolitan area. The term "check clearinghouse association" may include arrangements using the premises of a Federal Reserve Bank, but it does not include the handling of checks for forward collection or return by a Federal Reserve Bank.

(m) "Check processing region" means the geographical area served by an office of a Federal Reserve Bank for purposes of its check processing activities.

(n) "Consumer account" means any account used primarily for personal, family, or household purposes.

(o) "Depositary bank" means the first bank to which a check is transferred even though it is also the paying bank or the payee. A check deposited in an account is deemed to be transferred to the bank holding the account into which the check is deposited, even though the check is physically received and indorsed first by another bank.

(p) "Electronic payment" means a wire transfer or an ACH credit transfer.

(q) "Forward collection" means the process by which a bank sends a check on a cash basis to the paying bank for payment.

(r) "Local check" means a check drawn on or payable through or at a local paying bank. A depositary bank may rely on the routing number that appears on a check in magnetic ink to determine whether a check is a local check if the check is sent for payment or collection based on the routing number.

(s) "Local paying bank" means a paying bank to which a check is sent for payment or collection that is located in the same check processing region as the physical location of—

(1) The branch or proprietary ATM of the depositary bank in which that check was deposited; or

(2) Both the branch of the depositary bank at which the account is held and the nonproprietary ATM at which the check is deposited.

(t) "Merger transaction" means—

(1) A merger or consolidation of two or more banks; or

(2) The transfer of substantially all of the assets of one or more banks or branches to another bank in consideration of the assumption by the acquiring bank of substantially all of the liabilities of the transferring banks, including the deposit liabilities.

(u) "Noncash item" means an item that would otherwise be a check, except that—

(1) A passbook, certificate, or other document is attached;

(2) It is accompanied by special instructions, such as a request for special advice of payment or dishonor;

(3) It consists of more than a single thickness of paper, except a check that qualifies for handling by automated check processing equipment; or

(4) It has not been preprinted or post-encoded in magnetic ink with the routing number of the paying bank.

(v) "Nonlocal check" means a check payable by, through, or at a nonlocal paying bank.

(w) "Nonlocal paying bank" means a paying bank that is not a local paying bank with respect to the depositary bank.

(x) "Nonproprietary ATM" means an ATM that is not a proprietary ATM.

(y) "Participant" means a bank that—

(1) Is located in the geographic area served by a check clearinghouse association; and

(2) Both collects and receives for payment checks through the check clearinghouse association either directly or through another participant.

(z) "Paying bank" means—

(1) The bank by which a check is payable, unless the check is payable at or through another bank and is sent to the other bank for payment or collection;

(2) The bank at or through which a check is payable and to which it is sent for payment or collection;

(3) The bank whose routing number appears on a check in magnetic ink or in fractional form and to which the check is sent for payment or collection;

(4) The Federal Reserve Bank or Federal Home Loan Bank by which a check is payable; or

(5) The state or unit of general local government on which a check is drawn.

(aa) "Proprietary ATM" means an ATM that is—

(1) Owned or operated by, or operated exclusively for, the depositary bank;

(2) Located on the premises (including the outside wall) of the depositary bank; or

(3) Located within 50 feet of the premises of the depositary bank, and not identified as being owned or operated by another entity.

If more than one bank meets the owned or operated criterion of paragraph (aa)(1) of this section, the ATM is considered proprietary to the bank that operates it.

(bb) "Qualified returned check" means a returned check that is prepared for automated return to the depositary bank by placing the check in a carrier envelope or placing a strip on the check and encoding the strip or envelope in magnetic ink. A qualified returned check need not contain other elements of a check drawn on the depositary bank, such as the name of the depositary bank.

(cc) "Returning bank" means a bank (other than the paying or depositary bank) handling a returned check or notice in lieu of return. A returning bank is also a collecting bank for the purpose of U.C.C. 4–202 (1)(e) and (2).

(dd) "Routing number" means—

(1) The number printed on the face of a check in fractional form or in nine-digit form that identifies a paying bank; or

(2) The number in a bank's indorsement in fractional or nine-digit form.

(ee) "Similarly situated bank" means a bank of similar size, located in the same community, and with similar check handling activities as the paying bank or returning bank.

(ff) "State" means a state, the District of Columbia, Puerto Rico, or the U.S. Virgin Islands.

(gg) "Teller's check" means a check provided to a customer of a bank or acquired from a bank for remittance purposes, that is drawn by the bank, and drawn on another bank or payable through or at a bank.

(hh) "Traveler's check" means an instrument for the payment of money that—

(1) Is drawn on or payable through or at a bank;

(2) Is designated on its face by the term "traveler's check" or by any substantially similar term or is commonly known and marketed as a traveler's check by a corporation or bank that is an issuer of traveler's checks;

(3) Provides for a specimen signature of the purchaser to be completed at the time of purchase; and

(4) Provides for a countersignature of the purchaser to be completed at the time of negotiation.

(ii) "Uniform Commercial Code," "Code," or "U.C.C." means the Uniform Commercial Code as adopted in a state.

(jj) "United States" means the states, including the District of Columbia, the U.S. Virgin Islands, and Puerto Rico.

(kk) "Unit of general local government" means any city, county, parish, town, township, village, or other general purpose political subdivision of a state. The term does not include special purpose units of government, such as school districts or water districts.

(ll) "Wire transfer" means an unconditional order to a bank to pay a fixed or determinable amount of money to a beneficiary upon receipt or on a day stated in the order, that is transmitted by electronic or other means through the Federal Reserve Communications System, the New York Clearing House Interbank Payments System, other similar network, between banks, or on the books of a bank. "Wire transfer" does not include an electronic fund transfer as defined in section 902(f) of the Electronic Fund Transfer Act (15 U.S.C. 1693a(6)).

(mm) Unless the context requires otherwise, the terms not defined in this section have the meanings set forth in the U.C.C.

§ 229.3 Administrative enforcement.

(a) *Enforcement agencies.* Compliance with this part is enforced under—

(1) Section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) in the case of—

(i) National banks by the Comptroller of the Currency;

(ii) Member banks of the Federal Reserve System (other than national banks) by the Board; and

(iii) Banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) Section 5(d) of the Home Owners Loan Act of 1933 (12 U.S.C. 1464(d)), section 407 of the National Housing Act (12 U.S.C. 1730), and section 17 of the Federal Home Loan Bank Act (12 U.S.C. 1437), by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation) in the case of any institution subject to those provisions; and

(3) The Federal Credit Union Act (12 U.S.C. 1751 et seq.) by the National Credit Union Administration Board with respect to any federal credit union or credit union insured by the National Credit Union Share Insurance Fund.

(b) *Additional powers.* (1) For the purposes of the exercise by any agency referred to in paragraph (a) of this section of its powers under any statute referred to in that paragraph, a violation of any requirement imposed under the Act is deemed to be a violation of a requirement imposed under that statute.

(2) In addition to its powers under any provision of law specifically referred to

in paragraph (a) of this section, each of the agencies referred to in that paragraph may exercise, for purposes of enforcing compliance with any requirement imposed under this part, any other authority conferred on it by law.

(c) *Enforcement by the Board.* (1) Except to the extent that enforcement of the requirements imposed under this part is specifically committed to some other government agency, the Board shall enforce such requirements.

(2) If the Board determines that—

(i) Any bank that is not a bank described in paragraph (a) of this section; or

(ii) Any other person subject to the authority of the Board under the Act and this part,

has failed to comply with any requirement imposed by this part, the Board may issue an order prohibiting any bank, any Federal Reserve Bank, or any other person subject to the authority of the Board from engaging in any activity or transaction that directly or indirectly involves such noncomplying bank or person (including any activity or transaction involving the receipt, payment, collection, and clearing of checks, and any related function of the payment system with respect to checks).

Subpart B—Availability of Funds and Disclosure of Funds Availability Policies

§ 229.10 Next-day availability.

(a) *Cash deposits.* (1) A bank shall make funds deposited in an account by cash available for withdrawal not later than the business day after the banking day on which the cash is deposited, if the deposit is made in person to an employee of the depositary bank.

(2) A bank shall make funds deposited in an account by cash available for withdrawal not later than the second business day after the banking day on which the cash is deposited, if the deposit is not made in person to an employee of the depositary bank.

(b) *Electronic payments.*—(1) *In general.* A bank shall make funds received for deposit in an account by an electronic payment available for withdrawal not later than the business day after the banking day on which the bank received the electronic payment.

(2) *When an electronic payment is received.* An electronic payment is received when the bank receiving the payment has received both—

(i) Payment in actually and finally collected funds; and

(ii) Information on the account and amount to be credited.

A bank receives an electronic payment only to the extent that the bank has received payment in actually and finally collected funds.

(c) *Certain check deposits.*—(1) *General rule.* A depositary bank shall make funds deposited in an account by check available for withdrawal not later than the business day after the banking day on which the funds are deposited, in the case of—

(i) A check drawn on the Treasury of the United States and deposited in an account held by a payee of the check;

(ii) A U.S. Postal Service money order deposited—

(A) In an account held by a payee of the money order; and

(B) In person to an employee of the depositary bank.

(iii) A check drawn on a Federal Reserve Bank or Federal Home Loan Bank and deposited—

(A) In an account held by a payee of the check; and

(B) In person to an employee of the depositary bank;

(iv) A check drawn by a state or a unit of general local government and deposited—

(A) In an account held by a payee of the check;

(B) In a depositary bank located in the state that issued the check, or the same state as the unit of general local government that issued the check;

(C) In person to an employee of the depositary bank; and

(D) With a special deposit slip or deposit envelope, if such slip or envelope is required by the depositary bank under paragraph (c)(3) of this section.

(v) A cashier's, certified, or teller's check deposited—

(A) In an account held by a payee of the check;

(B) In person to an employee of the depositary bank; and

(C) With a special deposit slip or deposit envelope, if such slip or envelope is required by the depositary bank under paragraph (c)(3) of this section.

(vi) A check deposited in a branch of the depositary bank and drawn on the same or another branch of the same bank if both branches are located in the same state or the same check processing region; and,

(vii) The lesser of—

(A) $100, or

(B) The aggregate amount deposited on any one banking day to all accounts of the customer by check or checks not subject to next-day availability under paragraphs (c)(1) (i) through (vi) of this section.

(2) *Checks not deposited in person.* A depositary bank shall make funds deposited in an account by check or checks available for withdrawal not later than the second business day after the banking day on which funds are deposited, in the case of a check deposit described in and that meets the requirements of paragraphs (c)(1) (ii), (iii), (iv), and (v), of this section, except that it is not deposited in person to an employee of the depositary bank.

(3) *Special deposit slip.* (i) As a condition to making the funds available for withdrawal in accordance with this section, a depositary bank may require that a state or local government check or a cashier's, certified, or teller's check be deposited with a special deposit slip or deposit envelope that identifies the type of check.

(ii) If a depositary bank requires the use of a special deposit slip or deposit envelope, the bank must either provide the special deposit slip or deposit envelope to its customers or inform its customers how the slip or envelope may be prepared or obtained and make the slip or envelope reasonably available.

§ 229.11 Temporary availability schedule.

(a) *Effective date.* The temporary availability schedule contained in this section is effective from September 1, 1988, through August 31, 1990. For the permanent availability schedule, which is effective September 1, 1990, see § 229.12.

(b) *Local checks and certain other checks*—(1) *In general.* A depositary bank shall make funds deposited in an account by a check available for withdrawal not later than the third business day following the banking day on which funds are deposited, in the case of—

(i) A local check;

(ii) A check drawn on the Treasury of the United States that is not governed by the availability requirements of § 229.10(c);

(iii) A U.S. Postal Service money order that is not governed by the availability requirements of § 229.10(c); and

(iv) A check drawn on a Federal Reserve Bank or Federal Home Loan Bank; a check drawn by a state or unit of general local government; or a cashier's, certified, or teller's check; if any check referred to in this paragraph (b)(1)(iv) of this section is a local check that is not governed by the availability requirements of § 229.10(c).

(2) *Time period adjustment for withdrawal by cash or similar means.* A depositary bank may extend by one business day the time that funds deposited in an account by one or more

local checks are available for withdrawal by cash or similar means unless the checks are drawn on or payable at or through a local paying bank that is a participant in the same check clearinghouse association as the depositary bank. Similar means include electronic payment, issuance of a cashier's or teller's check, certification of a check, or other irrevocable commitment to pay, but do not include the granting of credit to a bank, Federal Reserve Bank, or Federal Home Loan Bank that presents a check to the depositary bank for payment. A depositary bank shall, however, make $400 of these funds available for withdrawal by cash or similar means not later than 5:00 p.m. on the third business day following the banking day on which the funds are deposited. This $400 is in addition to the $100 available under § 229.10(c)(1)(vii).

(c) *Nonlocal checks*—(1) *In general.* A depositary bank shall make funds deposited in an account by a check available for withdrawal not later than the seventh business day following the banking day on which funds are deposited, in the case of—

(i) A nonlocal check; and

(ii) A check drawn on a Federal Reserve Bank or Federal Home Loan Bank; a check drawn by a state or unit of general local government; a cashier's, certified, or teller's check; or a check deposited in a branch of the depositary bank and drawn on the same or another branch of the same bank, if any check referred to in this paragraph (c)(1)(ii) is a nonlocal check that is not governed by the availability requirements of § 229.10(c).

(2) *Reduction in schedule for certain check deposits.* Nonlocal checks specified in Appendix B–1 to this part must be made available for withdrawal not later than the times prescribed in that Appendix.

(d) *Deposits at nonproprietary ATMs.* A depositary bank shall make funds deposited in an account at a nonproprietary ATM by cash or check available for withdrawal not later than the seventh business day following the banking day on which the funds are deposited.

(e) *Extension of schedule for certain deposits in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.* The depositary bank may extend the time periods set forth in this section by one business day in the case of any deposit, other than a deposit described in § 229.10, that is—

(1) Deposited in an account at a branch of a depositary bank if the branch is located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands; and

(2) Deposited by a check drawn on or payable at or through a paying bank not located in the same state as the depositary bank.

§ 229.12 Permanent availability schedule.

(a) *Effective date.* The permanent availability schedule contained in this section is effective September 1, 1990.

(b) *Local checks and certain other checks.* A depositary bank shall make funds deposited in an account by a check available for withdrawal not later than the second business day following the banking day on which funds are deposited, in the case of—

(1) A local check;

(2) A check drawn on the Treasury of the United States that is not governed by the availability requirements of § 229.10(c);

(3) A check drawn on the Treasury of the United States that is deposited at a nonproprietary ATM;

(4) A U.S. Postal Service money order that is not governed by the availability requirements of § 229.10(c); and

(5) A check drawn on a Federal Reserve Bank or Federal Home Loan Bank; a check drawn by a state or unit of general local government; or a cashier's, certified, or teller's check; if any check referred to in this paragraph (b)(5) is a local check that is not governed by the availability requirements of § 229.10(c).

(c) *Nonlocal checks.*—(1) *In general.* A depositary bank shall make funds deposited in an account by a check available for withdrawal not later than the fifth business day following the banking day on which funds are deposited, in the case of—

(i) A nonlocal check; and

(ii) A check drawn on a Federal Reserve Bank or Federal Home Loan Bank; a check drawn by a state or unit of general local government; a cashier's, certified, or teller's check; or a check deposited in a branch of the depositary bank and drawn on the same or another branch of the same bank, if any check referred to in this paragraph (c)(1)(ii) is a nonlocal check that is not governed by the availability requirements of § 229.10(c).

(2) Nonlocal checks specified in Appendix B–2 to this part must be made available for withdrawal not later than the times prescribed in that Appendix.

(d) *Time period adjustment for withdrawal by cash or similar means.* A depositary bank may extend by one business day the time that funds deposited in an account by one or more checks subject to paragraphs (b) or (c) of this section are available for withdrawal by cash or similar means. Similar means include electronic payment, issuance of a cashier's or teller's check, or certification of a check, or other irrevocable commitment to pay, but do not include the granting of credit to a bank, a Federal Reserve Bank, or a Federal Home Loan Bank that presents a check to the depositary bank for payment. A depositary bank shall, however, make $400 of these funds available for withdrawal by cash or similar means not later than 5:00 p.m. on the business day on which the funds are available under paragraphs (b) and (c) of this section. This $400 is in addition to the $100 available under § 229.10(c)(1)(vii).

(e) *Extension of schedule for certain deposits in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.* The depositary bank may extend the time periods set forth in this section by one business day in the case of any deposit, other than a deposit described in § 229.10, that is—

(1) Deposited in an account at a branch of a depositary bank if the branch is located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands; and

(2) Deposited by a check drawn on or payable at or through a paying bank not located in the same state as the depositary bank.

§ 229.13 Exceptions.

(a) *New accounts.* (1) A deposit in a new account—

(i) Is subject to the requirements of § 229.10 (a) and (b) to make funds from deposits by cash and electronic payments available for withdrawal on the business day following the banking day of deposit or receipt;

(ii) Is subject to the requirements of § 229.10(c)(1) (i) through (v) and § 229.10(c)(2) only with respect to the first $5,000 of funds deposited on any one banking day; but the amount of the deposit in excess of $5,000 shall be available for withdrawal not later than the ninth business day following the banking day on which funds are deposited; and

(iii) Is not subject to the availability requirements of §§ 229.10(c)(1) (vi) and (vii), 229.11, and 229.12.

For purposes of this paragraph, checks subject to § 229.10(c)(1)(v) include traveler's checks.

(2) An account is considered a new account during the first 30 calendar days after the account is established. An account is not considered a new account if each customer on the account has had, within 30 calendar days before the account is established, another account

at the depositary bank for at least 30 calendar days.

(b) *Large deposits.* Sections 229.11 and 229.12 do not apply to the aggregate amount of deposits by one or more checks to the extent that the aggregate amount is in excess of $5,000 on any one banking. day. For customers that have multiple accounts at a depositary bank, the bank may apply this exception to the aggregate deposits to all accounts held by the customer, even if the customer is not the sole holder of the accounts and not all of the holders of the accounts are the same.

(c) *Redeposited checks.* Sections 229.11 and 229.12 do not apply to a check that has been returned unpaid and redeposited by the customer or the depositary bank. This exception does not apply—

(1) To a check that has been returned due to a missing indorsement and redeposited after the missing indorsement has been obtained, if the reason for return indication on the check states that it was returned due to a missing indorsement; or

(2) To a check that has been returned because it was post dated, if the reason for return indicated on the check states that it was returned because it was post dated, and if the check is no longer postdated when redeposited.

(d) *Repeated overdrafts.* If any account or combination of accounts of a depositary bank's customer has been repeatedly overdrawn, then for a period of six months after the last such overdraft, §§ 229.11 and 229.12 do not apply to any of the accounts. A depositary bank may consider a customer's account to be repeatedly overdrawn if—

(1) On six or more banking days within the preceding six months, the account balance is negative, or the account balance would have become negative if checks or other charges to the account had been paid; or

(2) On two or more banking days within the preceding six months, the account balance is negative, or the account balance would have become negative, in the amount of $5,000 or more, if checks or other charges to the account had been paid.

(e) *Reasonable cause to doubt collectibility.*—(1) *In general.* If a depositary bank has reasonable cause to believe that the check is uncollectible from the paying bank, then § 229.10(c)(1)(iii) and (v); § 229.10(c)(2) to the extent that it applies to a check drawn on a Federal Reserve Bank or a Federal Home Loan Bank, or a cashier's, teller's, or certified check; § 229.11; and § 229.12 do not apply with respect to a check deposited in an account at a depositary bank. Reasonable cause to believe a check is uncollectible requires the existence of facts that would cause a well-grounded belief in the mind of a reasonable person. Such belief shall not be based on the fact that the check is of a particular class or is deposited by a particular class of persons. The reason for the bank's belief that the check is uncollectible shall be included in the notice required under paragraph (g) of this section.

(2) *Overdraft and returned check fees.* A depositary bank that extends the time when funds will be available for withdrawal as described in paragraph (e)(1) of this section, and does not furnish the depositor with written notice at the time of deposit shall not assess any fees for any subsequent overdrafts (including use of a line of credit) or return of checks of other debits to the account, if—

(i) The overdraft or return of the check would not have occurred except for the fact that the deposited funds were delayed under paragraph (e)(1) of this section; and

(ii) The deposited check was paid by the paying bank.

Notwithstanding the foregoing, the depositary bank may assess an overdraft or returned check fee if it includes a notice concerning overdraft and returned check fees with the notice of exception required in paragraph (g) of this section and, when required, refunds any such fees upon the request of the customer. The overdraft and returned check notice must state that the customer may be entitled to a refund of overdraft or returned check fees that are assessed if the check subject to the exception is paid and how to obtain a refund.

(f) *Emergency conditions.* Sections 229.11 and 229.12 do not apply to funds deposited by check in a depositary bank in the case of—

(1) An interruption of communications or computer or other equipment facilities;

(2) A suspension of payments by another bank;

(3) A war; or

(4) An emergency condition beyond the control of the depositary bank,

if the depositary bank exercises such diligence as the circumstances require.

(g) *Notice of exception.*—(1) *In general.* When a depositary bank extends the time when funds will be available for withdrawal based on the application of an exception contained in paragraphs (b) through (f) of this section, it must provide the depositor with a written notice. The notice shall include the following information—

(i) The account number of the customer;

(ii) The date and amount of the deposit;

(iii) The amount of the deposit that is being delayed;

(iv) The reason the exception was invoked; and

(v) The day the funds will be available for withdrawal, unless the emergency conditions exception in paragraph (f) of this section has been invoked, and the depositary bank, in good faith, does not know the duration of the emergency and, consequently, when the funds must be made available at the time the notice must be given.

(2) *Timing of notice.* (i) The notice shall be provided to the depositor at the time of the deposit, unless the deposit is not made in person to an employee of the depositary bank, or, if the facts upon which a determination to invoke one of the exceptions in paragraphs (b) through (f) of this section to delay a deposit only become known to the depositary bank after the time of the deposit. If the notice is not given at the time of the deposit, the depositary bank shall mail or deliver the notice to the customer as soon as practicable, but no later than the first business day following the day the facts become known to the depositary bank, or the deposit is made, whichever is later.

(ii) If the availability of funds is delayed under the emergency conditions exception provided in paragraph (f) of this section, the depositary bank is not required to provide a notice if the funds subject to the exception become available before the notice must be sent under paragraph (g)(2)(i) of this section.

(3) *Record retention.* A depositary bank shall retain a record, in accordance with § 229.21(g), of each notice provided pursuant to its application of the reasonable cause exception under paragraph (e) of this section, together with a brief statement of the facts giving rise to the bank's reason to doubt the collectibility of the check.

(h) *Availability of deposits subject to exceptions.* (1) If an exception contained in paragraphs (b) through (f) of this section applies, the depositary bank may extend the time periods established under §§ 229.11 and 229.12 by a reasonable period of time.

(2) If a depositary bank invokes an exception under paragraph (e) of this section based on its reasonable cause to doubt collectibility of a check that is subject to § 229.10(c)(1)(iii) or (v) or § 229.10(c)(2) to the extent that it applies to a check drawn on a Federal Reserve Bank or a Federal Home Loan Bank, or a

cashier's, teller's, or certified check, the depositary bank shall make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to §§ 229.11 or 229.12.

(3) If a depositary bank invokes an exception under paragraph (f) of this section based on an emergency condition, the depositary bank shall make the funds available for withdrawal not later than a reasonable period after the emergency has ceased or the period established in §§ 229.11 and 229.12, whichever is later.

(4) For the purposes of paragraphs (h)(1), (2), and (3) of this section, an extension of up to four business days is a reasonable period. An extension of more than four business days may be reasonable, but the bank has the burden of so establishing.

§ 229.14 Payment of interest.

(a) *In general.* A depositary bank shall begin to accrue interest or dividends on funds deposited in an interest-bearing account not later than the business day on which the depositary bank receives credit for the funds. For the purposes of this section, the depositary bank may—

(1) Rely on the availability schedule of its Federal Reserve Bank, Federal Home Loan Bank, or correspondent bank to determine the time credit is actually received; and

(2) Accrue interest or dividends on funds deposited in interest-bearing accounts by checks that the depositary bank sends to paying banks or subsequent collecting banks for payment or collection based on the availability of funds the depositary bank receives from the paying or collecting banks.

(b) *Special rule for credit unions.* Paragraph (a) of this section does not apply to any account at a bank described in § 229.2(e)(4), if the bank—

(1) Begins the accrual of interest or dividends at a later date than the date described in paragraph (a) of this section with respect to all funds, including cash, deposited in the account; and

(2) Provides notice of its interest or dividend payment policy in the manner required under § 229.16(d).

(c) *Exception for checks returned unpaid.* This subpart does not require a bank to pay interest or dividends on funds deposited by a check that is returned unpaid.

§ 229.15 General disclosure requirements.

(a) *Form of disclosures.* A bank shall make the disclosures required by this subpart clearly and conspicuously in writing. Disclosures, other than those posted at locations where employees accept consumer deposits and ATMs and the notice on preprinted deposit slips, must be in a form that the customer may keep. The disclosures shall be grouped together and shall not contain any information not related to the disclosures required by this subpart. If contained in a document that sets forth other account terms, the disclosures shall be highlighted within the document by, for example, use of a separate heading.

(b) *Uniform reference to day of availability.* In its disclosure, a bank shall describe funds as being available for withdrawal on "the _____ business day after" the day of deposit. In this calculation, the first business day is the business day following the banking day the deposit was received, and the last business day is the day on which the funds are made available.

(c) *Multiple accounts and multiple account holders.* A bank need not give multiple disclosures to a customer that holds multiple accounts if the accounts are subject to the same availability policies. Similarly, a bank need not give separate disclosures to each customer on a jointly held account.

(d) *Dormant or inactive accounts.* A bank need not give availability disclosures to a customer that holds a dormant or inactive account.

§ 229.16 Specific availability policy disclosure.

(a) *General.* To meet the requirements of a specific availability policy disclosure under §§ 229.17 and 229.18(d), a bank shall provide a disclosure describing the bank's policy as to when funds deposited in an account are available for withdrawal. The disclosure must reflect the policy followed by the bank in most cases. A bank may impose longer delays on a case-by-case basis or by invoking one of the exceptions in § 229.13, provided this is reflected in the disclosure.

(b) *Content of specific availability policy disclosure.* The specific availability policy disclosure shall contain the following, as applicable—

(1) A summary of the bank's availability policy;

(2) A description of any categories of deposits or checks used by the bank when it delays availability (such as local or nonlocal checks); how to determine the category to which a particular deposit or check belongs; and when each category will be available for withdrawal (including a description of the bank's business days and when a deposit is considered received);

(3) A description of any of the exceptions in § 229.13 that may be invoked by the bank, including the time following a deposit that funds generally will be available for withdrawal and a statement that the bank will notify the customer if the bank invokes one of the exceptions;

(4) A description, as specified in paragraph (c)(1) of this section, of any case-by-case policy of delaying availability that may result in deposited funds being available for withdrawal later than the time periods stated in the bank's availability policy; and

(5) A description of how the customer can differentiate between a proprietary and a nonproprietary ATM, if the bank makes funds from deposits at nonproprietary ATMs available for withdrawal later than funds from deposits at proprietary ATMs.

(c) *Longer delays on a case-by-case basis.*—(1) *Notice in specific policy disclosure.* A bank that has a policy of making deposited funds available for withdrawal sooner than required by this subpart may extend the time when funds are available up to the time periods allowed under this subpart on a case-by-case basis, provided the bank includes the following in its specific policy disclosure—

(i) A statement that the time when deposited funds are available for withdrawal may be extended in some cases, and the latest time following a deposit that funds will be available for withdrawal;

(ii) A statement that the bank will notify the customer if funds deposited in the customer's account will not be available for withdrawal until later than the time periods stated in the bank's availability policy; and

(iii) A statement that customers should ask if they need to be sure about when a particular deposit will be available for withdrawal.

(2) *Notice at time of case-by-case delay.—(i) In general.* When a depositary bank extends the time when funds will be available for withdrawal on a case-by-case basis, it must provide the depositor with a written notice. The notice shall include the following information—

(A) The account number of the customer;

(B) The date and amount of the deposit;

(C) The amount of the deposit that is being delayed; and

(D) The day the funds will be available for withdrawal.

(ii) *Timing of notice.* The notice shall be provided to the depositor at the time of the deposit, unless the deposit is not

made in person to an employee of the depositary bank or the decision to extend the time when the deposited funds will be available is made after the time of the deposit. If notice is not given at the time of the deposit, the depositary bank shall mail or deliver the notice to the customer not later than the first business day following the banking day the deposit is made.

(3) Overdraft and returned check fees. A depositary bank that extends the time when funds will be available for withdrawal on a case-by-case basis and does not furnish the depositor with written notice at the time of deposit shall not assess any fees for any subsequent overdrafts (including use of a line of credit) or return of checks or other debits to the account, if—

(i) The overdraft or return of the check or other debit would not have occurred except for the fact that the deposited funds were delayed under paragraph (c)(1) of this section; and

(ii) The deposited check was paid by the paying bank.

Notwithstanding the foregoing, the depositary bank may assess an overdraft or returned check fee if it includes a notice concerning overdraft and returned check fees with the notice required in paragraph (c)(2) of this section and, when required, refunds any such fees upon the request of the customer. The overdraft and returned check notice must state that the customer may be entitled to a refund of overdraft or returned check fees that are assessed if the check subject to the delay is paid and state how to obtain a refund.

(d) *Credit union notice of interest payment policy.* If a bank described in § 229.2(e)(4) begins to accrue interest or dividends on all deposits made in an interest-bearing account, including cash deposits, at a later time than the day specified in § 229.14(a), the bank's specific policy disclosures shall contain an explanation of when interest or dividends on deposited funds begin to accrue.

§ 229.17 Initial disclosures.

(a) *New accounts.* Before opening an account, a bank shall provide a potential customer with the applicable specific availability policy disclosure described in § 229.16.

(b) *Existing accounts.* (1) In the first regularly scheduled mailing to customers after September 1, 1988, but not later than October 31, 1988, a bank shall send to existing customers the specific availability policy disclosure described in § 229.16, unless the bank has previously given disclosures that meet the requirements of that section.

(2) If the disclosure required by paragraph (b)(1) of this section is included with a disclosure of other account terms and conditions, the bank must direct the customer's attention to the availability disclosures by, for example, the use of an insert or a letter.

(3) The disclosure required by paragraph (b)(1) of this section may not be included in a mailing of promotional material, such as a solicitation for a new product or service, unless the mailing also includes the customer's account statement.

§ 229.18 Additional disclosure requirements.

(a) *Deposit slips.* A bank shall include on all preprinted deposit slips furnished to its customers a notice that deposits may not be available for immediate withdrawal.

(b) *Locations where employees accept consumer deposits.* A bank shall post in a conspicuous place in each location where its employees receive deposits to consumer accounts a notice that sets forth the time periods applicable to the availability of funds deposited in a consumer account.

(c) *Automated teller machines.* (1) A depositary bank shall post or provide a notice at each ATM location that funds deposited in the ATM may not be available for immediate withdrawal.

(2) A depositary bank that operates an off-premises ATM from which deposits are removed not more than two times each week, as described in § 229.19(a)(4), shall disclose at or on the ATM the days on which deposits made at the ATM will be considered received.

(d) *Upon request.* A bank shall provide to any person, upon oral or written request, a notice containing the applicable specific availability policy disclosure described in § 229.16.

(e) *Changes in policy.* A bank shall send a notice to holders of consumer accounts at least 30 days before implementing a change to the bank's availability policy regarding such accounts, except that a change that expedites the availability of funds may be disclosed not later than 30 days after implementation.

§ 229.19 Miscellaneous.

(a) *When funds are considered deposited.* For the purposes of this subpart—

(1) Funds deposited at a staffed facility or an ATM are considered deposited when they are received at the staffed facility or ATM;

(2) Funds mailed to the depositary bank are considered deposited on the day they are received by the depositary bank;

(3) Funds deposited to a night depository, lock box, or similar facility are considered deposited on the day on which the deposit is removed from such facility and is available for processing by the depositary bank;

(4) Funds deposited at an ATM that is not on, or within 50 feet of, the premises of the depositary bank are considered deposited on the day the funds are removed from the ATM, if funds normally are removed from the ATM not more than two times each week; and

(5) Funds may be considered deposited on the next banking day, in the case of funds that are deposited—

(i) On a day that is not a banking day for the depositary bank; or

(ii) After a cut-off hour set by the depositary bank for the receipt of deposits of 2:00 p.m. or later, or, for the receipt of deposits at ATMs or off-premise facilities, of 12:00 noon or later. Different cut-off hours later than these times may be established for receipt of different types of deposits, or receipt of deposits at different locations.

(b) *Availability at start of business day.* Except as otherwise provided in §§ 229.11(b)(2) and 229.12(d), if any provision of this subpart requires that funds be made available for withdrawal on any business day, the funds shall be available for withdrawal by the later of—

(1) 9:00 a.m. (local time of the depositary bank); or

(2) The time the depositary bank's teller facilities (including ATMs) are available for customer account withdrawals.

(c) *Effect on policies of depositary bank.* This part does not—

(1) Prohibit a depositary bank from making funds available to a customer for withdrawal in a shorter period of time than the time required by this subpart;

(2) Affect a depositary bank's right—

(i) To accept or reject a check for deposit;

(ii) To revoke any settlement made by the depositary bank with respect to a check accepted by the bank for deposit, to charge back the customer's account for the amount of a check based on the return of the check or receipt of a notice of nonpayment of the check, or to claim a refund of such credit; and

(iii) To charge back funds made available to its customer for an electronic payment for which the bank has not received payment in actually and finally collected funds;

(3) Require a depositary bank to open or otherwise to make its facilities available for customer transactions on a given business day; or

(4) Supersede any policy of a depositary bank that limits the amount of cash a customer may withdraw from its account on any one day, if that policy—

(i) Is not dependent on the time the funds have been deposited in the account, as long as the funds have been on deposit for the time period specified in §§ 229.10, 229.11, 229.12, or 229.13; and—

(ii) In the case of withdrawals made in person to an employee of the depositary bank—

(A) Is applied without discrimination to all customers of the bank; and

(B) Is related to security, operating, or bonding requirements of the depositary bank.

(d) *Use of calculated availability.* A depositary bank may provide availability to its nonconsumer accounts based on a sample of checks that represents the average composition of the customer's deposits, if the terms for availability based on the sample are equivalent to or more prompt than the availability requirements of this subpart.

(e) *Holds on other funds.* A depositary bank that receives a check for deposit in an account or purchases a check for cash, other than a check drawn on that bank and presented over the counter for payment in cash, may place a hold on any funds of the customer at the bank, if—

(1) The amount of funds that are held do not exceed the amount of the check; and

(2) The funds are made available for withdrawal within the times specified in §§ 229.10, 229.11, 229.12, and 229.13.

(f) *Employee training and compliance.* Each bank shall establish procedures to ensure that the bank complies with the requirements of this subpart, and shall provide each employee who performs duties subject to the requirements of this subpart with a statement of the procedures applicable to that employee.

(g) *Effect of Merger Transaction.* For purposes of this subpart, except for the purposes of the new accounts exception of § 229.13(a), and when funds are considered deposited under § 229.19(a), two or more banks that have engaged in a merger transaction may be considered to be separate banks for a period of one year following the consummation of the merger transaction.

§ 229.20 Relation to state law.

(a) *In general.* Any provision of a law or regulation of any state in effect on or before September 1, 1989, that requires funds deposited in an account at a bank chartered by the state to be made available for withdrawal in a shorter time than the time provided in Subpart B, and, in connection therewith, Subpart A, shall—

(1) Supersede the provisions of the Act and Subpart B, and, in connection therewith, Subpart A, to the extent the provisions relate to the time by which funds deposited or received for deposit in an account are available for withdrawal; and

(2) Apply to all federally insured banks located within the state.

No amendment to a state law or regulation governing the availability of funds that becomes effective after September 1, 1989, shall supersede the Act and Subpart B, and, in connection therewith, Subpart A, but unamended provisions of state law shall remain in effect.

(b) *Preemption of inconsistent law.* Except as provided in paragraph (a), the Act and Subpart B, and, in connection therewith, Subpart A, supersede any provision of inconsistent state law.

(c) *Standards for preemption.* A provision of a state law in effect on or before September 2, 2989, is not inconsistent with the Act, or Subpart B, or in connection therewith, Subpart A, if it requires that funds shall be available in a shorter period of time than the time provided in this subpart. Inconsistency with the Act and Subpart B, and in connection therewith, Subpart A, may exist when state law—

(1) Permits a depositary bank to make funds deposited in an account by cash, electronic payment, or check available for withdrawal in a longer period of time than the maximum period of time permitted under Subpart B, and, in connection therewith, Subpart A; or

(2) Provides for disclosures or notices concerning funds availability relating to accounts.

(d) *Preemption determinations.* The Board may determine, upon the request of any state, bank, or other interested party, whether the Act and Subpart B, and, in connection therewith, Subpart A, preempt provisions of state laws relating to the availability of funds.

(e) *Procedures for preemption determinations.* A request for a preemption determination shall include the following—

(1) A copy of the full text of the state law in question, including any implementing regulations or judicial interpretations of that law; and

(2) A comparison of the provisions of state law with the corresponding provisions in the Act and Subparts A and B of this part, together with a discussion of the reasons why specific provisions of state law are either consistent or inconsistent with corresponding sections of the Act and Subparts A and B of this part.

A request for a preemption determination shall be addressed to the Secretary, Board of Governors of the Federal Reserve System.

§ 229.21 Civil liability.

(a) *Civil liability.* A bank that fails to comply with any requirement imposed under Subpart B, and in connection therewith, Subpart A, of this part or any provision of state law that supersedes any provision of Subpart B, and in connection therewith, Subpart A, with respect to any person is liable to that person in an amount equal to the sum of—

(1) Any actual damage sustained by that person as a result of the failure;

(2) Such additional amount as the court may allow, except that—

(i) In the case of an individual action, liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(ii) In the case of a class action—

(A) No minimum recovery shall be applicable to each member of the class; and

(B) The total recovery under this paragraph in any class action or series of class actions arising out of the same failure to comply by the same depositary bank shall not be more than the lesser of $500,000 or 1 percent of the net worth of the bank involved; and

(3) In the case of a successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

(b) *Class action awards.* In determining the amount of any award in any class action, the court shall consider, among other relevant factors—

(1) The amount of any damages awarded;

(2) The frequency and persistence of failures of compliance;

(3) The resources of the bank;

(4) The number of persons adversely affected; and

(5) The extent to which the failure of compliance was intentional.

(c) *Bona fide errors.*—(1) *General rule.* A bank is not liable in any action brought under this section for a violation of this subpart if the bank demonstrates by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(2) *Examples.* Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to the

bank's obligation under this subpart is not a bona fide error.

(d) *Jurisdiction.* Any action under this section may be brought in any United States district court or in any other court of competent jurisdiction, and shall be brought within one year after the date of the occurrence of the violation involved.

(e) *Reliance on Board rulings.* No provision of this subpart imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, regardless of whether such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason after the act or omission has occurred.

(f) *Exclusions.* This section does not apply to claims that arise under Subpart C of this part or to actions for wrongful dishonor.

(g) *Record retention.* (1) A bank shall retain evidence of compliance with the requirements imposed by this subpart for not less than two years. Records may be stored by use of microfiche, microfilm, magnetic tape, or other methods capable of accurately retaining and reproducing information.

(2) If a bank has actual notice that it is being investigated, or is subject to an enforcement proceeding by an agency charged with monitoring that bank's compliance with the Act and this subpart, or has been served with notice of an action filed under this section, it shall retain the records pertaining to the action or proceeding pending final disposition of the matter, unless an earlier time is allowed by order of the agency or court.

Subpart C—Collection of Checks

§ 229.30 Paying bank's responsibility for return of checks.

(a) *Return of checks.* If a paying bank determines not to pay a check, it shall return the check in an expeditious manner as provided in either paragraphs (a)(1) or (a)(2) of this section.

(1) *Two-day/four-day test.* A paying bank returns a check in an expeditious manner if it sends the returned check in a manner such that the check would normally be received by the depositary bank not later than 4:00 p.m. (local time of the depositary bank) of—

(i) The second business day following the banking day on which the check was presented to the paying bank, if the paying bank is a local paying bank with respect to the depositary bank; or

(ii) The fourth business day following the banking day on which the check was presented to the paying bank, if the paying bank is a nonlocal paying bank with respect to the depositary bank. If the last business day on which the paying bank may deliver a returned check to the depositary bank is not a banking day for the depositary bank, the paying bank meets the two-day/four-day test if the returned check is received by the depositary bank on or before the depositary bank's next banking day.

(2) *Forward collection test.* A paying bank also returns a check in an expeditious manner if it sends the returned check in a manner that a similarly situated bank would normally handle a check—

(i) Of similar amount as the returned check;

(ii) Drawn on the depositary bank; and

(iii) Deposited for forward collection in the similarly situated bank by noon on the banking day following the banking day on which the check was presented to the paying bank.

Subject to the requirement for expeditious return, a paying bank may send a returned check to the depositary bank, or to any other bank agreeing to handle the returned check expeditiously under § 229.31(a). A paying bank may convert a check to a qualified returned check. A qualified returned check must be encoded in magnetic ink with the routing number of the depositary bank, the amount of the returned check, and a "2" in position 44 of the MICR line as a return identifier, in accordance with the American National Standard Specifications for Placement and Location of MICR Printing, X9.13 (Sept. 1983). This paragraph does not affect a paying bank's responsibility to return a check within the deadlines required by the U.C.C., Regulation J (12 CFR Part 210), or § 229.30(c).

(b) *Unidentifiable depositary bank.* A paying bank that is unable to identify the depositary bank with respect to a check may send the returned check to any bank that handled the check for forward collection even if that bank does not agree to handle the check expeditiously under § 229.31(a). A paying bank sending a returned check under this paragraph to a bank that handled the check for forward collection must advise the bank to which the check is sent that the paying bank is unable to identify the depositary bank. The expeditious return requirements in § 229.30(a) do not apply to the paying bank's return of a check under this paragraph.

(c) *Extension of deadline for expedited delivery.* The deadline for return or notice of nonpayment under the U.C.C. or Regulation J (12 CFR Part 210) is extended if a paying bank, in an effort to expedite delivery of a returned check to a bank, uses a means of delivery that would ordinarily result in the returned check being received by the bank to which it is sent on or before the receiving bank's next banking day following the otherwise applicable deadline. The deadline is extended further if a paying bank uses a highly expeditious means of transportation, even if this means of transportation would ordinarily result in delivery after the receiving bank's next banking day.

(d) *Identification of returned check.* A paying bank returning a check shall clearly indicate on the face of the check that it is a returned check and the reason for return.

(e) *Depositary bank without accounts.* The expeditious return requirements of paragraph (a) of this section do not apply to checks deposited in a depositary bank that does not maintain accounts.

(f) *Notice in lieu of return.* If a check is unavailable for return, the paying bank may send in its place a copy of the front and back of the returned check, or, if no such copy is available, a written notice of nonpayment containing the information specified in § 229.33(b). The copy or notice shall clearly state that it constitutes a notice in lieu of return. A notice in lieu of return is considered a returned check subject to the expeditious return requirements of this section and to the other requirements of this subpart.

(g) *Reliance on routing number.* A paying bank may return a returned check based on any routing number designating the depositary bank appearing on the returned check in the depositary bank's indorsement.

§ 229.31 Returning bank's responsibility for return of checks.

(a) *Return of checks.* A returning bank shall return a returned check in an expeditious manner as provided in either paragraphs (a)(1) or (a)(2) of this section.

(1) *Two-day/four-day test.* A returning bank returns a check in an expeditious manner if it sends the returned check in a manner such that the check would normally be received by the depositary bank not later than 4:00 p.m. (local time) of—

(i) The second business day following the banking day on which the check was presented to the paying bank if the paying bank is a local paying bank with respect to the depositary bank; or

(ii) The fourth business day following the banking day on which the check was presented to the paying bank if the paying bank is a nonlocal paying bank with respect to the depositary bank.

If the last business day on which the returning bank may deliver a returned check to the depositary bank is not a banking day for the depositary bank, the returning bank meets this requirement if the returned check is received by the depositary bank on or before the depositary bank's next banking day.

(2) *Forward collection test.* A returning bank also returns a check in an expeditious manner if it sends the returned check in a manner that a similarly situated bank would normally handle a check—

(i) Of similar amount as the returned check;

(ii) Drawn on the depositary bank; and

(iii) Received for forward collection by the similarly situated bank at the time the returning bank received the returned check, except that a returning bank may set a cut-off hour for the receipt of returned checks that is earlier than the similarly situated bank's cut-off hour for checks received for forward collection, if the cut-off hour is not earlier than 2:00 p.m.

Subject to the requirement for expeditious return, the returning bank may send the returned check to the depositary bank, or to any bank agreeing to handle the returned check expeditiously under § 229.31(a). The returning bank may convert the returned check to a qualified returned check. A qualified returned check must be encoded in magnetic ink with the routing number of the depositary bank, the amount of the returned check, and a "2" in position 44 of the MICR line as a return identifier, in accordance with the American National Standard Specification for Placement and Location of MICR Printing, X9.13 (Sept. 1983). The time for expeditious return under the forward collection test, and the deadline for return under the U.C.C. and Regulation J (12 CFR part 210), are extended by one business day if the returning bank converts a returned check to a qualified returned check. This extension does not apply to the two-day/four-day test specified in paragraph (a)(1) of this section or when a returning bank is returning a check directly to the depositary bank.

(b) *Unidentifiable depositary bank.* A returning bank that is unable to identify the depositary bank with respect to a returned check may send the returned check to—

(1) Any collecting bank that handled the check for forward collection if the returning bank was not a collecting bank with respect to the returned check; or

(2) A prior collecting bank, if the returning bank was a collecting bank with respect to the returned check;

even if that collecting bank does not agree to handle the returned check expeditiously under § 229.31(a). A returning bank sending a returned check under this paragraph must advise the bank to which the check is sent that the returning bank is unable to identify the depositary bank. The expeditious return requirements in paragraph (a) of this section do not apply to return of a check under this paragraph. A returning bank that receives a returned check from a paying bank under § 229.30(b), but which is able to identify the depositary bank, must thereafter return the check expeditiously to the depositary bank.

(c) *Settlement.* A returning bank shall settle with a bank sending a returned check to it for return by the same means that it settles or would settle with the sending bank for a check received for forward collection drawn on the depositary bank. This settlement is final when made.

(d) *Charges.* A returning bank may impose a charge on a bank sending a returned check for handling the returned check.

(e) *Depositary bank without accounts.* The expeditious return requirements of paragraph (a) of this section do not apply to checks deposited with a depositary bank that does not maintain accounts.

(f) *Notice in lieu of return.* If a check is unavailable for return, the returning bank may send in its place a copy of the front and back of the returned check, or, if no copy is available, a written notice of nonpayment containing the information specified in § 229.33(b). The copy or notice shall clearly state that it constitutes a notice in lieu of return. A notice in lieu of return is considered a returned check subject to the expeditious return requirements of this section and to the other requirements of this subpart.

(g) *Reliance on routing number.* A returning bank may return a returned check based on any routing number designating the depositary bank appearing on the returned check in the depositary bank's indorsement or in magnetic ink on a qualified returned check.

§ 229.32 Depositary bank's responsibility for returned checks.

(a) *Acceptance of returned checks.* A depositary bank shall accept returned checks and written notices of nonpayment—

(1) At a location at which presentment of checks for forward collection is requested by the depositary bank; and

(2) (i) At a branch, head office, or other location consistent with the name and address of the bank in its indorsement on the check;

(ii) If no address appears in the indorsement, at a branch or head office associated with the routing number of the bank in its indorsement on the check; or

(iii) If no routing number or address appears in its indorsement on the check, at any branch or head office of the bank. A depositary bank may require that returned checks be separated from forward collection checks.

(b) *Payment.* A depositary bank shall pay the returning or paying bank returning the check to it for the amount of the check prior to the close of business on the banking day on which it received the check ("payment date") by—

(1) Debit to an account of the depositary bank on the books of the returning or paying bank;

(2) Cash;

(3) Wire transfer; or

(4) Any other form of payment acceptable to the returning or paying bank;

provided that the proceeds of the payment are available to the returning or paying bank in cash or by credit to an account of the returning or paying bank on or as of the payment date. If the payment date is not a banking day for the returning or paying bank or the depositary bank is unable to make the payment on the payment date, payment shall be made by the next day that is a banking day for the returning or paying bank. These payments are final when made.

(c) *Misrouted returned checks and written notices of nonpayment.* If a bank receives a returned check or written notice of nonpayment on the basis that it is the depositary bank, and the bank determines that it is not the depositary bank with respect to the check or notice, it shall either promptly send the returned check or notice to the depositary bank directly or by means of a returning bank agreeing to handle the returned check expeditiously under § 229.31(a), or send the check or notice back to the bank from which it was received.

(d) *Charges.* A depositary bank may not impose a charge for accepting and paying checks being returned to it.

§ 229.33 Notice of nonpayment.

(a) *Requirement.* If a paying bank determines not to pay a check in the amount of $2,500 or more, it shall provide notice of nonpayment such that the notice is received by the depositary

bank by 4:00 p.m. (local time) on the second business day following the banking day on which the check was presented to the paying bank. If the day the paying bank is required to provide notice is not a banking day for the depositary bank, receipt of notice on the depositary bank's next banking day constitutes timely notice. Notice may be provided by any reasonable means, including the returned check, a writing (including a copy of the check), telephone, Fedwire, telex, or other form of telegraph.

(b) *Content of notice.* Notice must include the—

(1) Name and routing number of the paying bank;

(2) Name of the payee(s);

(3) Amount;

(4) Date of the indorsement of the depositary bank;

(5) Account number of the customer(s) of the depositary bank;

(6) Branch name or number of the depositary bank from its indorsement;

(7) Trace number associated with the indorsement of the depositary bank; and

(8) Reason for nonpayment.

The notice may include other information from the check that may be useful in identifying the check being returned and the customer, and, in the case of a written notice, must include the name and routing number of the depositary bank from its indorsement. If the paying bank is not sure of an item of information, it shall include the information required by this paragraph to the extent possible, and identify any item of information for which the bank is not sure of the accuracy with question marks.

(c) *Acceptance of notice.* The depositary bank shall accept notices during its banking day—

(1) Either at the telephone or telegraph number of its return check unit indicated in the indorsement, or, if no such number appears in the indorsement or if the number is illegible, at the general purpose telephone or telegraph number of its head office or the branch indicated in the indorsement; and

(2) At any other number held out by the bank for receipt of notice of nonpayment, and, in the case of written notice, as specified in § 229.32(a).

(d) *Notification to customer.* If the depositary bank receives a returned check or notice of nonpayment, it shall send notice to its customer of the facts by midnight of the banking day following the banking day on which it received the returned check or notice, or within a longer reasonable time.

(e) *Depositary bank without accounts.* The requirements of this section do not apply to checks deposited in a depositary bank that does not maintain accounts.

§ 229.34 Warranties by paying bank and returning bank.

(a) *Warranties.* Each paying bank or returning bank that transfers a returned check and receives a settlement or other consideration for it warrants to the transferee returning bank, to any subsequent returning bank, to the depositary bank, and to the owner of the check, that—

(1) The paying bank returned the check within its deadline under the U.C.C., Regulation J (12 CFR Part 210), or § 229.30(c) of this part;

(2) It is authorized to return the check;

(3) The check has not been materially altered; and

(4) In the case of a notice in lieu of return, the original check has not and will not be returned.

These warranties are not made with respect to checks drawn on the Treasury of the United States, a state, or a unit of general local government.

(b) *Warranty of notice of nonpayment.* Each paying bank warrants to the transferee bank, to any subsequent transferee bank, to the depositary bank, and to the owner of the check that—

(1) The paying bank returned or will return the check within its deadline under the U.C.C., Regulation J (12 CFR Part 210), or § 229.30(c) of this part;

(2) It is authorized to send the notice; and

(3) The check has not been materially altered.

These warranties are not made with respect to checks drawn on a state or a unit of general local government.

(c) *Damages.* Damages for breach of these warranties shall not exceed the consideration received by the paying or returning bank, plus finance charges and expenses related to the returned check, if any.

(d) *Tender of defense.* If a returning bank is sued for breach of a warranty under this section, it may give a prior returning bank or the paying bank written notice of the litigation, and the bank notified may then give similar notice to any other prior returning bank or the paying bank. If the notice states that the paying or returning bank notified may come in and defend, and that if the paying or returning bank notified does not do so, it will in any action against it by the paying or returning bank giving the notice be bound by any determination of fact common to the two litigations, then unless after seasonable receipt of the notice the paying or returning bank notified does come in and defend, it is so bound.

§ 229.35 Indorsements.

(a) *Indorsement standards.* A bank (other than a paying bank) that handles a check during forward collection or a returned check shall indorse the check in accordance with the indorsement standard set forth in Appendix D to this part.

(b) *Liability of bank handling check.* A bank that handles a check for forward collection or return is liable to any bank that subsequently handles the check to the extent that the subsequent bank does not receive payment for the check because of suspension of payments by another bank or otherwise. This paragraph applies whether or not a bank has placed its indorsement on the check. This liability is not affected by the failure of any bank to exercise ordinary care, but any bank failing to do so remains liable. A bank seeking recovery against a prior bank shall send notice to that prior bank reasonably promptly after it learns the facts entitling it to recover. A bank may recover from the bank with which it settled for the check by revoking the settlement, charging back any credit given to an account, or obtaining a refund. A bank may have the rights of a holder with respect to each check it handles.

(c) *Indorsement by a bank.* After a check has been indorsed by a bank, only a bank may acquire the rights of a holder—

(1) Until the check has been returned to the person initiating collection; or

(2) Until the check has been specially indorsed by a bank to a person who is not a bank.

(d) *Indorsement for depositary bank.* A depositary bank may arrange with another bank to apply the other bank's indorsement as the depositary bank indorsement, provided that any indorsement of the depositary bank on the check avoids the area reserved for the depositary bank indorsement as specified in Appendix D. The other bank indorsing as depositary bank is considered the depositary bank for purposes of Subpart C of this part.

§ 229.36 Presentment of checks.

(a) *Payable through and payable at checks.* A check payable at or through a paying bank is considered to be drawn on that bank for purposes of the expeditious return and notice of nonpayment requirements of this subpart.

(b) *Receipt at bank office or processing center.* A check is considered

received by the paying bank when it is received:

(1) At a location to which delivery is requested by the paying bank;

(2) At an address of the bank associated with the routing number on the check, whether in magnetic ink or in fractional form;

(3) At any branch or head office, if the bank is identified on the check by name without address; or

(4) At a branch, head office, or other location consistent with the name and address of the bank on the check if the bank is identified on the check by name and address.

(c) *Truncation.* A bank may present a check to a paying bank by transmission of information describing the check in accordance with an agreement with the paying bank. A truncation agreement may not extend return times or otherwise vary the requirements of this part with respect to parties interested in the check that are not party to the agreement.

(d) *Liability of bank during forward collection.* Settlements between banks for the forward collection of a check are final when made; however, a collecting bank handling a check for forward collection may be liable to a prior collecting bank, including the depositary bank, and the depositary bank's customer.

§ 229.37 Variation by agreement.

The effect of the provisions of Subpart C may be varied by agreement, except that no agreement can disclaim the responsibility of a bank for its own lack of good faith or failure to exercise ordinary care, or can limit the measure of damages for such lack or failure; but the parties may determine by agreement the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

§ 229.38 Liability.

(a) *Standard of care; liability; measure of damages.* A bank shall exercise ordinary care and act in good faith in complying with the requirements of this subpart. A bank that fails to exercise ordinary care or act in good faith under this subpart may be liable to the depositary bank, the depositary bank's customer, the owner of a check, or another party to the check. The measure of damages for failure to exercise ordinary care is the amount of the loss incurred, up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care. A bank that fails to act in good faith under this subpart may be liable for other damages, if any, suffered by the party as a proximate consequence. Subject to a bank's duty to exercise ordinary care or act in good faith in choosing the means of return or notice of nonpayment, the bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person, or for loss or destruction of a check or notice of nonpayment in transit or in the possession of others. This section does not affect a paying bank's liability to its customer under the U.C.C. or other law.

(b) *Paying bank's failure to make timely return.* If a paying bank fails both to comply with § 229.30(a) and to comply with the deadline for return under the U.C.C., Regulation J (12 CFR Part 210), or § 229.30(c) in connection with a single nonpayment of a check, the paying bank shall be liable under either § 229.30(a) or such other provision, but not both.

(c) *Comparative negligence.* If a person, including a bank, fails to exercise ordinary care or act in good faith under this subpart in indorsing a check (§ 229.35), accepting a returned check or notice of nonpayment (§§ 229.32(a) and 229.33(c)), or otherwise, the damages incurred by that person under § 229.38(a) shall be diminished in proportion to the amount of negligence or bad faith attributable to that person.

(d) *Responsibility for back of check.* A paying bank is responsible for damages under paragraph (a) of this section to the extent that the condition of the back of a check when issued by it or its customer adversely affects the ability of a bank to indorse the check legibly in accordance with § 229.35. A depositary bank is responsible for damages under paragraph (a) of this section to the extent that the condition of the back of a check arising after the issuance of the check and prior to acceptance of the check by it adversely affects the ability of a bank to indorse the check legibly in accordance with § 229.35. Responsibility under this paragraph shall be treated as negligence of the paying or depositary bank for purposes of paragraph (c) of this section.

(e) *Timeliness of action.* If a bank is delayed in acting beyond the time limits set forth in this subpart because of interruption of communication or computer facilities, suspension of payments by a bank, war, emergency conditions, failure of equipment, or other circumstances beyond its control, its time for acting is extended for the time necessary to complete the action, if it exercises such diligence as the circumstances require.

(f) *Exclusion.* Section 229.21 of this part and § 611 (a), (b), and (c) of the Act (12 U.S.C. 4010 (a), (b), and (c)) do not apply to this subpart.

(g) *Jurisdiction.* Any action under this subpart may be brought in any United States district court, or in any other court of competent jurisdiction, and shall be brought within one year after the date of the occurrence of the violation involved.

(h) *Reliance on Board rulings.* No provision of this subpart imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, regardless of whether the rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason after the act or omission has occurred.

§ 229.39 Insolvency of bank.

(a) *Duty of receiver.* A check or returned check in, or coming into, the possession of a paying, collecting, depositary, or returning bank that suspends payment, and which is not paid, shall be returned by the receiver, trustee, or agent in charge of the closed bank to the bank or customer that transferred the check to the closed bank.

(b) *Preference against paying or depositary bank.* If a paying or depositary bank finally pays a check or returned check and suspends payment without making a settlement for the check with the prior bank which is or becomes final, the prior bank has a preferred claim against the paying or depositary bank.

(c) *Preference against collecting, paying, or returning bank.* If a collecting, paying, or returning bank receives settlement from a subsequent bank for a check or returned check, which settlement is or becomes final, and suspends payments without making a settlement for the check with the prior bank, which is or becomes final, the prior bank has a preferred claim against the collecting or returning bank.

(d) *Finality of settlement.* If a paying or depositary bank gives, or a collecting, paying, or returning bank gives or receives, a settlement for a check or returned check and thereafter suspends payment, the suspension does not prevent or interfere with the settlement becoming final if such finality occurs automatically upon the lapse of a certain time or the happening of certain events.

§ 229.40 Effect of merger transaction.

For purposes of this subpart, two or more banks that have engaged in a

merger transaction may be considered to be separate banks for a period of one year following the consummation of the merger transaction.

§ 229.41 Relation to state law.

The provisions of this subpart supersede any inconsistent provisions of the U.C.C. as adopted in any state, or of any other state law, but only to the extent of the inconsistency.

§ 229.42 Exclusions.

The expeditious return (§§ 229.30(a) and 229.31(a)) and notice of nonpayment (§ 229.33) requirements of this subpart do not apply to a check drawn upon the United States Treasury, to a U.S. Postal Service money order, or to a check drawn on a state or a unit of general local government that is not payable through or at a bank.

Appendix A.—Routing Number Guide to Local Checks and Certain Checks That Are Subject to Next-Day Availability

Each bank is assigned a routing number by Rand McNally & Co., as agent for the American Bankers Association. The routing number takes two forms: a fractional form and a nine-digit form. A paying bank is normally identified on the face of a check by its routing number in both the fractional form (which generally appears in the upper right-hand corner of the check) and the nine-digit form (which is printed in magnetic ink in a strip along the bottom of the check).

The first four digits of the nine-digit routing number and the denominator of the fractional routing number form the "Federal Reserve routing symbol," which identifies the Federal Reserve District, the Federal Reserve office, and the clearing arrangements used by the paying bank. Because the Expedited Funds Availability Act and Regulation CC define local and nonlocal checks in terms of the Federal Reserve office serving the paying bank, it is possible to determine whether a check is local or nonlocal by referring to the Federal Reserve routing symbol.

Following are two lists: a list of next-day availability checks and a list of Federal Reserve routing symbols associated with each Federal Reserve office. A depositary bank should refer to the routing numbers listed below for the Federal Reserve office that serves the territory in which the branch of deposit is located. Checks with these Federal Reserve routing symbols are considered local checks.

First Federal Reserve District

[Federal Reserve Bank of Boston]

Head Office

0110[1]	2110[2]
0113	2113
0114	2114
0115	2115
0116	2116
0117	2117

Windsor Locks office

0111	2111
0118	2118
0119	2119
0211[3]	2211[3]

Lewiston Office

0112	2112

Second Federal Reserve District

[Federal Reserve Bank of New York]

Head Office

0210	0260
0223	2215
0215	2216
0216	2260

Buffalo Branch

0220	2220
0223	2223

Cranford Office

0212	2212
0270	

Jericho Office

0214	2214
0219	2219
0280	2280

Utica Office

0213	2213

[1] The first two digits identify the Federal Reserve District. Thus 01 identifies the First Federal Reserve District (Boston), and 12 identifies the Twelfth District (San Francisco).

[2] Adding 2 to the first digit denotes a thrift institution. Thus 21 identifies a thrift in the First District, and 32 denotes a thrift in the Twelfth District.

[3] Banks in Fairfield County, Connecticut are members of the Federal Reserve Bank of New York and therefore have Second District routing numbers. Their checks, however, are processed by the Windsor Locks office. Thus, checks drawn on banks with 0211 or 2211 routing numbers would not be local checks for Second District depositary banks.

Third Federal Reserve District

[Federal Reserve Bank of Philadelphia]

Head Office

0310	2310
0311	2311
0312	2312
0313	2313
0319	2319
0360	2360

Fourth Federal Reserve District

[Federal Reserve Bank of Cleveland]

Head Office

0410	2410
0412	2412

Cincinnati Branch

0420	2420
0421	2421
0422	2422
0423	2423

Pittsburgh Branch

0430	2430
0432	2432
0433	2433
0434	2434

Columbus Office

0440	2440
0441	2441
0442	2442

Fifth Federal Reserve District

[Federal Reserve Bank of Richmond]

Head Office

0510	2510
0514	2514

Baltimore Branch

0520	2520
0521	2521
0522	2522
0540	2540
0550	2550
0560	2560
0570	2570

Charlotte Branch

0530	2530
0531	2531

Columbia Office

0532	2532
0539	2539

Charleston Office

0515	2515
0519	2519

Sixth Federal Reserve District

[Federal Reserve Bank of Atlanta]

Head Office

0610	2610
0611	2611
0612	2612
0613	2613

Birmingham Branch

0620	2620
0621	2621
0622	2622

Jacksonville Branch

0630	2630
0631	2631
0632	2632

Nashville Branch

0640	2640
0641	2641
0642	2642

New Orleans Branch

0650	2650
0651	2651
0652	2652
0653	2653
0654	2654
0655	2655

Miami Branch

0660	2660
0670	2670

Seventh Federal Reserve District

[Federal Reserve Bank of Chicago]

Head Office

0710	2710
0711	2711
0712	2712
0719	2719

Detroit Branch

0720	2720
0724	2724

Des Moines Office

0730	2730
0739	2739

Indianapolis Office

0740	2740
0749	2749

Milwaukee Office

0750	2750
0759	2759

Eighth Federal Reserve District

[Federal Reserve Bank of St. Louis]

Head Office

0810	2810
0812	2812
0815	2815
0819	2819
0865	2865

Little Rock Branch

0820	2820
0829	2829

Louisville Branch

0813	2813
0830	2830
0839	2839
0863	2863

Memphis Branch

0840	2840
0841	2841
0842	2842
0843	2843

Ninth Federal Reserve District

[Federal Reserve Bank of Minneapolis]

Head Office

0910	2911
0911	2912
0912	0960
0913	2913
0914	2914
0915	2915
0918	2918
0919	2919
2910	2960

Helena Branch

0920	2020
0921	2921
0929	

Tenth Federal Reserve District

[Federal Reserve Bank of Kansas City]

Head Office

1010	3010
1011	3011
1012	3012
1019	3019

Denver Branch

1020	3020
1021	3021
1022	3022
1023	3023
1070	3070

Oklahoma City Branch

1030	3030
1031	3031
1039	3039

Omaha Branch

P1040	3040
1041	3041
1049	3049

Eleventh Federal Reserve District

[Federal Reserve Bank of Dallas]

Head Office

1110	3110
1111	3111
1113	3113
1119	3119

El Paso Branch

1120	3120
1122	3122
1123	3123
1163	3163

Houston Branch

1130	3130
1131	3131

San Antonio Branch

1140	3140
1149	3149

Twelfth Federal Reserve District

[Federal Reserve Bank of San Francisco]

Head Office

1210	3210
1211	3211
1212	3212
1213	3213
1214	3214

Los Angeles Branch

1220	3220
1221	3221
1222	3222
1223	3223
1224	3224

Portland Branch

1230	3230
1231	3231
1232	3232
1233	3233

Salt Lake City Branch

1240	3240
1241	3241
1242	3242
1243	2343

Seattle Branch

1250	3250
1251	3251
1252	3252

U.S. Treasury Checks and Postal Money Orders

0000 0050 5	0000 0119 3
0000 0051 8	0000 0800 2

Federal Reserve Offices

0110 0001 5	0620 0019 0
0111 0048 1	0630 0019 9
0112 0048 8	0640 0010 1
0210 0120 8	0650 0021 0
0220 0026 6	0660 0010 9
0214 0950 9	0710 0030 1
0213 0500 1	0720 0029 0
0310 0004 0	0730 0033 8
0410 0001 4	0740 0020 1
0420 0043 7	0750 0012 9
0430 0030 0	0810 0004 5
0440 0050 3	0820 0013 8
0510 0003 3	0830 0059 3
0520 0027 8	0840 0003 9
0530 0020 6	0910 0008 0
0539 0008 9	0920 0026 7
0519 0002 3	1010 0004 8
0610 0014 6	1020 0019 9

1030 0024 0
1040 0012 6
1110 0003 8
1120 0001 1
1130 0004 9
1140 0072 1
1210 0037 4
1220 0016 6
1230 0001 3
1240 0031 3
1250 0001 1

Federal Home Loan Banks

0110 0053 6
0420 0091 6
0430 0143 5
0610 0876 6
0710 0450 1
0730 0091 4
0740 0101 9
1011 0194 7
1119 1083 0
1210 0070 1
1250 0050 3

Appendix B–1—Reduction of Schedules for Certain Nonlocal Checks Under the Temporary Schedule

A depositary bank that is located in the following check processing territories shall make funds deposited in an account by a nonlocal check described below available for withdrawal not later than the number of business days following the banking day on which funds are deposited, as specified below.

Federal Reserve office	Number of business days following the banking day funds are deposited
Boston	
Depositary banks (0110, 2110) to: 0210, 0260, 0280, 0310, 0360, 0710, 2260, 2310, 2360, 2710	5
Windsor Locks	
None.	
Lewiston	
None.	
New York	
Depositary banks (0210, 0260, 2260, 0215, 2215, 0216, 2216) to: 0214, 0219, 0280, 2214, 2219	4
Depositary banks (0210, 0260, 2260, 0215, 2215, 0216, 2216) to: 0110, 0212, 0213, 0220, 0270, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2212, 2213, 2220, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Jericho	
Depositary banks (0214, 2214, 0219, 2219, 0280) to: 0210, 0260, 2260	4
Depositary banks (0214, 2214, 0219, 2219, 0280) to: 0110, 0212, 0213, 0215, 0216, 0220, 0270, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2212, 2213, 2215, 2216, 2220, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Cranford	
Depositary banks (0212, 0270, 2212) to: 0210, 0260, 0280, 2260	4
Depositary banks (0212, 2212, 0270) to: 0110, 0213, 0214, 0215, 0216, 0219, 0220, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2213, 2214, 2215, 2216, 2219, 2220, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2730, 2730, 2750, 1810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 33240, 3250	5
Buffalo	
Depositary banks (0220, 2220, 0223, 2223) to: 0210, 0212, 0260, 0270, 0280, 2212, 22605	4
Depositary banks (0220, 2220, 0223, 2223) to: 0110, 0213, 0214, 0215, 0216, 0219, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2213, 2214, 2215, 2216, 2219, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Utica	
Depositary banks (0213, 2213) to: 0210, 0212, 0260, 0270, 0280, 2212, 2260	4
Depositary banks (0213, 2213) to: 0110, 0214, 0215, 0216, 0219, 0220, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2214, 2215, 2216, 2219, 2220, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Philadelphia	
Depositary banks (0310, 2310, 0360, 2360) to: 0110, 0210, 0220, 0260, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0830, 0840, 0910, 0960, 1010, 1020, 1040, 2110, 2220, 2260, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2830, 2840, 2910, 2960, 3010, 3020, 3040	5
Cleveland	
Depositary banks (0410, 2410) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5

Federal Reserve office	Number of business days following the banking day funds are deposited
Cincinnati	
Depositary banks (0420, 2420) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0430, 0440, 0441, 0442, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0749, 0750, 0810, 0813, 0830, 0839, 0840, 0863, 0910, 0960, 1010, 1020, 1030, 1040, 1110, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2430, 2440, 2441, 2442, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2749, 2750, 2810, 2813, 2830, 2839, 2840, 2863, 2910, 2960, 3010, 3020, 3030, 3040, 3110, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Columbus	
Depositary banks (0440, 2440) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Pittsburgh	
Depositary banks (0430, 2430) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Richmond	
Depositary banks (0510, 2510) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0515, 0519, 0520, 0521, 0522, 0530, 0531, 0539, 0550, 0560, 0570, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2515, 2519, 2520, 2521, 2522, 2530, 2531, 2539, 2550, 2560, 2570, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140	5
Baltimore	
Depositary banks (0520, 2520) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0830, 0840, 0910, 0960, 1010, 1020, 1040, 1240, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2830, 2840, 2910, 2960, 3010, 3020, 3040, 3240	5
Charlotte	
Depositary banks (0530, 2530) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0520, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2520, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140	5
Columbia	
Depositary banks (0539, 2539) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140	5
Charleston	
Depositary banks (0519, 2519) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0830, 0840, 0910, 0960, 1010, 1020, 1040, 1240, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2830, 2840, 2910, 2960, 3010, 3020, 3040, 3240	5
Atlanta	
Depositary banks (0610, 2610) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1240, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3240	5
Birmingham	
Depositary banks (0620, 2620) to: 0651, 2651	4
Depositary banks (0620, 2620) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Jacksonville	
Depositary banks (0630, 2630) to:	

Federal Reserve office	Number of business days following the banking day funds are deposited
0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140	5
Miami	
Depositary banks (0660, 2660) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0610, 0620, 0630, 0640, 0650, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2610, 2620, 2630, 2640, 2650, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140	5
Nashville	
0613, 2613	4
Depositary banks (0640, 2640) to: 0530, 0539, 0610, 0620, 0630, 0650, 0660, 0840, 2530, 2539, 2610, 2620, 2630, 2650, 2660, 2840	5
New Orleans	
Depositary banks (0650, 2650) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Chicago	
Depositary banks (0710, 2710) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3223, 3230, 3240, 3250	5
Detroit	
Depositary banks (0720, 2720) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Des Moines	
Depositary banks (0730, 2730) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2540, 2539, 2610, 2620, 2630, 2650, 2660, 2710, 2720, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Indianapolis	
Depositary banks (0740, 2740) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Milwaukee	
Depositary banks (0750, 2750) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
St. Louis	
Depositary banks (0810, 2810) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0820, 0830, 0840, 0910, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1220, 1223, 1240, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2660, 2710, 2720, 2730, 2740, 2750, 2820, 2830, 2840, 2910, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3220, 3223, 3240	5

Federal Reserve office	Number of business days following the banking day funds are deposited
Little Rock	
Depositary banks (0820, 2820) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Louisville	
Depositary banks (0830, 2830) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0840, 0910, 0960, 1010, 1020, 1040, 1240, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2840, 2910, 2960, 3010, 3020, 3040, 3240	5
Memphis	
Depositary banks (0840, 2840) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0910, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1240, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2910, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130 3140, 3240	5
Minneapolis	
Depositary banks (0910, 2910, 0960, 2960) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1240, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3240	5
Helena	
None.	
Kansas City	
0865, 2865	4
Depositary banks (1010, 3010) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1020, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3020, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Denver	
Depositary banks (1020, 3020) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1030, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3030, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Oklahoma City	
Depositary banks (1030, 3030) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1040, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3040, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Omaha	
Depositary banks (1040, 3040) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1110, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3110, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
Dallas	
Depositary banks (1110, 3110) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1120, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3120, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5

Federal Reserve office	Number of business days following the banking day funds are deposited
Houston	
Depositary banks (1130, 3130) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
San Antonio	
Depositary banks (1140, 3140) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1120, 1130, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3120, 3130, 3210, 3220, 3223, 3230, 3240, 3250	5
El Paso	
Depositary banks (1120, 3120) to: 0110, 0210, 0220, 0260, 0280, 0310, 0360, 0410, 0420, 0430, 0440, 0510, 0519, 0520, 0530, 0539, 0610, 0620, 0630, 0640, 0650, 0660, 0710, 0720, 0730, 0740, 0750, 0810, 0820, 0830, 0840, 0910, 0920, 0960, 1010, 1020, 1030, 1040, 1110, 1130, 1140, 1210, 1220, 1223, 1230, 1240, 1250, 2110, 2220, 2260, 2310, 2360, 2410, 2420, 2430, 2440, 2510, 2519, 2520, 2530, 2539, 2610, 2620, 2630, 2640, 2650, 2660, 2710, 2720, 2730, 2740, 2750, 2810, 2820, 2830, 2840, 2910, 2920, 2960, 3010, 3020, 3030, 3040, 3110, 3130, 3140, 3210, 3220, 3223, 3230, 3240, 3250	5
San Francisco	
Depositary banks (1210, 3210) to: 1220, 1223, 3220, 3223	5
Los Angeles	
Depositary banks (1220, 1223, 3220, 3223) to: 1210, 3210	5
Portland	
Depositary banks (1230, 3220) to: 1250, 3250	5
Salt Lake City	
None.	
Seattle	
Depositary banks (1250, 3250) to: 1230, 3230	5

Appendix B–2—Reduction of Schedules for Certain Nonlocal Checks Under the Permanent Schedule

A depositary bank that is located in the following check processing territories shall make funds deposited in an account by a nonlocal check described below available for withdrawal not later than the number of business days following the banking day on which funds are deposited, as specified below.

Federal Reserve office	Number of business days following the banking day funds are deposited
New York	
Depositary banks (0210, 0260, 0280, 2260) to: 0214, 0219, 2214, 2219	3
Jericho	
0210, 0260, 2260	3
Cranford	
0210, 0260, 0280, 2260	3
Utica	
0210, 0280	3
Nashville	
0613, 2613	3
Kansas City	
0865, 2865,	3

Appendix C—Model Forms, Clauses, and Notices

This Appendix contains model disclosure forms, clauses and notices to facilitate compliance with the disclosure requirements of the regulation. Although use of these forms, clauses and notices is not required, banks using them properly to make disclosures required by the regulation are deemed to be in compliance.

Model Specific Policy Disclosure Forms

C–1 Next-day availability
C–2 Next-day availability and § 229.13 exceptions
C–3 Next-day availability, case-by-case holds to statutory limits, and § 229.13 exceptions (temporary schedule)
C–4 Holds to statutory limits on all deposits (temporary schedule)
C–5 Holds to statutory limits on all deposits (temporary schedule, includes chart)
C–6 Holds on all deposits, but for less time than the statutory limits, and case-by-case holds to the statutory limits (temporary schedule)
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Model Clauses

C–8 Holds on other funds (check cashing)
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C–9 Appendix B availability (nonlocal checks)
C–10 Automated teller machine deposits (temporary schedule, extended hold)
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C–12 Credit union interest payment policy

Model Notices

C–13 Exception hold notice
C–13A Reasonable cause hold notice
C–14 Case-by-case hold notice
C–15 Notice at locations where employees accept consumer deposits
C–15A Notice at locations where employees accept consumer deposits (case-by-case holds)
C–16 Notice at automated teller machines
C–17 Notice at automated teller machines (delayed receipt)
C–18 Deposit slip notice

Model Specific Policy Disclosure Forms

C–1—Next-day availability

YOUR ABILITY TO WITHDRAW FUNDS at (bank name and location)

Our policy is to make funds from your deposits available to you on the first business day after the day we receive your deposit. At that time, you can withdraw the funds in cash and we will use the funds to pay checks that you have written.

For determining the availability of your deposits, every day is a business day, except Saturdays, Sundays, and federal holidays. If you make a deposit before (time of day) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after (time of day) or on a day we are not open, we will consider that the deposit was made on the next business day we are open.

C–2—Next-day availability and § 229.13 exceptions

YOUR ABILITY TO WITHDRAW FUNDS at (bank name and location)

Our policy is to make funds from your deposits available to you on the first business day after the day we receive your deposit. At that time, you can withdraw the funds in cash and we will use the funds to pay checks that you have written.

For determining the availability of your deposits, every day is a business day, except Saturdays, Sundays, and federal holidays. If you make a deposit before (time of day) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after (time of day) or on a day we are not open, we will consider that the deposit was made on the next business day we are open.

Longer Delays May Apply

Funds you deposit by check may be delayed for a longer period under the following circumstances:

We believe a check you deposit will not be paid.

You deposit checks totaling more than $5,000 on any one day.

You redeposit a check that has been returned unpaid.

You have overdrawn your account repeatedly in the last six months.

There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the (number) business day after the day of your deposit.

Special Rules for New Accounts

If you are a new customer, the following special rules will apply during the first 30 days your account is open.

The first $5,000 from a deposit of U.S. Treasury checks will be available on the first business day after the day of your deposit. The excess over $5,000 will be available on the ninth business day after the day of your deposit. Funds from wire transfers into your account will be available on the first business day after the day we receive the transfer.

Funds from deposits of cash and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and state and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you [and you may have to use a special deposit slip]. The excess over $5,000 will be available on the ninth business day after the day of your deposit. If you do not make the deposit in person to one of our employees, the first $5,000 will not be available until the second business day after the day of your deposit.

Funds from all other check deposits will be available on the (number) business day after the day of your deposit.

C-3—Next-day availability, case-by-case holds to statutory limits, and § 229.13 exceptions (temporary schedule)

YOUR ABILITY TO WITHDRAW FUNDS at (bank name and location)

Our policy is to make funds from your deposits available to you on the first business day after the day we receive your deposit. At that time, you can withdraw the funds in cash and we will use the funds to pay checks that you have written.

For determining the availability of your deposits, every day is a business day, except Saturdays, Sundays, and federal holidays. If you make a deposit before (time of day) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after (time of day) or on a day we are not open, we will consider that the deposit was made on the next business day we are open.

Longer Delays May Apply

In some cases, we will not make all of the funds that you deposit by check available to you on the first business day after the day of your deposit. Depending on the type of check that you deposit, funds may not be available until the seventh business day after the day of your deposit. However, the first $100 of your deposits will be available on the first business day.

If we are not going to make all of the funds from your deposit available on the first business day, we will notify you at the time you make your deposit. We will also tell you when the funds will be available. If your deposit is not made directly to one of our employees, or if we decide to take this action after you have left the premises, we will mail you the notice by the day after we receive your deposit.

If you will need the funds from a deposit right away, you should ask us when the funds will be available.

In addition, funds you deposit by check may be delayed for a longer period under the following circumstances:

We believe a check you deposit will not be paid.

You deposit checks totaling more than $5,000 on any one day.

You redeposit a check that has been returned unpaid.

You have overdrawn your account repeatedly in the last six months.

There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the (number) business day after the day of your deposit.

Special Rules for New Accounts

If you are a new customer, the following special rules will apply during the first 30 days your account is open.

The first $5,000 from a deposit of U.S. Treasury checks will be available on the first business day after the day of your deposit. The excess over $5,000 will be available on the ninth business day after the day of your deposit. Funds from wire transfers into your account will be available on the first business day after the day we receive the transfer.

Funds from deposits of cash and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and state and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you [and you may have to use a special deposit slip]. The excess over $5,000 will be available on the ninth business day after the day of your deposit. If you do not make the deposit in person to one of our employees, the first $5,000 will not be available until the second business day after the day of your deposit.

Funds from all other check deposits will be available on the (number) business day after the day of your deposit.

C-4—Holds to statutory limits on all deposits (temporary schedule)

YOUR ABILITY TO WITHDRAW FUNDS at (*bank name and location*)

Our policy is to delay the availability of funds that you deposit in your account. Durinq the delay, you may not withdraw the funds in cash and we will not use the funds to pay checks that you have written.

Determining the Availability of a Deposit

The length of the delay is counted in business days from the day of your deposit. Every day is a business day except Saturdays, Sundays, and federal holidays. If you make a deposit before (*time of day*) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after (*time of day*) or on a day we are not open, we will consider that the deposit was made on the next business day we are open.

The length of the delay varies depending on the type of deposit and is explained below.

Next-Day Availability

Funds from the following deposits are available on the first business day after the day of your deposit:

U.S. Treasury checks that are payable to you.

Wire transfers, including preauthorized credits, such as social security benefits and payroll payments.

Checks drawn on (*bank name*) [unless (*any limitations related to branches to different states or check processing regions*)].

If you make the deposit in person to one of our employees, funds from the following deposits are also available on the first business day after the day of your deposit:

Cash.

State and local government checks that are payable to you [if you use a special deposit slip available from (*where deposit slip may be obtained*)].

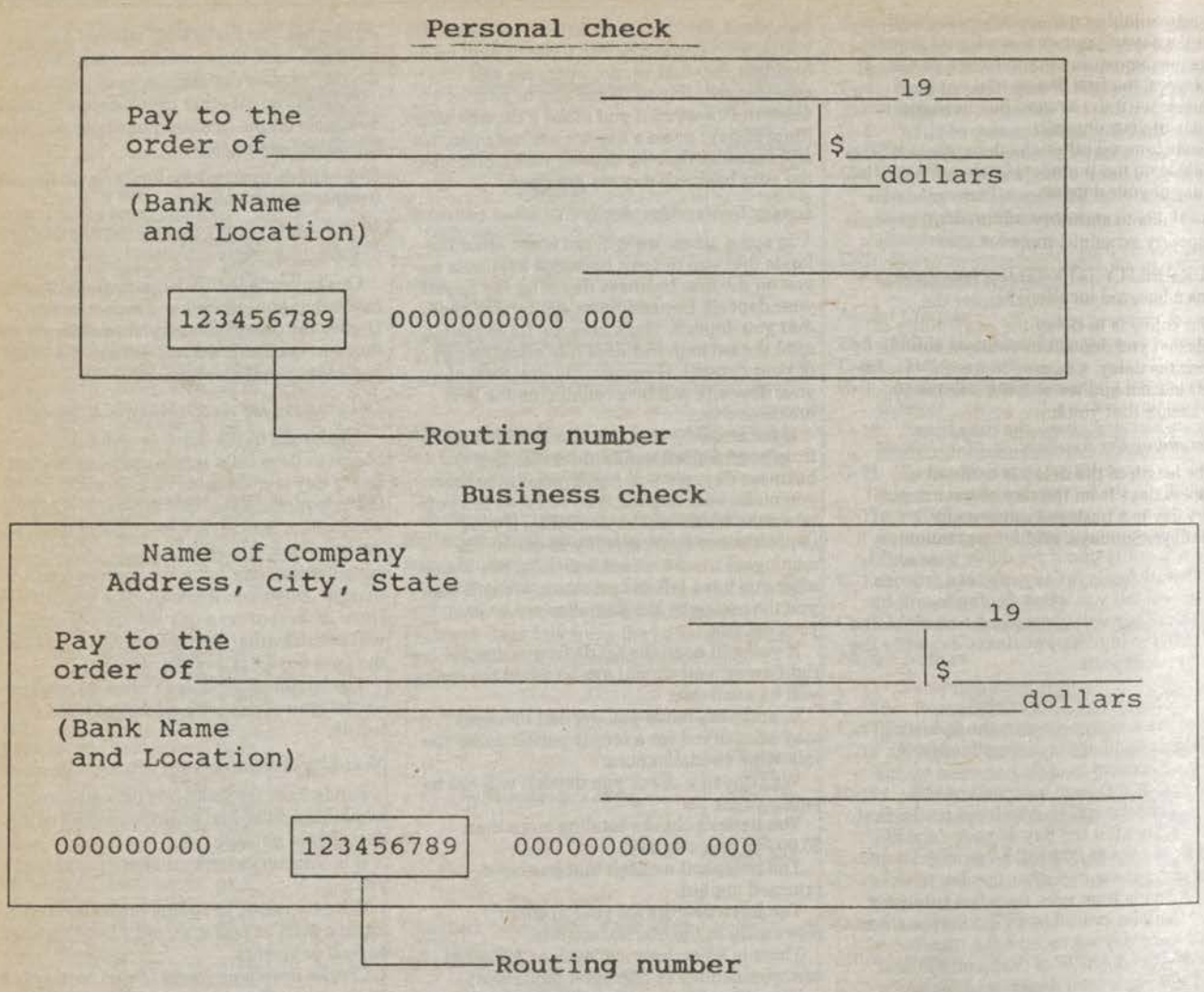
Cashier's, certified, and teller's checks that are payable to you [if you use a special deposit slip available from (*where deposit slip may be obtained*)].

Federal Reserve Bank checks, Federal Home Loan Bank checks, and postal money orders, if these items are payable to you.

If you do not make your deposit in person to one of our employees (for example, if you mail the deposit), funds from these deposits will be available on the second business day after the day of your deposit.

Other Check Deposits

The delay for other check deposits depends on whether the check is a local or a nonlocal check. To see whether a check is a local or a nonlocal check, look at the routing number on the check:



If the first four digits of the routing number (1234 in the examples above) are (*local numbers*), then the check is a local check. Otherwise, the check is a nonlocal check. Our policy is to make funds from these checks available as follows.

1. *Local checks.* The first $100 from a deposit of local checks will be available on the first business day after the day of your deposit. The remaining funds will be available on the third business day after the day of your deposit.

For example, if you deposit a local check of $700 on a Monday, $100 of the deposit is available on Tuesday. The remaining $600 is available on Thursday.

2. *Nonlocal checks.* The first $100 from a deposit of nonlocal checks will be available on the first business day after the day of your deposit. The remaining funds will be available on the seventh business day after the day of your deposit.

For example, if you deposit a $700 nonlocal check on a Monday, $100 of the deposit is available on Tuesday. The remaining $600 is available on Wednesday of the following week.

If you deposit both categories of checks, $100 from the checks will be available on the first business day after the day of your deposit, not $100 from each category of check.

Longer Delays May Apply

Funds you deposit by check may be delayed for a longer period under the following circumstances:

We believe a check you deposit will not be paid.

You deposit checks totaling more than $5,000 on any one day.

You redeposit a check that has been returned unpaid.

You have overdrawn your account repeatedly in the last six months.

There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the (*number*) business day after the day of your deposit.

Special Rules for New Accounts

If you are a new customer, the following special rules will apply during the first 30 days your account is open.

The first $5,000 from a deposit of U.S. Treasury checks will be available on the first business day after the day of your deposit. The excess over $5,000 will be available on the ninth business day after the day of your deposit. Funds from wire transfers into your account will be available on the first business day after the day we receive the transfer.

Funds from deposits of cash and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and state and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you [and you may have to use a special deposit slip]. The excess over $5,000

will be available on the ninth business day after the day of your deposit. If you do not make the deposit in person to one of our employees, the first $5,000 will not be available until the second business day after the day of your deposit.

Funds from all other check deposits will be available on the (*number*) business day after the day of your deposit.

C-5—Holds to statutory limits on all deposits (temporary schedule, includes chart)

YOUR ABILITY TO WITHDRAW FUNDS at (bank name and location)

Our policy is to delay the availability of funds that you deposit in your account. During the delay, you may not withdraw the funds in cash and we will not use the funds to pay checks that you have written.

Determining the Availability of a Deposit

The length of the delay is counted in business days from the day of your deposit. Every day is a business day except Saturdays, Sundays, and federal holidays. If you make a deposit before (time of day) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after (time of day) or on a day we are not open, we will consider that the deposit was made on the next business day we are open.

The length of the delay varies depending on the type of deposit and is explained below.

Next-Day Availability

Funds from the following deposits are available on the first business day after the day of your deposit:

U.S. Treasury checks that are payable to you.

Wire transfers, including preauthorized credits, such as social security benefits and payroll payments.

Checks drawn on (*bank name*) [unless (*any limitations related to branches in different states or check processing regions)].*

If you make the deposit in person to one of our employees, funds from the following deposits are also available on the first business day after the day of your deposit:

Cash.

State and local government checks that are payable to you [if you use a special deposit slip available from (where deposit slip may be obtained)].

Cashier's certified, and teller's checks that are payable to you [if you use a special deposit slip available from (where deposit slip may be obtained)].

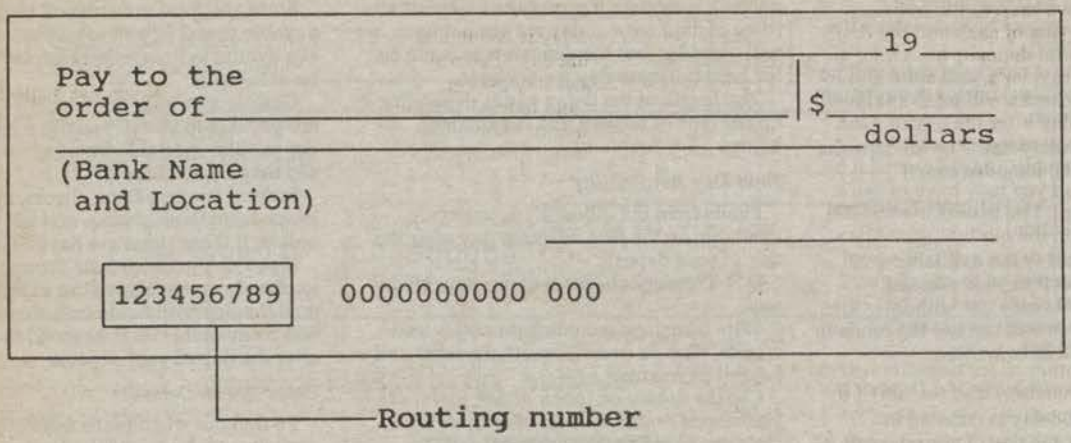
Federal Reserve Bank checks, Federal Home Loan Bank checks, and postal money orders, if these items are payable to you.

If you do not make your deposit in person to one of our employees (for example, if you mail the deposit), funds from these deposits will be available on the second business day after the day of your deposit.

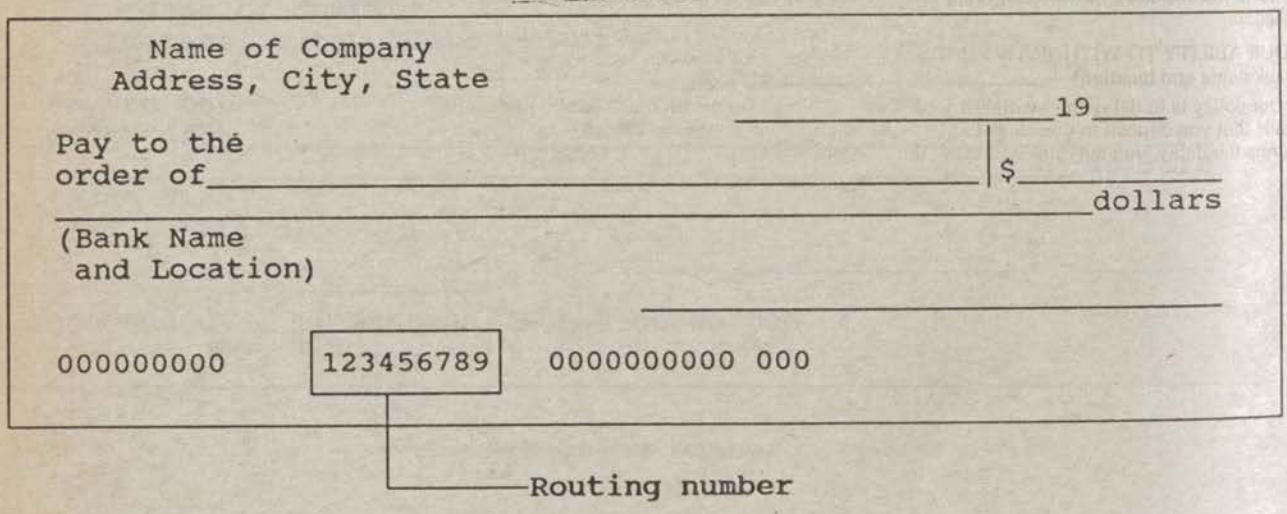
Other Check Deposits

To find out when funds from other check deposits will be available, look at the first four digits of the routing number on the check:

Personal check



Business check



Once you have determined the first four digits of the routing number (1234 in the examples above), the following chart will show you when funds from the check will be available:

First four digits from routing number	When funds are available:	When funds are available if a deposit is made on a Monday
(Local numbers)..	$100 on the first business day after the day of your deposit.	Tuesday.
	Remaining funds on the third business day after the day of your deposit.	Thursday.
All other numbers..	$100 on the first business day after the day of your deposit.	Tuesday.
	Remaining funds on the seventh business day after the day of your deposit.	Wednesday of the following week.

If you deposit both categories of checks, $100 from the checks will be available on the first business day after the day of your deposit, not $100 from each category of check.

Longer Delays May Apply

Funds you deposit by check may be delayed for a longer period under the following circumstances:

We believe a check you deposit will not be paid.

You deposit checks totaling more than $5,000 on any one day.

You redeposit a check that has been returned unpaid.

You have overdrawn your account repeatedly in the last six months.

There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the (number) business day after the day of your deposit.

Special Rules for New Accounts

If you are a new customer, the following special rules will apply during the first 30 days your account is open.

The first $5,000 from a deposit of U.S. Treasury checks will be available on the first business day after the day of your deposit. The excess over $5,000 will be available on

the ninth business day after the day of your deposit. Funds from wire transfers into your account will be available on the first business day after the day we receive the transfer.

Funds from deposits of cash and the first, $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and state and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you [and you may have to use a special deposit slip]. The excess over $5,000 will be available on the ninth business day after the day of your deposit. If you do not make the deposit in person to one of our employees, the first $5,000 will not be available until the second business day after the day of your deposit.

Funds from all other check deposits will be available on the (number) business day after the day of your deposit.

C–6—Holds on all deposits, but for less time than the statutory limits, and case-by-case holds to the statutory limits (temporary schedule)

YOUR ABILITY TO WITHDRAW FUNDS at (bank name and location)

Our policy is to delay the availability of funds that you deposit in your account. During the delay, you may not withdraw the funds in cash and we will not use the funds to pay checks that you have written.

Determining the Availability of a Deposit

The length of the delay is counted in business days from the day of your deposit. Every day is a business day except Saturdays, Sundays, and federal holidays. If you make a deposit before (time of day) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after (time of day) or on a day we are not open, we will consider that the deposit was made on the next business day we are open.

The length of the delay varies depending on the type of deposit and is explained below.

Next-day Availability

Funds from the following deposits are available on the first business day after the day of your deposit:

U.S. Treasury checks that are payable to you.

Wire transfers, including preauthorized credits, such as social security benefits and payroll payments.

Checks drawn on (bank name) [unless (any limitations related to branches in different states or check processing regions)].

If you make the deposit in person to one of our employees, funds from the following deposits are also available on the first business day after the day of your deposit:

Cash.

State and local government checks that are payable to you [if you use a special deposit slip available from (where deposit slip may be obtained)].

Cashier's, certified, and teller's checks that are payable to you [if you use a special deposit slip available from (where deposit slip may be obtained)].

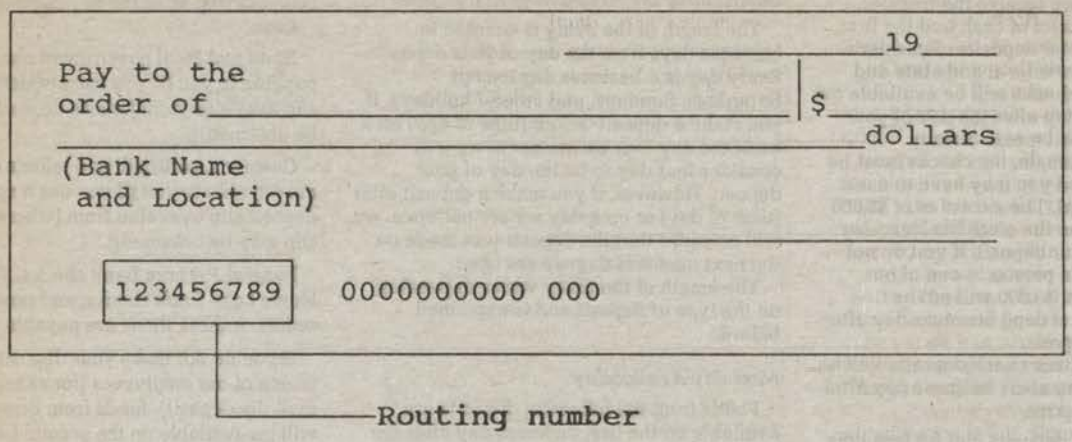
Federal Reserve Bank checks, Federal Home Loan Bank checks, and postal money orders, if these items are payable to you.

If you do not make your deposit in person to one of our employees (for example, if you mail the deposit), funds from these deposits will be available on the second business day after the day of your deposit.

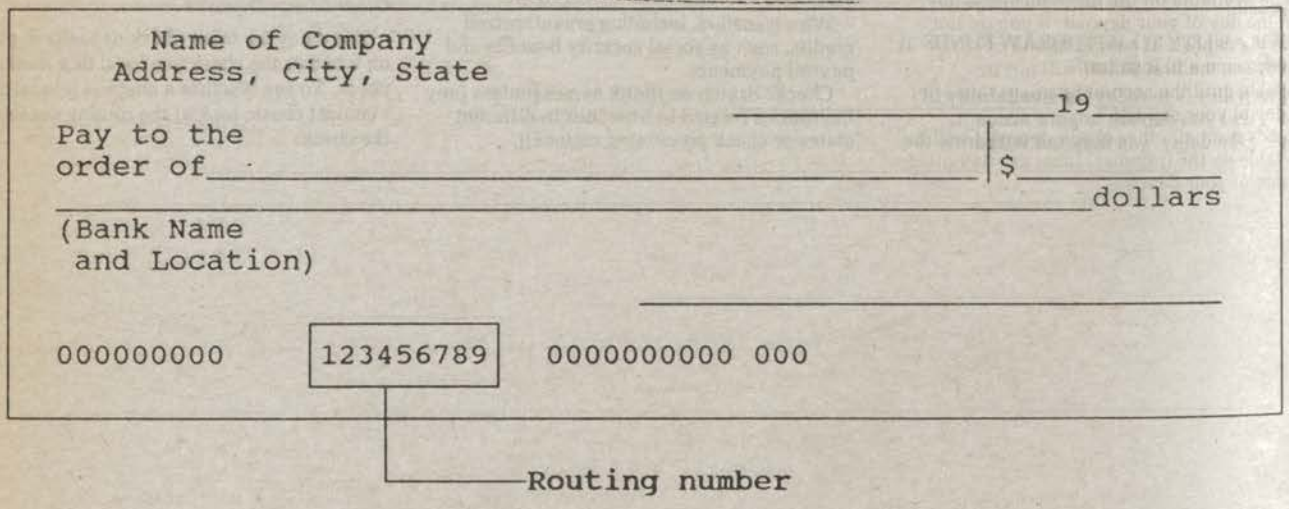
Other Check Deposits

The delay for other check deposits depends on whether the check is a local or a nonlocal check. To see whether a check is a local or a nonlocal check, look at the routing number on the check:

Personal check



Business Check



If the first four digits of the routing number (1234 in the examples above) are (local numbers), then the check is a local check. Otherwise, the check is a nonlocal check. Our policy is to make funds from these checks available as follows.

1. Local checks. The first $100 from a deposit of local checks will be available on the first business day after the day of your deposit. The remaining funds will be available on the (number) business day after the day of your deposit.

For example, if you deposit a local check of $700 on a Monday, $100 of the deposit is available on Tuesday. The remaining $600 is available on (day).

2. Nonlocal checks. The first $100 from a deposit of nonlocal checks will be available on the first business day after the day of your deposit. The remaining funds will be available on the (number) business day after the day of your deposit.

For example, if you deposit a $700 nonlocal check on a Monday, $100 of the deposit is available on Tuesday. The remaining $600 is available on (day).

If you deposit both categories of checks, $100 from the checks will be available on the first business day after the day of your deposit, not $100 from each category of check.

Longer Delays May Apply

In some cases, we will not make all of the funds that you deposit by check available at the times shown above. Depending on the type of check that you deposit, funds may not be available until the seventh business day after the day of your deposit. However, the first $100 of your deposits will be available on the first business day after the day of your deposit.

If we are not going to make all funds from your deposit available at the times shown above, we will notify you at the time you make your deposit. We will also tell you when the funds will be available. If your deposit is not made directly to a bank employee, or if we decide to take this action after you have left the premises, we will mail you the notice by the day after we receive your deposit.

If you will need the funds from a deposit right away, you should ask us when the funds will be available.

In addition, funds you deposit by check may be delayed for a longer period under the following circumstances:

We believe a check you deposit will not be paid.

You deposit checks totaling more than $5,000 on any one day

You redeposit a check that has been returned unpaid.

You have overdrawn your account repeatedly in the last six months.

There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be

available. They will generally be available no later than the (number) business day after the day of your deposit.

Special Rules for New Accounts

If you are a new customer, the following special rules will apply during the first 30 days your account is open.

The first $5,000 from a deposit of U.S. Treasury checks will be available on the first business day after the day of your deposit. The excess over $5,000 will be available on the ninth business day after the day of your deposit. Funds from wire transfers into your account will be available on the first business day after the day we receive the transfer.

Funds from deposits of cash and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and state and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you [and you may have to use a special deposit slip]. The excess over $5,000 will be available on the ninth business day after the day of your deposit. If you do not make the deposit in person to one of our employees, the first $5,000 will not be available until the second business day after the day of your deposit.

Funds from all other check deposits will be available on the (number) business day after the day of your deposit.

C–7—Holds to statutory limits on all deposits (permanent schedule)

YOUR ABILITY TO WITHDRAW FUNDS at (*bank name and location*)

Our policy is to delay the availability of funds that you deposit in your account. During the delay, you may not withdraw the funds in cash and we will not use the funds to pay checks that you have written.

Determining the Availability of a Deposit

The length of the delay is counted in business days from the day of your deposit. Every day is a business day except Saturdays, Sundays, and federal holidays. If you make a deposit before (*time of day*) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after (*time of day*) or on a day we are not open, we will consider that the deposit was made on the next business day we are open.

The length of the delay varies depending on the type of deposit and is explained below.

Next-Day Availability

Funds from the following deposits are available on the first business day after the day of your deposit:

U.S. Treasury checks that are payable to you.

Wire transfers, including preauthorized credits, such as social security benefits and payroll payments

Checks drawn on (*bank name*) [unless (*any limitations related to branches in different states or check processing regions*)].

If you make the deposit in person to one of our employees, funds from the following deposits are also available on the first business day after the day of your deposit:

Cash.

State and local government checks that are payable to you [if you use a special deposit slip available from (*where deposit slip may be obtained*)].

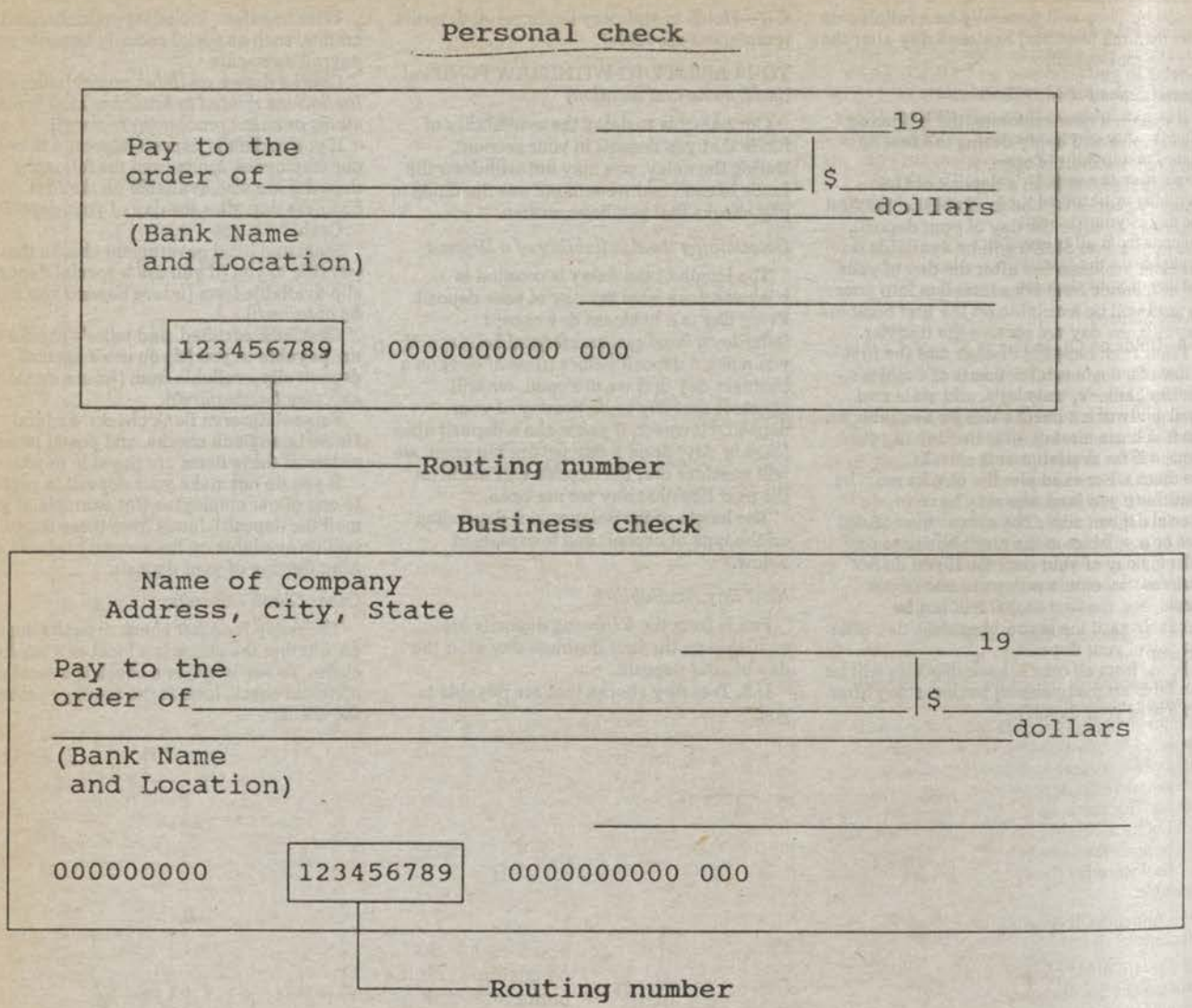
Cashier's, certified, and teller's checks that are payable to you [if you use a special deposit slip available from (*where deposit slip may be obtained*)].

Federal Reserve Bank checks, Federal Home Loan Bank checks, and postal money orders, if these items are payable to you.

If you do not make your deposit in person to one of our employees (for example, if you mail the deposit), funds from these deposits will be available on the second business day after the day of your deposit.

Other Check Deposits

The delay for other check deposits depends on whether the check is a local or a nonlocal check. To see whether a check is a local or a nonlocal check, look at the routing number on the check:



If the first four digits of the routing number (1234 in the examples above) are (*local numbers*), then the check is a local check. Otherwise, the check is a nonlocal check. Our policy is to make funds from these checks available as follows.

1. *Local checks.* The first $100 from a deposit of local checks will be available on the first business day after the day of your deposit. The remaining funds will be available on the second business day after the day of your deposit.

For example, if you deposit a local check of $700 on a Monday, $100 of the deposit is available on Tuesday. The remaining $600 is available on Wednesday.

2. *Nonlocal checks.* The first $100 from a deposit of nonlocal checks will be available on the first business day after the day of your deposit. The remaining funds will be available on the fifth business day after the day of your deposit.

For example, if you deposit a $700 nonlocal check on a Monday, $100 of the deposit is available on Tuesday. The remaining $600 is available on Monday of the following week.

Longer Delays May Apply

Funds you deposit by check may be delayed for a longer period under the following circumstances:

We believe a check you deposit will not be paid.

You deposit checks totaling more than $5,000 on any one day.

You redeposit a check that has been returned unpaid.

You have overdrawn your account repeatedly in the last six months.

There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the (*number*) business day after the day of your deposit.

If you deposit both categories of checks, $100 from the checks will be available on the first business day after the day of your deposit, not $100 from each category of check.

Special Rules for New Accounts

If you are a new customer, the following special rules will apply during the first 30 days your account is open. The first $5,000 from a deposit of U.S. Treasury checks will be available on the first business day after the day of your deposit. The excess over $5,000 will be available on the ninth business day after the day of your deposit. Funds from wire transfers into your account will be available on the first business day after the day we receive the transfer.

Funds from deposits of cash and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and state and local government checks will be available on the first business day after the day of your

deposit if the deposit meets certain conditions. For example, the checks must be payable to you [and you may have to use a special deposit slip]. The excess over $5,000 will be available on the ninth business day after the day of your deposit. If you do not make the deposit in person to one of our employees, the first $5,000 will not be available until the second business day after the day of your deposit.

Funds from all other check deposits will be available on the (*number*) business day after the day of your deposit.

Model Clauses

C–8—Holds on Other Funds (Check Cashing)

If we cash a check for you that is drawn on another bank, we may withhold the availability of a corresponding amount of funds that are already in your account. Those funds will be available at the time funds from the check we cashed would have been available if you had deposited it. For example, if we cash a $100 local check for you, $100 of funds already in your account will not be available until the (*number*) business day after the day we cashed the check.

C–8A—Holds on Other Funds (Other Account)

If we accept for deposit a check that is drawn on another bank, we may make funds from the deposit available for withdrawal immediately but delay your availability to withdraw a corresponding amount of funds that you have on deposit in another account with us. The funds in the other account would then not be available for withdrawal until the time periods that are described elsewhere in this disclosure for the type of check that you deposited.

C–9—Appendix B Availability (Nonlocal Checks)

3. Certain other checks. We can process nonlocal checks drawn on financial institutions in certain areas faster than usual. Therefore, funds from deposits of checks drawn on institutions in those areas will be available to you more quickly. Call us if you would like a list of the routing numbers for these institutions.

C–10—Automated Teller Machine Deposits (Temporary Schedule, Extended Hold)

Deposits at Automated Teller Machines

Funds from any deposits (cash or checks) made at automated teller machines (ATMs) we do not own or operate will not be available until the seventh business day after the day of your deposit. This rule does not apply at ATMs that we own or operate.

[A list of our ATMs is enclosed.]

or

[A list of ATMs where you can make deposits but that are not owned or operated by us is enclosed.]

or

[All ATMs that we own or operate are identified as our machines.]

C–11—Cash withdrawal limitation (temporary schedule)

1. Local checks. The first $100 from a deposit of local checks will be available on the first business day after the day of your deposit to pay checks you have written to others. All of the remaining funds will be available on the third business day after the day of your deposit to pay checks you have written to others.

The first $100 will also be available for withdrawal in cash on the first business day after the day of your deposit. An additional $400 of the deposit may be withdrawn in cash at or after (*time no later than 5:00 p.m.*) on the third business day after the day of your deposit. All of the remaining funds will be available for cash withdrawal on the fourth business day after the day of your deposit.

For example, if you deposit a local check of $700 on a Monday, $100 of the deposit is available on Tuesday to pay checks to others and to withdraw in cash. The rest is available to pay checks on Thursday. At or after (*time no later than 5:00 p.m.*) on Thursday you may withdraw another $400 of the deposit in cash, and you may withdraw the rest in cash on Friday.

2. Nonlocal checks. The first $100 from a deposit of nonlocal checks will be available on the first business day after the day of your deposit for cash withdrawal and to pay checks you have written to others. The remainder will be available on the seventh business day after the day of your deposit for both of these purposes.

For example, if you deposit a nonlocal check on a Monday, $100 of the deposit is available on Tuesday to pay checks to others and to withdraw in cash. The remaining funds from the deposit are available on Wednesday of the following week for cash withdrawal and to pay checks written to others.

C–11A—Cash Withdrawal Limitation (Temporary Schedule, Clearinghouse Member)

1. Local checks. The first $100 from a deposit of local checks will be available on the first business day after the day of your deposit for cash withdrawal and to pay checks you have written to others. The remainder generally will be available on the third business day after the day of your deposit for both of these purposes.

For example, if you deposit a local check of $700 on a Monday, $100 of the deposit is available on Tuesday to pay checks to others and to withdraw in cash. The remaining $600 is available on Thursday for cash withdrawal and to pay checks you have written to others.

In some cases, however, depending on the bank on which the check is drawn, special limitations apply to withdrawals in cash. The first $100 will be available for cash withdrawal on the first business day after the day of your deposit. An additional $400 of the deposit may be withdrawn in cash at or after *(time no later than 5:00 p.m.)* on the third business day after the day of your deposit. All of the remaining funds will be available for cash withdrawal on the fourth business day after the day of your deposit.

In these cases, for example, if you deposit a local check of $700 on a Monday, $100 of the deposit is available on Tuesday to pay checks to others and to withdraw in cash. The rest is available to pay checks on Thursday. At or after *(time no later than 5:00 p.m.)* on Thursday you may withdraw another $400 of the deposit in cash, and you may withdraw the rest in cash on Friday.

2. Nonlocal checks. The first $100 from a deposit of nonlocal checks will be available on the first business day after the day of your deposit for cash withdrawal and to pay checks you have written to others. The remainder will be available on the seventh business day after the day of your deposit for both of these purposes.

For example, if you deposit a nonlocal check on a Monday, $100 of the deposit is available on Tuesday to pay checks to others and to withdraw in cash. The remaining funds from the deposit are available on Wednesday of the following week for cash withdrawal and to pay checks written to others.

C–11B—Cash Withdrawal Limitation (Permanent Schedule)

1. Local checks. The first $100 from a deposit of local checks will be available on the first business day after the day of your deposit to pay checks you have written to others. All of the remaining funds will be available on the second business day after the day of your deposit to pay checks you have written to others.

The first $100 will also be available for withdrawal in cash on the first business day after the day of your deposit. An additional $400 of the deposit may be withdrawn in cash at or after *(time no later than 5:00 p.m.)* on the second business day after the day of your deposit. All of the remaining funds will be available for cash withdrawal on the third business day after the day of your deposit.

For example, if you deposit a local check of $700 on a Monday, $100 of the deposit is available on Tuesday to pay checks to others and to withdraw in cash. The rest is available to pay checks on Wednesday. At or after *(time no later than 5:00 p.m.)* on Wednesday you may withdraw another $400 of the deposit in cash, and you may withdraw the rest in cash on Thursday.

2. Nonlocal checks. The first $100 from a deposit of nonlocal checks will be available on the first business day after the day of your deposit to pay checks you have written to others. All of the remaining funds will be available on the fifth business day after the day of your deposit to pay checks you have written to others.

The first $100 will also be available for withdrawal in cash on the first business day after the day of your deposit. An additional $400 of the deposit may be withdrawn in cash at or after *(time no later than 5:00 p.m.)* on the fifth business day after the day of your deposit. All of the remaining funds will be available for cash withdrawal on the sixth business day after the day of your deposit.

For example, if you deposit a nonlocal check of $700 on a Monday, $100 of the deposit is available on Tuesday to pay checks to others and to withdraw in cash. The rest is available to pay checks on Monday of the following week. At or after *(time no later than 5:00 p.m.)* on that Monday, you may withdraw another $400 of the deposit in cash. The rest may be withdrawn in cash on Tuesday of that following week.

C–12—Credit Union Interest Payment Policy

Interest Payment Policy

If we receive a deposit to your account on or before the tenth of the month, you begin earning interest on the deposit (whether it was a deposit of cash or checks) as of the first day of that month. If we receive the deposit after the tenth of the month, you begin earning interest on the deposit as of the first of the following month. For example, a deposit made on June 7 earns interest from June 1, while a deposit made on June 17 earns interest from July 1.

Model Notices

C–13—Exception hold notice

NOTICE OF HOLD

Account number: *(number)*
Date of deposit: *(date)*
Amount of deposit: *(amount)*

We are delaying the availability of $*(amount being held)* from this deposit. These funds will be available on the *(number)* business day after the day of your deposit.

We are taking this action because:

—A check you deposited was previously returned unpaid.
—You have overdrawn your account repeatedly in the last six months.
—The checks you deposited on this day exceed $5,000.
—An emergency, such as failure of communications or computer equipment, has occurred.
—We believe a check you deposited will not be paid for the following reasons:

_____

_____

_____

[If you did not receive this notice at the time you made the deposit and the check you deposited is paid, we will refund to you any fees for overdrafts or returned checks that result solely from the additional delay that we are imposing. To obtain a refund of such fees, *(description of procedure for obtaining refund)*.]

C–13A—Reasonable cause hold notice

NOTICE OF HOLD

Account number: *(number)*
Date of deposit: *(date)*
Amount of deposit: *(amount)*

We are delaying the availability of the funds you deposited by the following check: *(description of check, such as amount and drawer)*

These funds will be available on the *(number)* business day after the day of your deposit. The reason for the delay is explained below:

—We received notice that the check is being returned unpaid.
—We have confidential information that indicates that the check may not be paid.
—The check is drawn on an account with repeated overdrafts.
—We are unable to verify the endorsement of a joint payee.
—Some information on the check is not consistent with other information on the check.
—There are erasures or other apparent alterations on the check.
—The routing number of the paying bank is not a current routing number.
—The check is postdated or has a stale date.
—Information from the paying bank indicates that the check may not be paid.
—We have been notified that the check has been lost or damaged in collection.
—Other:

_____

[If you did not receive this notice at the time you made the deposit and the check you deposited is paid, we will refund to you any fees for overdrafts or returned checks that result solely from the additional delay that we are imposing. To obtain a refund of such fees, *(description of procedure for obtaining refund)*.]

C–14—Case-by-case hold notice

NOTICE OF HOLD

Account number: *(number)*
Date of deposit: *(date)*
Amount of deposit: *(amount)*

We are delaying the availability of $*(amount being held)* from this deposit. These funds will be available on the *(number)* business day after the day of your deposit.

[If you did not receive this notice at the time you made the deposit and the check you deposited is paid, we will refund to you any fees for overdrafts or returned checks that result solely from the additional delay that we are imposing. To obtain a refund of such fees, *(description of procedure for obtaining refund)*.]

C–15—Notice at Locations Where Employees Accept Consumer Deposits

FUNDS AVAILABILITY POLICY

Description of deposit	When funds can be withdrawn by cash or check
Cash, wire transfers, cashier's, certified, teller's, or government checks, checks on (*bank name*) [unless (*any limitation related to branches in different check processing regions*)], and the first $100 of a day's deposits of other checks.	The first business day after the day of deposit.
Local checks	The third business day after the day of deposit.
Nonlocal checks	The seventh business day after the day of deposit.

C–15A—Notice at Locations Where Employees Accept Consumer Deposits (Case-by-Case Holds)

FUNDS AVAILABILITY POLICY

Our general policy is to allow you to withdraw funds deposited in your account on the (*number*) business day after the day we receive your deposit. In some cases, we may delay your ability to withdraw funds beyond the (*number*) business day. Then, the funds will generally be available by the seventh business day after the day of deposit.

C–16—Notice at Automated Teller Machines

AVAILABILITY OF DEPOSITS

Funds from deposits may not be available for immediate withdrawal. Please refer to your institution's rules governing funds availability for details.

C–17—Notice at Automated Teller Machines (Delayed Receipt)

NOTICE

Deposits at this ATM between (*day*) and (*day*) will not be considered received until (*day*). The availability of funds from the deposit may be delayed as a result.

C–18—Deposit Slip Notice

Deposits may not be available for immediate withdrawal.

Appendix D.—Indorsement Standards

1. The depositary bank shall indorse a check according to the following specifications:

• The indorsement shall contain—
—The bank's nine-digit routing number, set off by arrows at each end of the number and pointing toward the number;
—The bank's name/location; and
—The indorsement date.

• The indorsement may also contain—
—An optional branch identification;
—An optional trace/sequence number;
—An optional telephone number for receipt of notification of large-dollar returned checks; and
—Other optional information provided that the inclusion of such information does not interfere with the readability of the indorsement.

• The indorsement shall be written in dark purple or black ink.

• The indorsement shall be placed on the back of the check so that the routing number is wholly contained in the area 3.0 inches from the leading edge of the check to 1.5 inches from the trailing edge of the check.[1]

2. Each subsequent collecting bank indorser shall protect the identifiability and legibility of the depositary bank indorsement by:

• Including *only* its nine-digit routing number (without arrows), the indorsement date, and an optional trace/sequence number;

• Using an ink color other than purple; and

• Indorsing in the area on the back of the check from 0.0 inches to 3.0 inches from the leading edge of the check.

3. Each returning bank indorser shall protect the identifiability and legibility of the depositary bank indorsement by:

• Using an ink color other than purple;

• Staying clear of the area on the back of the check from 3.0 inches from the leading edge of the check to the trailing edge of the check.

[1] The leading edge is defined as the right side of the check looking at it from the front. The trailing edge is defined as the left side of the check looking at it from the front. See American National Standards Committee on Financial Services *Specification for the Placement and Location of MICR Printing, X 9.13.*

Appendix E.—Commentary

The Board interpretations, which are labeled "Commentary" and follow each section of Regulation CC, provide background material to explain the Board's intent in adopting a particular part of the regulation; the Commentary also provides examples to aid in understanding how a particular requirement is to work. Under section 611(e) of the Expedited Funds Availability Act (12 U.S.C. 4010(e)), no provision of section 611 imposing any liability shall apply to any act done or omitted in good faith conformity with any rule, regulation, or interpretation thereof by the Board of Governors of the Federal Reserve System, notwithstanding the fact that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

The Commentary is an "interpretation" of a regulation by the Board within the meaning of section 611.

Section 229.2 Definitions

Section 229.2 defines the terms used in the regulation. For the most part, terms are defined as they are in section 602 of the Expedited Funds Availability Act (12 U.S.C. 4001). The Board has made a number of changes for the sake of clarity, to conform the terminology to that which is familiar to the banking industry, to define terms that are not defined in the Act, and to carry out the purposes of the Act. The Board has also incorporated by reference the definitions of the Uniform Commercial Code where appropriate. Some of the Regulation CC's definitions are self-explanatory and therefore are not discussed in this commentary.

(a) *Account.* The Act defines account to mean "a demand deposit account or similar transaction account at a depository institution." The regulation defines "account" in terms of the definition of "transaction account" in the Board's Regulation D (12 CFR Part 204). The definition of "account" in Regulation CC, however, excludes certain deposits, such as nondocumentary obligations (see 12 CFR 204.2(a)(1)(vii)), that are covered under the definition of "transaction account" in Regulation D. The definition applies to accounts with general third party payment powers but does not cover time deposits or savings deposits, including money market deposit accounts, even though they may have limited third party payment powers. The Board believes that it is appropriate to exclude these accounts because of the reference to demand deposits in the Act, which suggests that the Act is intended to apply only to accounts that permit unlimited third party transfers.

The term account also differs from the definition of transaction account in Regulation D because the term "account" refers to accounts held at banks. Under Subparts A and C, the term "bank" includes not only any "depository institution," as defined in the Act, but also any person engaged in the business of banking, such as a Federal Reserve Bank, a Federal Home Loan Bank, or a private banker that is not subject to Regulation D. Thus accounts at these institutions benefit from the expeditious return requirements of Subpart C.

Interbank deposits, including accounts of offices of domestic banks or foreign banks located outside the United States, and direct and indirect accounts of the United States Treasury (including Treasury General Accounts and Treasury Tax and Loan Deposit Accounts) are exempt from Regulation CC.

(b) *Automated clearinghouse (ACH).* The Board has defined "automated clearinghouse" as a facility that processes debit and credit transfers under rules established by a Federal Reserve Bank operating circular governing automated clearinghouse items or the rules of an ACH association. ACH credit transfers are included in the definition of "electronic payment."

The reference to "credit transfers" and "debit transfers" does not refer to the corresponding credit and debit entries that are part of the same transaction, but to different kinds of ACH payments. In an ACH credit transfer, the originator orders that its account be debited and another account credited. In an ACH debit transfer, the originator, with prior authorization, orders another account to be debited and the originator's account to be credited.

A facility that handles only "wire transfers" (defined elsewhere) is not an ACH.

(c) *Automated teller machine (ATM)* is not defined in the Act. The regulation defines an ATM as an electronic device at which a natural person may make deposits to an account by cash or check and perform other account transactions. Point-of-sale terminals, machines that only dispense cash, night depositories, and lobby deposit boxes are not ATMs within the meaning of the definition, either because they do not accept deposits of cash or checks (e.g. point-of-sale terminals and cash dispensers) or because they only accept deposits (e.g. night depositories and lobby boxes) and cannot perform other transactions. A lobby deposit box or similar receptacle in which written payment orders or deposits may be placed is not an ATM.

A facility may be an ATM within this definition even if it is a branch under state or federal law, although an ATM is not a branch as that term is used in this regulation.

(d) *Available for withdrawal.* Under this definition, when funds become "available for withdrawal," the funds may be put to all uses for which the customer may use actually and finally collected funds in the customer's account under the customer's account agreement with the bank. Examples of such uses include payment of checks drawn on the account, certification of checks, electronic payments, and cash withdrawals. Funds are available for these uses notwithstanding provisions of other law that may restrict the use of uncollected funds (e.g., 18 U.S.C. 1004; 12 U.S.C. 331).

If a bank makes funds available to a customer for a specific purpose (such as paying checks that would otherwise overdraw the customer's account and be returned for insufficient funds) before the funds must be made available under the bank's policy or this regulation, it may nevertheless apply a hold consistent with this regulation to those funds for other purposes (such as cash withdrawals). For the purposes of this regulation, funds are considered available for withdrawal even though they cannot actually be withdrawn because they are subject to garnishment, tax levy, or court order restricting disbursements from the account.

(e) *Bank.* The Act uses the term "depository institution," which it defines by reference to section 19(b)(1)(A)(i) through (vi) of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A)(i) through (vi)). This regulation uses the term "bank," a term that conforms to the usage the Board has previously adopted in Regulation J. "Bank" is also used in Article 4 of the Uniform Commercial Code.

"Bank" is defined to include depository institutions, such as commercial banks, savings banks, savings and loan associations, and credit unions as defined in the Act, and U.S. branches of foreign banks. For purposes of Subpart C, and in connection therewith, Subpart A, any Federal Reserve Bank, Federal Home Loan Bank, or any other person engaged in the business of banking is regarded as a bank. The phrase "any other person engaged in the business of banking," is derived from U.C.C. § 1–201(4), and is intended to cover entities, such as certain industrial banks and private bankers that handle checks for collection and payment, so that all checks will be covered by the same rules for forward collection and return, even though they may not be covered by the requirements of Subpart B. For the purposes of Subpart C, and in connection therewith, Subpart A, term may also include states and units of general local government to the extent that they pay warrants or other drafts drawn directly on the state or local government itself.

Unless otherwise specified, the term bank includes all of a bank's offices in the United States. The regulation does not cover foreign offices of U.S. banks.

(f) *Banking day* and (g) *Business day.* The Act defines "business day" as any day excluding Saturdays, Sundays, and legal holidays. "Legal holiday," however, is not defined, and the variety of local holidays, together with the practice of some banks to close midweek, makes the Act's definition difficult to apply. The Board believes that two kinds of business days are relevant. First, when determining the day when funds are deposited or when a bank must perform certain actions (such as returning a check), the focus should be on a day that the bank is actually open for business. Second, when counting days for purposes of determining when funds must be available under the regulation or when notice of nonpayment must be received by the depositary bank, there would be confusion and uncertainty in trying to follow the schedule of a particular bank, and there is less need to identify a day when a particular bank is open. Most banks that act as intermediaries (large correspondents and Federal Reserve Banks) follow the same holiday schedule. Accordingly, the regulation has two definitions: "business day" generally follows the standard Federal Reserve holiday schedule (which is followed by most large

banks), and "banking day" is defined to mean that part of a business day on which a bank is open for substantially all of its banking activities.

The definition of banking day corresponds to the definition of banking day in U.C.C. § 4–104(1)(c), except that a banking day is defined in terms of a "business day." Thus, if a bank is open on Saturday, Saturday might be a banking day for purposes of the U.C.C., but it would not be a banking day for purposes of Regulation CC because Saturday is never a "business day" under the regulation.

The definition of banking day is phrased in terms of when "an office of a bank is open" to indicate that a bank may observe a banking day on a per branch basis. Deposits made at an ATM are considered made at the branch holding the account into which the deposit is made for purposes of determining the day of deposit.

(h) *Cash* means U.S. coins and currency. The phrase in the Act "including Federal Reserve notes" has been deleted as unnecessary. (See 31 U.S.C. 5103.)

(i) *Cashier's check.* The regulation adds to the second item in the Act's definition of "cashier's check" the phrase, "on behalf of the bank as drawer," to clarify that the term "cashier's check" is intended to cover only checks that a bank draws on itself. The definition of cashier's check includes checks provided to customers for purposes of making payments or to pay withdrawals or provided to others to enable them to make payments. Cashier's checks provided to customers or others are often labeled as "cashier's check," "officer's check," or "official check." The definition does not include checks that a bank draws on itself for other purposes, such as to pay employees and vendors.

(j) *Certified check.* The Act defines a certified check as one to which a bank has certified that the drawer's signature is genuine and that the bank has set aside funds to pay the check. Under the Uniform Commercial Code, certification of a check means the bank's signed agreement that it will honor the check as presented (U.C.C. §§ 3–410, 3–411). The regulation defines "certified check" to include both the Act's and U.C.C.'s definitions.

(k) *Check* is defined in section 602(7) of the Act as a negotiable demand draft drawn on or payable through an office of a depository institution located in the United States, excluding noncash items. The regulation includes six categories of instruments within the definition of check.

The first category is negotiable demand drafts drawn on or payable through or at an office of a bank. As the definition of "bank" includes only offices located in the United States, this category is limited to checks drawn on or payable through or at a banking office located in the United States.

The Act treats drafts payable through a bank as checks, even though under the U.C.C. the payable through bank is a collecting bank to make presentment and is generally not authorized to make payment (U.C.C. § 3–120). The Act does not expressly address items that are payable at a bank. This regulation treats both payable through and payable at demand drafts as checks. The Board believes that treating demand drafts payable at a bank as checks will not have a substantial effect on the operations of payable at banks—by far the largest proportion of payable at items are not negotiable demand drafts, but time items, such as commercial paper, bonds, notes, bankers' acceptances, and securities. These time items are not covered by the requirements of the Act or this regulation. (The treatment of payable through drafts is discussed in greater detail in connection with the definitions of "local check" and "paying bank.")

The second category is checks drawn on Federal Reserve Banks and Federal Home Loan Banks. Principal and interest payments on federal debt instruments are often paid with checks drawn on a Federal Reserve Bank as fiscal agent of the United States, and these "fiscal agency checks" are indistinguishable from other checks drawn on Federal Reserve Banks. (See 31 CFR Part 355.) Federal Reserve Bank checks are also used by some banks as substitutes for cashier's or teller's checks. Similarly, savings and loan associations often use checks drawn on Federal Home Loan Banks as teller's checks. The definition of check includes checks drawn on Federal Home Loan Banks and Federal Reserve Banks because in many cases they are the functional equivalent of Treasury checks or teller's checks.

The third and fourth categories of instrument included in the definition of check refer to government checks. The Act refers to checks drawn on the U.S. Treasury, even though these instruments are not drawn on or payable through an office of a depository institution, and checks drawn by state and local governments. The Act also gives the Board authority to define functionally equivalent instruments as "depository checks." [1] Thus, the Act is intended to apply to instruments other than those that meet the strict definition of check in section 602(7) of the Act. Checks and warrants drawn by states and local governments are often used for the purposes of making unemployment compensation payments and other payments that are important to the recipients. Consequently, the Board has expressly defined check to include drafts drawn on the U.S. Treasury and drafts or warrants drawn by a state or a unit of general local government on itself.

The fifth category of instrument included in the definition of check is U.S. Postal Service money orders. These instruments are defined as checks, because they are often used as a substitute for checks by consumers, even though money orders are not negotiable under Postal Service regulations. The Board has not provided specific rules for other types of money orders; these instruments are generally drawn on or payable through or payable at banks and are treated as checks on that basis.

The sixth and final category of instrument included in the definition of check is traveler's checks drawn on or payable through or at a bank. "Traveler's check" is defined in paragraph (hh) of this section. Finally, for the purposes of Subpart C, and in connection therewith, Subpart A, the definition of check includes nonnegotiable demand drafts because these instruments are often handled as cash items in the forward collection process.

The definition of check does not include an instrument payable in foreign currency (i.e., other than in United States money as defined in 31 U.S.C. 5101) or a credit card draft.

(l) *Check clearinghouse association.* The Act defines a clearinghouse association as any arrangement by which participants exchange deposited checks on a local basis, including an entire metropolitan area. The definition includes informal arrangements where the participants have not formally constituted themselves as an association. The definition of check clearinghouse association excludes direct exchanges involving only two banks.

The Act defines clearinghouses as local arrangements, which may cover an entire metropolitan area. In some cases, most notably California, a single in different metropolitan areas. For purposes of this regulation, each of those exchanges would be regarded as a separate clearinghouse.

Using the premises of a Federal Reserve Bank to exchange checks does not constitute the handling of checks for collection by the Reserve Bank. Several clearinghouses meet at Reserve Banks to exchange checks among their members.

(m) *Check processing region.* The Act defines this term as "the geographic area served by a Federal Reserve bank check processing center or such larger area as the Board may prescribe by regulations." The Board has defined check processing region as the territory served by one of the 48 Federal Reserve head offices, branches, or regional check processing centers. Appendix A includes a list of routing numbers arranged by Federal Reserve Bank office. The definition of check processing region is key to determining whether a check is considered local or nonlocal.

(n) *Consumer account* is defined as an account used primarily for personal, family, or household purposes. Both consumer and nonconsumer accounts are subject to the requirements of this regulation, including the requirement that funds be made available according to specific schedules and that the bank make specified disclosures of its availability policies. Section 229.18(b) (notices at branch locations) and § 229.18(e) (notice of changes in policy) apply only to consumer accounts. Section 229.19(d) (use of calculated availability) applies only to nonconsumer accounts.

(o) *Depositary bank.* The regulation uses the term depositary bank rather than the term "receiving depository institution." "Receiving depository institution" is a term unique to the Act, while "depositary bank" is the term used in Article 4 of the U.C.C. and Regulation J.

A depositary bank includes the bank in which the check is first deposited. If a foreign office of a U.S. or foreign bank sends checks to its U.S. correspondent bank for forward

[1] Section 602(11) of the Act (12 U.S.C. 4001(11)) defines "depository check" as "any cashier's check, certified check, teller's check, and any other functionally equivalent instrument as determined by the Board."

collection, the U.S. correspondent is the depositary bank since foreign offices of banks are not included in the definition of bank.

If a customer deposits a check in its account at a bank, the customer's bank is the depositary bank with respect to the check. For example, if a person deposits a check into an account at a nonproprietary ATM, the bank holding the account into which the check is deposited is the depositary bank even though another bank may service the nonproprietary ATM and send the check for collection. (Under § 229.35 the depositary bank may agree with the bank servicing the nonproprietary ATM to have the servicing bank place its own indorsement on the check as the depositary bank. For the purposes of Subpart C, the bank applying its indorsement as the depositary bank indorsement on the check is the depositary bank.)

A bank may act as both the depositary bank and the paying bank with respect to a check, if the check is drawn on, payable at, or payable through the bank in which it was deposited. A bank is also considered a depositary bank with respect to checks it receives as payee. For example, a bank is a depositary bank with respect to checks it receives for loan repayment, even though these checks are not deposited in an account at the bank. Because these checks would not be "deposited to accounts," they would not be subject to the availability or disclosure requirements of Subpart B.

(p) *Electronic payment* is defined to mean a wire transfer as defined in § 229.2(11) or an ACH credit transfer. The Act requires that funds deposited by wire transfer be made available for withdrawal on the business day following deposit but expressly leaves the definition of the term wire transfer to the Board. Because ACH credit transfers frequently involve important consumer payments, such as wages, the regulation requires that funds deposited by ACH credit transfers be available for withdrawal on the business day following deposit.

ACH debit transfers, even though they may be transmitted electronically, are not defined as electronic payments because the receiver of an ACH debit transfer has the right to return the transfer, which would reverse the credit given to the originator. Thus, ACH debit transfers are more like checks than wire transfers. Further, bank customers that receive funds by originating ACH debit transfers are primarily large corporations, which would generally be able to negotiate with their banks for prompt availability.

A point-of-sale transaction would not be considered an electronic payment unless the transaction was effected by means of an ACH credit transfer or wire transfer.

(q) *Forward collection* is defined to mean the process by which a bank sends a check to the paying bank for payment as distinguished from the process by which the check is returned after nonpayment. Noncash collections are not included in the term "forward collection."

(r) *Local check* is defined as a check drawn on, payable through, or payable at a local paying bank. A depositary bank may rely on the routing number on the check in determining whether the check is local or nonlocal if the bank collects the check based on the routing number. A check, such as a check drawn on a local bank but payable through a nonlocal bank, could have two paying banks, one local and one nonlocal, depending on where the check is sent for payment or collection.

Appendix A includes a list of routing numbers arranged by Federal Reserve Bank office to enable persons to determine whether or not a check is local.

(s) *Local paying bank* is defined as a paying bank to which a check is sent for forward collection located in the same check processing region as the branch or proprietary ATM of the depositary bank. A bank may rely on the routing number on a check in identifying a local check provided that it sends the check for payment or collection based on that routing number; consequently, a person can determine which checks are local by reference to the routing number.

Examples

I. If a check that is drawn on a bank that is located in the same check processing region as the depositary bank is payable through a bank located in another check processing region, the check is considered local or nonlocal depending on where the check was sent for payment. If the depositary bank sends the check directly to the drawee bank for payment, the check is considered local; if it sends the check to the payable through bank, the check is considered nonlocal.

2. The location of the depositary bank is determined by the physical location of the branch or proprietary ATM at which a check is deposited. If the branch of the depositary bank located in one check processing region sends a check to the depositary bank's central facility in another check processing region, and the central facility is in the same check processing region as the paying bank, the check is still considered nonlocal. (See commentary on definition of "paying bank".)

For deposits at nonproprietary ATMs, a paying bank is a local paying bank only if the paying bank to which a check is sent for forward collection is located in the same check processing region as the location of both the branch of the depositary bank at which the account is held, and the nonproprietary ATM at which the check is deposited.

(t) *Merger transaction* is a term used in Subparts B and C in connection with transition rules for merged banks. It encompasses mergers, consolidations, and purchase/assumption transactions of the type that must usually be approved under the Bank Merger Act (12 U.S.C. 1828) or similar statutes; it does not encompass acquisitions of a bank under the Bank Holding Company Act (12 U.S.C. 1842) or section 408 of the National Housing Act (12 U.S.C. 1730a) where an acquired bank maintains its separate corporate existence.

Regulation CC adopts a one-year transition period for banks that are party to a merger transaction during which the merged banks will continue to be treated as separate entities. (See §§ 229.19(g) and 229.40.)

(u) *Noncash item.* The Act defines the term "check" to exclude "noncash items," and defines noncash items to include checks to which another document is attached, checks accompanied by special instructions, or any similar item classified as a noncash item in the Board's regulation.

The regulation's definition of "noncash item" also includes checks that consist of more than a single thickness of paper (except checks that qualify for handling by automated check processing equipment, e.g. those placed in carrier envelopes) and checks that have not been preprinted or post-encoded in magnetic ink with the paying bank's routing number as well as checks with documents attached or accompanied by special instructions.

A check that has been preprinted or post-encoded with a routing number that has been retired (e.g., because of a merger) for at least three years is a noncash item unless the current number is added for processing purposes by placing the check in an encoded carrier document or adding a strip to the check.

Checks that are accompanied by special instructions are also noncash items. For example, a person concerned about whether a check will be paid may request the depositary bank to send a check for collection as a noncash item with an instruction to the paying bank to notify the depositary bank promptly when the check is paid or dishonored.

For purposes of forward collection, a copy of a check is neither a check nor a noncash item, but may be treated as either. For purposes of return, a copy is generally a notice in lieu of return. (See §§ 229.30(f) and 229.31(f).)

(y) *Participant* means a bank that is located in the geographic area served by a clearinghouse and that both collects checks drawn on other clearinghouse participants, and receives for payment checks from other clearinghouse participants through the clearinghouse either directly or through another participant. The phrase "through a participant" covers associate members of the clearinghouse, but a bank is not a participant merely because it sends a check to a correspondent that in turn presents the check through a clearinghouse exchange.

(z) *Paying bank.* The regulation uses this term in lieu of the Act's "originating depository institution," and defines it, as in Regulation J (12 CFR Part 210), to include the payor bank, the payable at bank, and the payable through bank.

Under §§ 229.30 and 229.36(a), a bank designated as a "payable through bank" or "payable at bank" is responsible for the expedited return of checks and notice of nonpayment requirements of Subpart C. The payable through or payable at bank may contract with the payor with respect to its liability in discharging these responsibilities. The Board believes that the Act makes a clear connection between availability and the time it takes for checks to be cleared and returned. Allowing the payable through bank additional time to forward checks to the payor, and await return or pay instructions from the payor, would delay the return of these checks, increasing the risks to depositary banks. Accordingly, for

availability purposes, a check payable through or payable at a bank is considered drawn on the payable through or payable at bank if it is sent to that bank for collection.

If a check is sent for forward collection based on the routing number, the bank associated with the routing number is a paying bank for the purposes of Subpart C requirements, including notice of nonpayment, even if the check is not drawn by a customer of that bank or the check is fraudulent.

The phrase "and to which [the check] is sent for payment or collection" includes sending not only the physical check, but information regarding the check under a truncation arrangement.

Federal Reserve Banks and Federal Home Loan Banks are also paying banks under all subparts of the regulation with respect to checks payable by them, even though such banks are not defined as banks for purposes of Subpart B.

(aa) *Proprietary ATM.* Under the temporary schedule, all deposits at nonproprietary ATMs are treated as deposits of nonlocal checks and deposits at proprietary ATMs are generally treated as deposits at banking offices. The Conference Report on the Act indicates that the special availability rules for deposits received through nonproprietary ATMs are provided because "nonproprietary ATMs today do not distinguish among check deposits or between check and cash deposits" (H.R. Rep. No. 261, 100th Cong., 1st Sess. at 179 (1987)). Thus, during the temporary schedule, a deposit of any combination of cash and checks at a nonproprietary ATM may be treated as if it were a deposit of nonlocal checks, because the depositary bank does not know the makeup of the deposit and consequently is unable to place different holds on cash, local check, and nonlocal check deposits made at the ATM.

A colloquy between Senators Proxmire and Dodd during the floor debate on the Competitive Equality Banking Act (133 Cong. Rec. S11289 (Aug. 4, 1987)) indicates that whether a bank operates the ATM is the primary criterion to determining whether the ATM is proprietary to that bank. Since a bank should be capable of ascertaining the composition of deposits made to an ATM operated by that bank, an exception to the availability schedules is not warranted for these deposits. If more than one bank meets the owns or operates criterion, the ATM is considered proprietary to the bank that operates it. For the purpose of this definition, the bank that operates an ATM is the bank that puts checks deposited into the ATM into the forward collection stream. An ATM owned by one or more banks, but operated by a nonbank servicer, is considered proprietary to the bank or banks that own it.

The Act also includes location as a factor in determining whether an ATM that is either owned or operated by a bank is proprietary to that bank. The definition of proprietary ATM includes an ATM located on the premises of the bank, either inside the branch or on its outside wall, regardless of whether the ATM is owned or operated by that bank. Since the Act also defines a proprietary ATM as one that is "in close proximity" to the bank, the regulation defines an ATM located within 50 feet of a bank to be proprietary to that bank unless it is identified as being owned or operated by another entity. The Board believes that the statutory proximity test was designed to apply to situations where it would appear to the depositor that the ATM is run by his or her bank, because of the proximity of the ATM to the bank. The Board believes that an ATM located within 50 feet of a banking office would be presumed proprietary to that bank unless it is clearly identified as being owned or operated by another entity.

(bb) *Qualified returned check.* Subpart C requires the paying bank and returning bank(s) to return checks in an expeditious manner. The banks may meet this responsibility by returning a check to the depositary bank by the same general means used for forward collection of a check from the depositary bank to the paying bank. One way to speed the return process is to prepare the returned check for automated processing. Returned checks can be automated by either the paying bank or a returning bank by placing the return in a carrier envelope or by placing a strip on the bottom of the return, and encoding the envelope or strip with the routing number of the depositary bank, the amount of the check, and a special return identifier. Returns are identified by placing a "2" in position 44 of the MICR line. (See American National Standards Committee on Financial Services, *Specification for the Placement and Location of MICR Printing, X9.13* (Sept. 8, 1983) hereinafter referred to as "ANSI X9.13–1983.")

Generally, under the standard of care imposed by § 229.38, a paying or returning bank would be liable for any damages incurred due to misencoding of the routing number, the amount of the check, or return identifier on a qualified returned check unless the error was due to problems with the depositary bank's indorsement. (See also discussion of § 229.38(c).) A qualified returned check that contains an encoding error would still be a qualified returned check for purposes of the regulation.

A qualified returned check need not contain the elements of a check drawn on the depositary bank, such as the name of the depositary bank, as is required under the direct return provision of U.C.C. § 4–212(2). Because indorsements and other information on carrier envelopes or strips will not appear on a returned check itself, banks will wish to retain carrier envelopes and/or microfilm or other records of carrier envelopes or strips with their check records.

(cc) *Returning bank* is defined to mean any bank (excluding the paying bank and the depositary bank) handling a returned check. A returning bank may or may not be a bank that handled the returned check in the forward collection process. A returning bank includes a bank that agrees to handle a returned check for expeditious return to the depositary bank under § 229.31(a). A returning bank is also a collecting bank for the purpose of a collecting bank's duty to act seasonably under U.C.C. § 4–202.

(dd) *Routing number.* Each bank is assigned a routing number by Rand McNally & Co. as agent for the American Bankers Association. The routing number takes two forms: a fractional form and a nine-digit form. A paying bank is identified by both the fractional form routing number (which normally appears in the upper right hand corner of the check) and the nine-digit form. The nine-digit routing number of the paying bank is generally printed in magnetic ink near the bottom of the check (the "MICR strip;" see ANSI X9.13–1983). Subpart C requires depositary banks and subsequent collecting banks to place their routing numbers in nine-digit form in their indorsements.

(gg) *Teller's check* is defined in the Act to mean a check issued by a depository institution and drawn on another depository institution. The definition in the regulation includes not only checks drawn by a bank on another bank, but also checks payable through or at a bank. This would include checks drawn on a nonbank, as long as the check is payable through or at a bank. The definition explicitly excludes checks used by the bank to pay employees or vendors. (See also Commentary on the definition of "cashier's check.")

(hh) *Traveler's check.* The Act and regulation require that traveler's checks be treated as cashier's, teller's, or certified checks when a new depositor opens an account. (See § 229.13(a); 12 U.S.C. 4003(a)(1)(C).) The Act does not define traveler's check.

One element of the definition states that a traveler's check is "drawn on or payable through or at a bank." Traveler's checks that are not issued by banks may not have any words on them identifying a bank as drawee or paying agent, but may bear unique routing numbers with an 8000 prefix that identifies a bank as paying agent.

Because a traveler's check is payable by, at, or through a bank, it is also a check for purposes of this regulation. When not subject to the next-day availability requirement for new accounts, a traveler's check should be treated as a local or nonlocal check depending on the location of the paying bank. The depositary bank may rely on the designation of the paying bank by the routing number to determine whether local or nonlocal treatment is required.

(ii) *Uniform Commercial Code* is defined as the version of the Code adopted by the individual states. For purposes of uniform citation, all citations to the U.C.C. in this part refer to the Official Text as approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

(ll) *Wire transfer.* The Act delegates to the Board the authority to define the term "wire transfer." The regulation defines wire transfer as an unconditional order to a bank to pay a fixed or determinable amount of money to a beneficiary upon receipt or on a day stated in the order that is transmitted by electronic or other means over certain networks or on the books of banks and that is used primarily to transfer funds between commercial accounts. Unconditional means that no condition, such as presentation of documents, must be met before the bank receiving the order is to make payment. A

wire transfer may be transmitted by electronic or other means. "Electronic means" include computer-to-computer links, on-line terminals, telegrams (including TWX, TELEX, or similar methods of communication), telephone calls, or other similar methods. Fedwire (the Federal Reserve's wire transfer network), CHIPS (Clearing House Inter-bank Payments System, operated by the New York Clearing House), and book transfers among banks or within one bank are covered by this definition. Credits for credit and debit card transactions are not wire transfers. The term "wire transfer" excludes "electronic fund transfers" as that term is defined by the Electronic Fund Transfer Act.

Section 229.10 Next-Day Availability

(a) *Cash deposits.* This paragraph implements the Act's requirement for next-day availability for cash deposits to accounts at a depositary bank "staffed by individuals employed by such institution." [2] This paragraph, as well as other provisions of this subpart governing the availability of funds, provides that funds must be made available for withdrawal not later than a specified number of "business days" following the "banking day" on which the funds are deposited. Thus, a deposit is only considered made on a banking day, i.e., a day that the bank is open to the public for carrying on substantially all of its banking functions. For example, if a deposit is made at an ATM on a Saturday, Sunday, or other day on which the bank is closed to the public, the deposit is considered received on that bank's next banking day.

Nevertheless, "business days" are used to determine the number of days following the banking day of deposit that funds must be available for withdrawal. For example, if a deposit of a local check were made on a Monday under the temporary schedule, which requires that funds be available for withdrawal on the third business day after deposit, funds must be made available on Thursday regardless of whether the bank was closed on Wednesday for other than a standard legal holiday as specified in the definition of "business day."

Under this paragraph, cash deposited in an account at a staffed teller station on a Monday must become available for withdrawal by the start of business on Tuesday. It must become available for withdrawal by the start of business on Wednesday if it is deposited by mail, at a proprietary ATM (or at a nonproprietary ATM under the permanent schedule), or by other means other than at a staffed teller station.

(b) *Electronic payments.* The Act provides next-day availability for funds received for deposit by wire transfer. The regulation uses the term "electronic payment," rather than "wire transfer," to include both wire transfers and ACH credit transfers under the next-day availability requirement. (*See* discussion of definitions of "automated clearinghouse," "electronic payment," and "wire transfer" in § 229.2.)

The Act requires that funds received by wire transfer be available for withdrawal not later than the business day following the day a wire transfer is received. This paragraph clarifies what constitutes receipt of an electronic payment. For the purposes of this paragraph, a bank receives an electronic payment when the bank receives both payment in finally collected funds and the payment instructions indicating the customer accounts to be credited and the amount to be credited to each account. For example, in the case of Fedwire, the bank receives finally collected funds at the time the payment is made. (See 12 CFR 210.36.) Finally collected funds generally are received for an ACH credit transfer when they are posted to the receiving bank's account on the settlement day. In certain cases, the bank receiving ACH credit payments will not receive the specific payment instructions indicating which accounts to credit until after settlement day. In these cases, the payments are not considered received until the information on the account and amount to be credited is received.

This paragraph also establishes the extent to which an electronic payment is considered made. Thus, if a participant on a private network fails to settle and the receiving bank receives finally settled funds representing only a partial amount of the payment, it must make only the amount that it actually received available for withdrawal.

The availability requirements of this regulation do not preempt or invalidate other rules, regulations, or agreements which require funds to be made available on a more prompt basis. For example, the next-day availability requirement for ACH credits in this section does not preempt ACH association rules and Treasury regulations (31 CFR Part 210), which provide that the proceeds of these credit payments be available to the recipient for withdrawal on the day the bank receives the funds.

(c) *Certain check deposits.* The Act generally requires that funds be made available on the business day following the banking day of deposit for Treasury checks; state and local government checks; cashier's, certified, and teller's checks; and "on us" checks, under specified conditions. (Treasury checks are checks drawn on the Treasury of the United States and have a routing number beginning with the digits "0000.") This section also requires next-day availability for additional types of checks not addressed in the Act. Checks drawn on a Federal Reserve Bank or a Federal Home Loan Bank and U.S. Postal Service money orders must also be made available on the next business day following deposit under specified conditions. For the purposes of this section, all checks drawn on a Federal Reserve Bank or Federal Home Loan Bank are subject to the next-day availability requirement if they are deposited in an account held by a payee of the check and in person to an employee of the depositary bank, regardless of the purpose for which the checks were issued.

Deposit in Account of Payee

One statutory condition to receipt of next-day availability of Treasury checks; state and local government checks; and cashier's, certified, and teller's checks is that the check must be "endorsed only by the person to whom it was issued." The Act could be interpreted to include a check that has been indorsed in blank and deposited into an account of a third party that is not named as payee. The Board believes that such a check presents greater risks than a check deposited by the payee and that Congress did not intend to require next-day availability to such checks. The regulation, therefore, provides that funds must be available on the business day following deposit only if the check is deposited in an account held by a payee of the check. For the purposes of this section, payee does not include transferees other than named payees. The regulation also applies this condition to Postal Service money orders, and checks drawn on Federal Reserve Banks and Federal Home Loan Banks.

Deposit at Staffed Teller Station

In most cases, next-day availability of the proceeds of checks subject to this section is conditioned on the deposit of these checks in person to an employee of the depositary bank. If the deposit is made at a proprietary ATM (and at a nonproprietary ATM under the permanent schedule), night depository, or through the mail, rather than at a staffed teller facility, the proceeds of the deposit must be available for withdrawal by the start of business on the second business day after deposit, under paragraph (c)(2) of this section.

The Act and regulation do not condition the receipt of next-day availability to deposits at staffed teller stations in the case of Treasury checks. Therefore, Treasury checks deposited at a proprietary ATM must be accorded next-day availability, if the check is deposited to an account of a payee of the check.

"On Us" Checks

The Act and regulation require next-day availability for on us checks, i.e., checks deposited in a branch of the depositary bank and drawn on the same or another branch of the same bank, if both branches are located in the same state or check processing region. Thus, checks deposited in one branch of a bank and drawn on another branch of the same bank must receive next-day availability even if the branch on which the checks are drawn is located in another check processing region but in the same state as the branch in which the check is deposited. For the purposes of this requirement, deposits at facilities that are not located on the premises of a brick-and-mortar branch of the bank, such as off-premise ATMs and remote depositories, are not considered deposits made at branches of the depositary bank.

First $100

The Act and regulation also require that up to $100 of the aggregate deposit by check or checks not subject to next-day availability on any one banking day be made available on the next business day. For example, if $70 were deposited in an account by check(s) on a Monday, the entire $70 must be available for withdrawal at the start of business on Tuesday. If $200 were deposited by check(s)

[2] Nothing in the Act or this regulation affects terms of account arrangements, such as negotiable order of withdrawal accounts, which may require prior notice of withdrawal. (See 12 CFR 204.2(e)(2).)

on a Monday, this section requires that $100 of the funds be available for withdrawal at the start of business on Tuesday. The portion of the customer's deposit to which the $100 must be applied is at the discretion of the depositary bank, as long as it is not applied to any checks subject to next day availability. The $100 next-day availability rule does not apply to deposits at nonproprietary ATMs.

The $100 that must be made available under this rule is in addition to the amount that must be made available for withdrawal on the business day after deposit under other provisions of this section. For example, if a customer deposits a $1,000 Treasury check, and a $1,000 local check in its account on Monday, $1,100 must be made available for withdrawal on Tuesday—the proceeds of the $1,000 Treasury check, as well as the first $100 of the local check.

A depositary bank may aggregate all local and nonlocal check deposits made by the customer on a given banking day for the purposes of the $100 next-day availability rule. Thus, if a customer has two accounts at the depositary bank, and on a particular banking day makes deposits to each account, $100 of the total deposited to the two accounts must be made available on the business day after deposit. Banks may aggregate deposits to individual and joint accounts for the purposes of this provision.

If the customer deposits a $500 local check, and gets $100 cash back at the time of deposit, the bank need not make an additional $100 available for withdrawal on the following day. Similarly, if the customer depositing the local check has a negative book balance, or negative available balance in its account at the time of deposit, the $100 that must be available on the next business day may be made available by applying the $100 to the negative balance, rather than making the $100 available for withdrawal by cash or check on the following day.

Fees for Withdrawals

A depositary bank may not impose a fee on a customer if the fee is based on the fact that the customer has withdrawn funds for which the bank has not received credit, if the funds must be made available for withdrawal under this Subpart.

Special Deposit Slips

Under the Act, a depositary bank may require the use of a special deposit slip as a condition to providing next-day availability for certain types of checks. This condition was included in the Act because a number of banks determine the availability of their customers' check deposits in an automated manner by reading the MICR-encoded routing number on the deposited checks. Using these procedures, a bank can determine whether a check is a local or nonlocal check; a check drawn on the Treasury, a Federal Reserve Bank, a Federal Home Loan Bank, or a branch of the depositary bank; or a U.S. Postal Service money order. Appendix A includes the routing numbers of certain categories of checks that are subject to next-day availability. The bank cannot require a special deposit slip for these checks.

A bank cannot distinguish whether the check is a state or local government check or a cashier's, certified, or teller's check by reading the MICR-encoded routing number, because these checks bear the same routing number as other checks drawn on the same bank that are not accorded next-day availability. Therefore, a bank may require a special deposit slip for these checks.

The regulation specifies that if a bank decides to require the use of a special deposit slip (or a special deposit envelope in the case of a deposit at an ATM or other unstaffed facility) as a condition to granting next-day availability under paragraphs (c)(1)(iv) or (c)(1)(v) of this section or second day availability under paragraph (c)(2) of this section, and if the deposit slip that must be used is different from the bank's regular deposit slips, the bank must either provide the special slips to its customers or inform its customers how such slips may be obtained and make the slips reasonably available to the customers.

A bank may meet this requirement by providing customers with an order form for the special deposit slips and allowing sufficient time for the customer to order and receive the slips before this condition is imposed. If a bank provides deposit slips in its branches for use by its customers, it must also provide the special deposit slips in the branches. If special deposit envelopes are required for deposits at an ATM, the bank must provide such envelopes at the ATM.

Generally, a teller is not required to advise depositors of the availability of special deposit slips merely because checks requiring special deposit slips for next-day availability are deposited without such slips. If a bank only provides the special deposit slips upon the request of a depositor, however, the teller must advise the depositor of the availability of the special deposit slips. If a bank prepares a deposit for a depositor, it must use a special deposit slip where appropriate. A bank may require the customer to segregate the checks subject to next-day availability for which special deposit slips could be required, and to indicate on a regular deposit slip that such checks are being deposited, if the bank so instructs its customers in its initial disclosure.

Section 229.11 Temporary Availability Schedule

(a) *Effective date.* Checks, other than those that must be accorded next-day availability, are categorized as either local or nonlocal, with different availability schedules attached to each. These schedules are effective on September 1, 1988, and will be superseded by more stringent schedules on September 1, 1990.

(b) *Local checks and certain other checks.* This paragraph sets forth the maximum hold period that can be placed on local checks during the temporary schedule. The regulation refers to the day on which funds must be available for withdrawal as within a specified number of business days after deposit, rather than after a specified number of intervening business days, as provided in the Act. A depositary bank must make funds from the deposit of a local check available on the third business day following the banking day on which the check is deposited. This requirement corresponds to the two intervening business days specified in the Act. Thus, under the temporary schedule, a local check deposited on a Monday must be available for withdrawal on Thursday, except in the case of deposits at nonproprietary ATMs and deposits to accounts in banks located outside the 48 contiguous states.

The regulation provides that Treasury checks and U.S. Postal Service money orders be treated as local checks, where the conditions to receiving next-day (or second-day) availability in § 229.10(c) are not met. These checks are treated as local checks because they are payable at any Federal Reserve office. Thus, a Treasury check or a postal money order that is indorsed and deposited in an account not held by the payee must be made available in accordance with the schedule for local checks.

Other types of checks described in § 229.10(c), such as checks drawn on a Federal Reserve Bank or Federal Home Loan Bank; state and local government checks; and cashier's, certified, and teller's checks for which next-day availability does not apply (e.g., because they were not deposited in an account of a payee of the check), are treated as either local or nonlocal checks, depending on the check processing region in which they are payable.

Time Period Adjustment for Withdrawal by Cash

The Act provides an adjustment to the availability rules for cash withdrawals. During the temporary schedule, the Act provides that funds from local checks that are drawn on or payable at or through a paying bank that is not a participant in the same check clearinghouse association as the depositary bank need not be available for cash withdrawal until 5:00 p.m. on the day specified in the schedule. At 5:00 p.m., $400 of the deposit must be made available for cash withdrawal. This $400 is in addition to the first $100 of a day's deposit, which must be made available for withdrawal at the start of business on the next business day following the banking day of deposit. The remainder of the funds must be available for cash withdrawal at the start of business on the business day following the business day specified in the schedule. This special rule does not, under the temporary schedule, apply to deposits of local checks cleared through a check clearinghouse association or to nonlocal checks.

The Act recognizes that the $400 that must be provided on the day specified in the schedule may exceed a bank's daily ATM cash withdrawal limit, and explicitly provides that the Act does not supersede the bank's policy in this regard. The Board believes that the rationale for accommodating a bank's ATM withdrawal limit also applies to other cash withdrawal limits established by that bank. Section 229.19(c)(4) of the regulation addresses the relation between a bank's cash withdrawal limit (for over-the-counter cash withdrawals as well as ATM cash withdrawals) and the requirements of this subpart.

The Board believes that the Congress included this special cash withdrawal rule to provide a depositary bank with additional

time to learn of the nonpayment of a check before it must make funds available to its customer. If a customer deposits a local check on a Monday, and that check is returned by the paying bank, the depositary bank may receive the returned check on Thursday (the day funds must be made available under the temporary schedule), but may not receive the returned check by the start of business on Thursday. Checks written by the customer that are presented to the depositary bank on Thursday are typically not posted to the customer's account until late Thursday night. Any returned checks that have been received on that day are debited to the customer's account before the checks being presented are posted. Thus, for the purpose of checks written by the customer, the fact that a return is not received until sometime during the day on which funds must be made available does not increase the bank's risk.

Nonetheless, the depositary bank's risk does increase significantly if the customer withdraws the funds in cash, because the withdrawal may occur before the return is received and posted. The intent of the special cash withdrawal rule is to minimize this risk to the depositary bank.

For this rule to minimize the depositary bank's risk, it must apply not only to cash withdrawals, but also to withdrawals by other means that result in an irrevocable debit to the customer's account or commitment to pay by the bank on the customer's behalf during the day. Thus, the cash withdrawal rule also includes withdrawals by electronic payment, issuance of a cashier's or teller's check, certification of a check, or other irrevocable commitment to pay, such as authorization of an on-line point-of-sale debit. The rule would also apply to checks presented over-the-counter for payment on the day of presentment by the depositor or another person. Such checks could not be dishonored for insufficient funds if an amount sufficient to cover the check had became available for cash withdrawal under this rule; however, payment of such checks would be subject to the bank's cut-off hour established under U.C.C. § 4–107. The cash withdrawal rule does not apply to checks and other provisional debits presented to the bank for payment that the bank has the right to return.

(c) *Nonlocal checks.* Under the temporary schedule, funds deposited by nonlocal checks must be made available for withdrawal not later than the seventh business day following the banking day the funds are deposited, except in the case of deposits at nonproprietary ATMs or in accounts of banks located outside the 48 contiguous states. Thus, funds from a nonlocal check deposited on a Monday must be available for withdrawal by Wednesday of the following week. The Act does not establish a special rule for cash withdrawals for nonlocal checks under the temporary schedule. Therefore, subject to § 229.19(c), the full amount of the deposit becomes available for withdrawal at the start of business on the business day specified in the schedule.

Reduction in Schedules

Section 603(d)(1) of the Act (12 U.S.C. 4002(d)(1)) requires the Board to reduce the statutory schedules for any category of checks where most of those checks would be returned in a shorter period of time than provided in the schedules. The conferees indicated that "if the new system makes it possible for two-thirds of the items of a category of checks to meet this test in a shorter period of time, then the Federal Reserve must shorten the schedules accordingly." H.R. Rep. No. 261, 100th Cong., 1st Sess. at 179 (1987).

Reduced schedules are provided for certain nonlocal checks where significant improvements can be made to the Act's schedules. Specifically, shorter schedules are provided for checks deposited in banks located in certain Federal Reserve cities and drawn on or payable at or through banks located in certain other Federal Reserve cities, where transportation arrangements allow for faster collection and return. In addition, shorter schedules are provided for checks drawn on or payable at or through certain banks that are served by two Federal Reserve offices, and for certain checks deposited in and drawn on or payable at or through banks in the New York City metropolitan area, where the proximity of the Federal Reserve offices facilitates faster clearing and return of these checks.

Appendix B–1 sets forth the specific reduction of schedules applicable to banks located in each check processing region.

(d) *Deposits at nonproprietary ATMs.* The Act and regulation provide a special rule for deposits made at nonproprietary ATMs. Notwithstanding other provisions of the regulation concerning availability requirements, during the temporary schedule, a depositary bank may treat all deposits made by its customers at a nonproprietary ATM as though the deposits were nonlocal checks. A deposit at a nonproprietary ATM on a Monday, including any deposit by cash or checks that would otherwise be subject to next-day availability, must be made available for withdrawal not later than Wednesday of the following week. This rule does not apply to deposits made at proprietary ATMs.

(e) *Extension of schedule for certain deposits in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.* The Act and regulation provide an extension of the availability schedules for check deposits at a branch of a bank if the branch is located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands. The schedules for local checks, nonlocal checks (including nonlocal checks subject to the reduced schedules of Appendix B), and deposits at nonproprietary ATMs are extended by one business day for checks deposited to accounts in banks located in these jurisdictions that are drawn on or payable at or through a paying bank not located in the same jurisdiction as the depositary bank. For example, a check deposited in a bank in Hawaii and drawn on a San Francisco paying bank must be made available for withdrawal not later than the fourth business day following deposit. This extension does not apply to deposits that must be made available for withdrawal on the next business day.

The Congress did not provide this extension of the schedules to checks drawn on a paying bank located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands and deposited in an account at a depositary bank in the 48 contiguous states. Therefore, a check deposited in a San Francisco bank drawn on a Hawaii paying bank must be made available for withdrawal not later than the third rather than the fourth business day following deposit.

Section 229.12 Permanent Availability Schedule

(a) *Effective date.* The permanent schedule supersedes the temporary schedule on September 1, 1990.

(b) *Local checks and certain other checks.* Under the permanent schedule, local checks must be made available for withdrawal not later than the second business day following the banking day on which the checks were deposited.

In addition, the proceeds of Treasury checks and U.S. Postal Service money orders not subject to next-day (or second-day) availability under § 229.10(c); Treasury checks deposited in nonproprietary ATMs; checks drawn on Federal Reserve Banks and Federal Home Loan Banks; checks drawn by a state or unit of general local government; and cashier's, certified, and teller's checks not subject to next-day (or second-day) availability under § 229.10(c) and payable in the same check processing region as the depositary bank, must be made available for withdrawal by the second business day following deposit.

Exceptions are made for withdrawals by cash or similar means and for deposits in banks located outside the 48 contiguous states. Thus, the proceeds of a local check deposited on a Monday generally must be made available for withdrawal on Wednesday.

(c) *Nonlocal checks.* Under the permanent schedule, the time period for availability of nonlocal checks is also reduced. Nonlocal checks must be made available for withdrawal not later than the fifth business day following deposit, i.e., proceeds of a nonlocal check deposited on a Monday must be made available for withdrawal on the following Monday. In addition, a check described in § 229.10(c) that does not meet the conditions for next-day availability (or second-day availability) is treated as a nonlocal check, if the check is drawn on or payable through or at a nonlocal paying bank. Adjustments are made to the schedule for withdrawals by cash or similar means and deposits in banks located outside the 48 contiguous states.

As described in the discussion of § 229.11(c), the Board is required to shorten the schedules for any category of check where most of those checks can be returned to the depositary bank in a shorter period of time than provided in the schedule. Appendix B–2 sets forth the reductions to the schedule for certain nonlocal checks under the permanent schedule.

(d) *Time period adjustment for withdrawal by cash or similar means.* Unlike the temporary schedule, the Act applies the special cash withdrawal rule to all local and nonlocal checks under the permanent schedule. The regulation implementing this

rule is described in the discussion of the temporary schedule at § 229.11(b). Under the permanent schedule, if the proceeds of local and nonlocal checks become available for withdrawal on the same business day, the $400 withdrawal limitation applies to the aggregate amount of the funds that became available for withdrawal on that day.

(e) *Extension of schedule for certain deposits in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.* The extension of the availability schedules provided to check deposits at a branch of a bank if the branch is located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands under the temporary schedule also applies when the permanent schedule becomes effective. Explanation of this provision is provided in the discussion of § 229.11(d).

Section 229.13 Exceptions

While certain safeguard exceptions (such as those for new accounts and checks the bank has reasonable cause to believe are uncollectible) are established in the Act, the Congress gave the Board the discretion to determine whether certain other exceptions should be included in its regulations. Specifically, the Act gives the Board the authority to establish exceptions to the schedules for large or redeposited checks and for accounts that have been repeatedly overdrawn. These exceptions do not apply to checks or other deposits that must be accorded next-day availability (or second-day availability, if the deposit is not made in person to an employee of the depositary bank) under § 229.10.

Many checks will not be returned to the depositary bank by the time funds must be made available for withdrawal under the local and nonlocal schedules. In order to reduce risk to depositary banks, the Board has exercised its statutory authority to adopt these exceptions to the schedules in the regulation to allow the depositary bank to extend the time within which it is required to make funds available. The exceptions provided in this section apply to the schedules for local and nonlocal checks during the temporary and permanent schedules, and, in limited cases, to the next-day availability requirement for certain check deposits.

The Act also gives the Board the authority to suspend the schedules for any classification of checks, if the schedules result in an unacceptable level of fraud losses. The Board will adopt regulations or issue orders to implement this statutory authority if and when circumstances requiring its implementation arise.

(a) *New accounts.*

Definition of New Account

The Act provides an exception to the availability schedule for new accounts. An account is defined as a new account during the first 30 calendar days after the account is opened. An account is open when the first deposit is made to the account. An account is not considered a new account, however, if each customer on the account has a transaction account relationship with the depositary bank, including a dormant account, that is at least 30 calendar days old on September 1, 1988, or at any time thereafter (i.e., an established account), or has had an established account with the depositary bank or within the 30 calendar days prior to opening the account.

The following are examples of what constitutes, and does not constitute, a new account:

(1) If the customer has an established account with a bank and opens a second account with the bank, the second account is not subject to the new account exception.

(2) If a customer's account were closed and another account opened as a successor to the original account (due, for example, to the theft of checks or a debit card used to access the original account), the successor account is not subject to the new account exception, assuming the previous account relationship is at least 30 days old. Similarly, if a customer closed an established account and opens a separate account within 30 days, the new account is not subject to the new account exception.

(3) If a customer has a savings deposit or other deposit that is not an account (as that term is defined in § 229.2(a)) at the bank, and opens an account, the account may be subject to the new account exception.

(4) If a person that is authorized to sign on a corporate account (but has no other relationship with the bank) opens a personal account, the personal account is subject to the new account exception.

(5) If a customer has an established joint account at a bank, and subsequently opens an individual account with that bank, the individual account is not subject to the new account exception.

(6) If two customers that each have an established individual account with the bank open a joint account, the joint account is not subject to the new account exception. If one of the customers on the account has no current or recent established account relationship with the bank, however, the joint account is subject to the new account exception, even if the other individual on the account has an established account relationship with the bank.

Rules Applicable to New Accounts

During the new account exception period, the schedules for local and nonlocal checks do not apply, and, unlike the other exceptions provided in this section, the regulation provides no maximum time frames within which the proceeds of these deposits must be made available for withdrawal. Maximum times within which funds must be available for withdrawal during the new account period are provided, however, for certain other deposits. Deposits received by cash and electronic payments must be made available for withdrawal in accordance with § 229.10.

Special rules also apply to deposits of Treasury checks; U.S. Postal Service money orders; checks drawn on Federal Reserve Banks and Federal Home Loan Banks; state and local government checks; cashier's, certified, and teller's checks; and, for the purposes of the new account exception only, traveler's checks. The first $5,000 of funds deposited to a new account on any one banking day by these check deposits must be made available for withdrawal in accordance with § 229.10(c). Thus, the first $5,000 of the proceeds of these check deposits must be made available on the next business day following deposit, if the deposit is made in person to an employee of the depositary bank and the other conditions of next-day availability are met. Funds must be made available on the second business day after deposit for deposits that are not made over-the-counter, in accordance with § 229.10(c)(2). (Proceeds of Treasury check deposits must be made available on the next business day after deposit, even if the check is not deposited in person to an employee of the depositary bank.) Funds in excess of the first $5,000 deposited by these types of checks on a banking day must be available for withdrawal not later than the ninth business day following the banking day of deposit. The requirements of § 229.10(c)(1)(vi) and (vii) that "on us" checks and the first $100 of a day's deposit be made available for withdrawal on the next business day do not apply during the new account period.

Representation by Customer

The depositary bank may rely on the representation of the customer that the customer has no established account relationship with the bank, and has not had any such account relationship within the past 30 days, to determine whether an account is subject to the new account exception.

(b) *Large deposits.* Under the large deposit exception, a depositary bank may extend the hold placed on local and nonlocal check deposits to the extent that the amount of the aggregate deposit on any banking day exceeds $5,000. While the first $5,000 of a day's deposit is subject to the availability provided for local or nonlocal checks, the amount in excess of $5,000 may be held for an additional period of time as provided in § 229.13(h). Deposits by cash, electronic payment, or checks that must be granted next-day (or second-day) availability under § 229.10 are not subject to this exception for large deposits.

The following example illustrates the operation of the large deposit exception. If a customer deposits a $10,000 Treasury check and a $9,000 local check on a Monday, $10,100 (the proceeds of the Treasury check and the first $100 of the local check) must be made available for withdrawal on Tuesday. An additional $4,900 of the proceeds of the local check must be available for withdrawal in accordance with the local schedule (i.e. Thursday under the temporary schedule), and the remaining $4,000 may be held for an additional period of time under the large deposit exception.

Where a customer has multiple accounts with a depositary bank, the bank may apply the large deposit exception to the aggregate deposits to all of the customer's accounts, even if the customer is not the sole holder of the accounts and not all of the holders of the customer's accounts are the same. Thus, a depositary bank may aggregate the deposits made to two individual accounts in the same name, to an individual and a joint account with one common name, or to two joint accounts with at least one common name for the purpose of applying the large deposit

exception. Aggregation of deposits to multiple accounts is permitted because the Board believes that the risk to the depositary bank associated with large deposits is similar regardless of how the deposits are allocated among the customer's accounts.

(c) *Redeposited checks.* The Act gives the Board the authority to promulgate an exception to the schedule for checks that have been returned unpaid and redeposited. Section 229.13(c) provides such an exception for checks that have been returned unpaid and redeposited by the customer or the depositary bank.

This exception addresses the increased risk to the depositary bank that checks that have been returned once will be uncollectible when they are presented to the paying bank a second time. The Board, however, does not believe that this increased risk is present for checks that have been returned due to a missing indorsement. Thus, the exception does not apply to checks returned unpaid due to missing indorsements and redeposited after the missing indorsement has been obtained, if the reason for return indicated on the check (see § 229.30(d)) states that it was returned due to a missing indorsement. For the same reason, this exception does not apply to a check returned because it was postdated (future dated), if the reason for return indicated on the check states that it was returned because it was postdated, and if it is no longer postdated when redeposited.

To determine when funds must be made available for withdrawal, the banking day on which the check is redeposited is considered to be the day of deposit. A depositary bank that made $100 of a check available for withdrawal under § 229.10(c)(1)(vii) can charge back the full amount of the check including the $100 if the check is returned unpaid, but the $100 must be made available again if the check is redeposited.

(d) *Repeated overdrafts.* The Act gives the Board the authority to establish an exception for "deposit accounts which have been overdrawn repeatedly." This paragraph provides two tests to determine what constitutes repeated overdrafts. Under the first test, a customer's accounts are considered repeatedly overdrawn if, on six banking days within the preceding six months, the available balance in any account held by the customer is negative, or the balance would have become negative if checks or other charges to the account had been paid, rather than returned. This test can be met based on separate occurrences (e.g., checks that are returned for insufficient funds on six different days), or based on one occurrence (e.g., a negative balance that remains on the customer's account for six banking days). If the bank dishonors a check that otherwise would have created a negative balance, however, the incident is considered an overdraft only on that day.

The second test addresses substantial overdrafts. Such overdrafts increase the risk to the depositary bank of dealing with the repeated overdrafter. Under this test, a customer incurs repeated overdrafts if, on two banking days within the preceding six months, the available balance in any account held by the customer is negative in an amount of $5,000 or more, or would have become negative in an amount of $5,000 or more if checks or other charges to the account had been paid.

The exception relates not only to overdrafts caused by checks drawn on the account, but also overdrafts caused by other debit charges (e.g. ACH debits, point-of-sale transactions, returned checks, account fees, etc.). If the potential debit is in excess of available funds, the exception applies regardless of whether the items were paid or returned unpaid. An overdraft resulting from an error on the part of the depositary bank, or from the imposition of overdraft charges for which the customer is entitled to a refund under §§ 229.13(e) or 229.16(c), cannot be considered in determining whether the customer is a repeated overdrafter. The exception excludes accounts with overdraft lines of credit, unless the credit line has been exceeded or would have been exceeded if the checks or other charges to the account had been paid.

In determining whether an account is subject to the repeated overdraft exception, a depositary bank may consider overdraft activity that occurred prior to the effective date of the regulation.

(e) *Reasonable cause to doubt collectibility.* In the case of certain check deposits, if the bank has reasonable cause to believe the check is uncollectible, it may extend the time funds must be made available for withdrawal. This exception applies to a deposit of a local or nonlocal check, a check drawn on a Federal Reserve Bank or a Federal Home Loan Bank, or a cashier's, certified, or teller's check. If the reasonable cause exception is invoked, the bank must include in the notice to its customer, required by § 229.13(g), the reason that the bank believes that the check is uncollectible.

The following are several examples of circumstances under which the reasonable cause exception may be invoked:

If a bank received a notice from the paying bank that a check was not paid and is being returned to the depositary bank, the depositary bank could place a hold on the check or extend a hold previously placed on that check, and notify the customer that the bank had received notice that the check is being returned. The exception could be invoked even if the notice were incomplete, if the bank had reasonable cause to believe that the notice applied to that particular check.

The depositary bank may have received information from the paying bank, prior to the presentment of the check, that gives the bank reasonable cause to believe that the check is uncollectible. For example, the paying bank may have indicated that payment has been stopped on the check, or that the drawer's account does not currently have sufficient funds to honor the check. Such information may provide sufficient basis to invoke this exception. In these cases, the depositary bank could invoke the exception and disclose as the reason the exception is being invoked the fact that information from the paying bank indicates that the check may not be paid.

The fact that a check is deposited more than six months after the date on the check (i.e. a stale check) is a reasonable indication that the check may be uncollectible, because under U.C.C. § 4–404 a bank has no duty to its customer to pay a check that is more than six months old. Similarly, if a check being deposited is postdated (future dated), the bank may have a reasonable cause to believe the check is uncollectible, because the check is not properly payable under U.C.C. § 4–401. The bank, in its notice, should specify that the check is stale date or postdated.

There are reasons that may cause a bank to believe that a check is uncollectible that are based on confidential information. For example, a bank could conclude that a check being deposited is uncollectible based on its reasonable belief that the depositor is engaging in kiting activity. Reasonable belief as to the insolvency or pending insolvency of the drawer of the check or the drawee bank and that the checks will not be paid may also justify invoking this exception. In these cases, the bank may indicate, as the reason it is invoking the exception, that the bank has confidential information that indicates that the check might not be paid.

The Board has included a reasonable cause exception notice as a model form in Appendix C (C–13A). The model notice includes a number of reasons for which this exception may be invoked. The Board does not intend to provide a comprehensive list of reasons for which this exception may be invoked; another reason that does not appear on the model notice may be used as the basis for extending a hold, if the reason satisfies the conditions for invoking this exception. A depositary bank may invoke the reasonable cause exception based on a combination of factors that give rise to a reasonable cause to doubt the collectibility of a check. In these cases, the bank should disclose the primary reasons for which the exception was invoked in accordance with paragraph (g) of this section.

The regulation provides that the determination that a check is uncollectible shall not be based on a class of checks or persons. For example, a depositary bank cannot invoke this exception simply because the check is drawn on a paying bank in a rural area and the depositary bank knows it will not have the opportunity to learn of nonpayment of that check before funds must be made available under the availability schedules. Similarly, a depositary bank cannot invoke the reasonable cause exception based on the race or national origin of the depositor.

If a depositary bank invokes this exception with respect to a particular check and does not provide a written notice to the depositor at the time of deposit, the depositary bank may not assess any overdraft fee (such as an NSF charge) or charge interest for use of overdraft credit, if the check is paid by the paying bank and these charges would not have occurred had the exception not been invoked. A bank may assess an overdraft fee under these circumstances, however, if it provides notice to the customer, in the notice of exception required by paragraph (g) of this section, that the fee may be subject to refund, and refunds the charges upon the request of the customer. The notice must state that the

customer may be entitled to a refund of any overdraft fees that are assessed if the check being held is paid, and indicate where such requests for a refund of overdraft fees should be directed.

(f) *Emergency conditions.* Certain emergency conditions may arise that delay the collection or return of checks, or delay the processing and updating of customer accounts. In the circumstances specified in this paragraph, the depositary bank may extend the holds that are placed on deposits of local and nonlocal checks that are affected by such delays, if the bank exercises such diligence as the circumstances require. For example, if a bank learns that a check has been delayed in the process of collection due to severe weather conditions or other causes beyond its control, an emergency condition covered by this section may exist and the bank may place a hold on the check to reflect the delay. In cases where the emergency conditions exception does not apply, as in the case of next-day checks under § 229.10(c), the depositary bank may not be liable for a delay in making funds available for withdrawal if the delay is due to a bona fide error such as an unavoidable computer malfunction.

(g) *Notice of exception.* If a depositary bank invokes any of the safeguard exceptions to the schedules listed above, other than the new account exception, and extends the hold on a deposit beyond the time periods permitted in §§ 229.10, 229.11, and 229.12, it must provide a notice to its customer stating the customer's account number, the date of deposit, the reason the exception was invoked, and the day funds will be available for withdrawal.

The requirement that the notice state the day the funds shall be made available may be satisfied if the notice identifies the date the deposit is received and information sufficient to indicate when funds will be available and the amounts that will be available at those times. For example, for a deposit involving more than one check, the bank need not provide a notice that discloses when funds from each individual check in the deposit will be available for withdrawal; instead, the bank may provide a total dollar amount for each of the time periods when funds will be available, or provide the customer with an explanation of how to determine the amount of the deposit that will be held and when the funds will be available for deposit. Appendix C (C–13) contains a model form of this exception notice.

For deposits made in person to an employee of the depositary bank, the notice generally must be given to the person making the deposit, i.e. the "depositor", at the time of deposit. The depositor need not be the customer holding the account. For other deposits, such as deposits received at an ATM, lobby deposit box, night depository, or through the mail, notice must be mailed to the customer not later than the close of the business day following the banking day on which the deposit was made.

Notice to the customer also may be provided at a later time, if the facts upon which the determination to invoke the exception do not become known to the depositary bank until after notice would otherwise have to be given. In these cases, the bank must mail the notice to the customer as soon as practicable, but not later than the business day following the day the facts become known. A bank is deemed to have knowledge when the facts are brought to the attention of the person or persons in the bank responsible for making the determination, or when the facts would have been brought to their attention if the bank had exercised due diligence.

If the depositary bank extends the hold placed on a deposit due to an emergency condition, the notice requirement generally applies; however, the regulation provides that the bank need not provide a notice if the funds would be available for withdrawal before the notice must be sent. For example, if on the last day of a hold period the depositary bank experiences a computer failure and customer accounts cannot be updated in a timely fashion to reflect the funds as available balances, notices are not required if the funds are made available before the notices must be sent.

A depositary bank must retain a record of each notice of a reasonable cause exception for a period of two years, or such longer time as provided in the record retention requirements of § 229.21. This record must contain a brief description of the facts on which the depositary bank based its judgment that there was reasonable cause to doubt the collectibility of a check. In many cases, such as where the exception was invoked on the basis of a notice of nonpayment received, the record requirement may be met by retaining a copy of the notice sent to the customer. In other cases, such as where the exception was invoked on the basis of confidential information, a further description to the facts, such as insolvency of drawer, should be included in the record.

(h) *Availability of deposits subject to exceptions.* If a depositary bank invokes any exception other than the new account exception, the bank may extend the time within which funds must be made available under the schedule by a reasonable period of time. This provision establishes that an extension of up to four business days is a reasonable period. Under certain circumstances, however, a longer extension of the schedules may be reasonable. In these cases, the burden is placed on the depositary bank to establish that a longer period is reasonable.

For example, assume a bank extended the hold on a check deposit by four business days based on its reasonable cause to believe that the check is uncollectible. If, on the day before the extended hold is scheduled to expire, the bank receives a notification from the paying bank that the check is being returned unpaid, the bank may determine that a longer hold is warranted, if it decides not to charge back the customer's account based on the notification. If the bank decides to extend the hold, the bank must send a second notice, in accordance with paragraph (g) of this section, indicating the new date that the funds will be available for withdrawal.

With respect to certain checks subject to the next-day (or second-day) availability requirement, the depositary bank may extend the time funds must be made available for withdrawal under the reasonable cause exception by a reasonable period beyond the delay that would have been permitted under the regulation had the checks not been subject to the next-day availability requirement. Thus, for a check drawn on a Federal Reserve Bank or Federal Home Loan Bank, or a cashier's, certified, or teller's check, the additional hold is added to the local or nonlocal schedule that would apply based on the location of the paying bank.

Four business days, in addition to the time period provided in the schedule, should provide adequate time for the depositary bank to learn of the nonpayment of virtually all checks that are returned.

In the case of the application of the emergency conditions exception, the depositary bank may extend the hold placed on a check by not more than a reasonable period following the end of the emergency or the time funds must be available for withdrawal under §§ 229.11 or 229.12, whichever is later.

This provision does not apply to holds imposed under the new account exception. Under that exception, the maximum time period within which funds must be made available for withdrawal is specified for deposits that generally must be accorded next-day availability under § 229.10. This subpart does not specify the maximum time period within which the proceeds of local and nonlocal checks must be made available for withdrawal during the new account period.

Section 229.14 Payment of Interest

(a) *In general.* This section requires that a depositary bank begin accruing interest on interest-bearing accounts not later than the day on which the depositary bank receives credit for the funds deposited.[3] A depositary bank generally receives credit on checks within one or two days following deposit. A bank receives credit on a cash deposit, an electronic payment, and the deposit of a check that is drawn on the depositary bank itself on the day the cash, electronic payment, or check is received. In the case of a deposit at a nonproprietary ATM, credit is generally received on the day the bank that operates the ATM credits the depositary bank for the amount of the deposit.

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[3] This section implements section 606 of the Act (12 U.S.C. 4005). The Act keys the requirement to pay interest to the time the depositary bank receives "provisional credit" for a check. "Provisional credit" is a term used in the U.C.C. that is derived from the Code's concept of "provisional settlement." (See U.C.C. §§ 4–211 and 4–213.) Provisional credit is credit that is subject to charge-back if the check is returned unpaid; once the check is finally paid, the right to charge back expires and the provisional credit becomes "final."

Under Subpart C, a paying bank no longer has an automatic right to charge back credits given in settlement of a check, and the concept of provisional settlement is no longer useful and has been eliminated by the regulation. Accordingly, this section uses the term "credit" rather than "provisional credit," and this section applies regardless of whether a credit would be provisional or final under the U.C.C. "Credit" does not include a bookkeeping entry (sometimes referred to as "deferred credit") that does not represent funds actually available for the bank's use.

Because "account" includes only transaction accounts, other interest-bearing accounts of the depositary bank, such as money market deposit accounts, savings deposits, and time deposits, are not subject to this requirement; however, a bank may accrue interest on such deposits in the same way that it accrues interest under this paragraph for simplicity of operation. The Board intends the term "interest" to refer to payments to or for the account of any customer as compensation for the use of funds, but to exclude the absorption of expenses incident to providing a normal banking function or a bank's forbearance from charging a fee in connection with such a service. (See 12 CFR 217.2(d).) Thus, earnings credits often applied to corporate accounts are not interest payments for the purposes of this section.

It may be difficult for a depositary bank to track which day the depositary bank receives credit for specific checks in order to accrue interest properly on the account to which the check is deposited. This difficulty may be pronounced if the bank uses different means of collecting checks based on the time of day the check is received, the dollar amount of the check, and/or the paying bank to which it must be sent. Thus, for the purpose of the interest accrual requirement, a bank may rely on an availability schedule from its Federal Reserve Bank, Federal Home Loan Bank, or correspondent to determine when the depositary bank receives credit. If availability is delayed beyond that specified in the availability schedule, a bank may charge back interest erroneously accrued or paid on the basis of that schedule.

This paragraph also permits a depositary bank to accrue interest on checks deposited to all of its interest-bearing accounts based on when the bank receives credit on all checks sent for payment or collection. For example, if a bank receives credit on 20 percent of the funds deposited in the bank by check as of the business day of deposit (e.g., "on us" checks), 70 percent as of the business day following deposit, and 10 percent on the second business day following deposit, the bank can apply these percentages to determine the day interest must begin to accrue on check deposits to all interest-bearing accounts, regardless of when the bank received credit on the funds deposited in any particular account. Thus, a bank may begin accruing interest on a uniform basis for all interest-bearing accounts, without the need to track the type of check deposited to each account.

This section is not intended to limit a policy of a depositary bank that provides that interest only accrues on balances that exceed a specified amount, or on the minimum balance maintained in the account during a given period, provided that the balance is determined based on the date that the depositary bank receives credit for the funds. This section is also not intended to limit any policy providing that interest accrues sooner than required by this paragraph.

(b) *Special rule for credit unions.* This provision implements a requirement in section 606(b), and provides an exemption from the payment of interest requirements for credit unions that do not begin to accrue interest or dividends on their customer accounts until a later date than the day the credit union receives credit for those deposits, including cash deposits. These credit unions are exempt from the payment of interest requirements, as long as they provide notice of their interest accrual policies in accordance with § 229.16(d). For example, if a credit union has a policy of computing interest on all deposits received by the 10th of the month from the first of that month, and on all deposits received after the 10th of the month from the first of the next month, that policy is not superseded by this regulation, if the credit union provides proper disclosure of this policy to its customers.

The Act limits this exemption to credit unions; other types of banks must comply with the payment of interest requirements. In addition, credit unions that compute interest from the day of deposit or day of credit should not change their existing practices in order to avoid compliance with the requirement that interest accrue from the day the credit union receives credit.

(c) *Exception for checks returned unpaid.* This provision is based on section 606(c) of the Act (12 U.S.C. 4005(c)) and provides that interest need not be paid on funds deposited in an interest-bearing account by check that has been returned unpaid, regardless of the reason for return.

Section 229.15 General Disclosure Requirements

(a) *Form of disclosures.* This paragraph sets forth the general requirements for the disclosures required under Subpart B. All of the disclosures must be given in a clear and conspicuous manner, must be in writing, and, in most cases, must be in a form the customer may keep. Disclosures posted at locations where employees accept consumer deposits, at ATMs, and on preprinted deposit slips need not be in a form that the customer may keep. Appendix C of the regulation contains model forms, clauses, and notices to assist banks in preparing disclosures.

Disclosures concerning availability must be grouped together and may not contain any information that is not related to the disclosures required by this subpart. Therefore, banks may not intersperse the required disclosures with other account disclosures, and may not include other account information that is not related to their availability policy within the text of the required disclosures. Banks may, however, include information that is related to their availability policies. For example, a bank may inform its customers that, even when the bank has already made funds available for withdrawal, the customer is responsible for any problem with the deposit, such as the return of a deposited check.

The regulation does not require that the disclosures be segregated from other account terms and conditions. For example, banks may include the disclosure of their specific availability policy in a booklet or pamphlet that sets out all of the terms and conditions of the bank's accounts. The required disclosures must, however, be grouped together and highlighted or identified in some manner, for example, by use of a separate heading for the disclosures, such as "When Deposits are Available for Withdrawal."

(b) *Uniform reference to day of availability.* This paragraph requires banks to disclose in a uniform manner when deposited funds will be available for withdrawal. Banks must disclose when deposited funds are available for withdrawal by stating the business day on which the customer may begin to withdraw funds. The business day funds will be available must be disclosed as "the _____ business day after" the day of deposit, or substantially similar language. The business day of availability is determined by counting the number of business days starting with the business day following the banking day on which the deposit is received, as determined under § 229.19(a), and ending with the business day on which the customer may begin to withdraw funds. For example, a bank that imposes delays of four intervening business days for nonlocal checks must describe those checks as being available on "the fifth business day after" the day of the deposit.

(c) *Multiple accounts and multiple account holders.* This paragraph clarifies that banks need not provide multiple disclosures under the regulation. A single disclosure to a customer that holds multiple accounts, or a single disclosure to one of the account holders of a jointly held account, satisfies the disclosure requirements of the regulation.

(d) *Dormant or inactive accounts.* This paragraph makes clear that banks need not provide disclosure of their specific availability policies to customers that hold accounts that are either dormant or inactive. The determination that certain accounts are dormant or inactive must be made by the bank. If a bank considers an account dormant or inactive for purposes other than this regulation and no longer provides statements and other mailings to an account for this reason, such an account is considered dormant or inactive for purposes of this regulation.

Section 229.16 Specific Availability Policy Disclosure

(a) *General.* This section describes the information that must be disclosed by banks to comply with §§ 229.17 and 229.18(d), which require that banks furnish notices of their specific policy regarding availability of deposited funds. The disclosure provided by a bank must reflect the availability policy followed by the bank in most cases, even though a bank may in some cases make funds available sooner or impose a longer delay.

(b) *Content of specific policy disclosure.* This paragraph sets forth the items that must be included, as applicable, in a bank's specific availability policy disclosure. The information that must be disclosed by a particular bank will vary considerably depending upon the bank's availability policy. For example, a bank that makes deposited funds available for withdrawal on the business day following the day of deposit need simply disclose that deposited funds will be available for withdrawal on the first business day after the day of deposit, the bank's business days, and when deposits are considered received.

On the other hand, a bank that has a policy of routinely delaying on a blanket basis the

time when deposited funds are available for withdrawal would have a more detailed disclosure. Such blanket hold policies might be for the maximum time allowed under the federal law or might be for shorter periods. These banks must disclose the types of deposits that will be subject to delays, how the customer can determine the type of deposit being made, and the day that funds from each type of deposit will be available for withdrawal.

Some banks may have a combination of next-day availability and blanket delays. For example, a bank may provide next-day availability for all deposits except for one or two categories, such as deposits at nonproprietary ATMs and nonlocal personal checks over a specified dollar amount. The bank would describe the categories that are subject to delays in availability and tell the customer when each category would be available for withdrawal, and state that other deposits will be available for withdrawal on the first business day after the day of deposit. Similarly, a bank that provides availability on the second business day for most of its deposits would need to identify the categories of deposits which, under the regulation, are subject to next-day availability and state that all other deposits will be available on the second business day.

Because many banks' availability policies may be complex, banks must give a brief summary of its policy at the beginning of the disclosure. In addition, the bank must describe any circumstances when actual availability may be longer than the schedules disclosed. Such circumstances would arise, for example, when the bank invokes one of the exceptions set forth in § 229.13 of the regulation, or when the bank delays or extends the time when deposited funds are available for withdrawal up to the time periods allowed by the regulation on a case-by-case basis. Also, a bank that must make certain checks available faster under Appendix B (reduction of schedules for certain nonlocal checks) must state that some check deposits will be available for withdrawal sooner because of special rules and that a list of the pertinent routing numbers is available upon request.

The business day cut-off time used by the bank must be disclosed and if some locations have different cut-off times the bank must note this in the disclosure and state the earliest time that might apply. A bank need not list all of the different cut-off times that might apply.

A bank taking advantage of the extended time period for making deposits at nonproprietary ATMs available for withdrawal under § 229.11(d) must explain this in the initial disclosure. In addition, the bank must provide a list (on or with the initial disclosure) of either the bank's proprietary ATMs or those ATMs that are nonproprietary at which customers may make deposits. As an alternative to providing such a list, the bank may label all of its proprietary ATMs with the bank's name and state in the initial disclosure that this has been done. Similarly, a bank taking advantage of the cash withdrawal limitations of §§ 229.11(b)(2) and 229.12(d), or the provision in § 229.19(e) allowing holds to be placed on other deposits when a deposit is made or a check is cashed, must explain this in the initial disclosure.

(c) *Longer delays on a case-by-case basis.*—(1) *Notice in specific policy disclosure.* Banks that make deposited funds available for withdrawal sooner than required by the regulation—for example, providing their customers with immediate or next-day availability for deposited funds—and delay the time when funds are available for withdrawal only from time to time determined on a case-by-case basis must provide notice of this in their specific availability policy disclosure. This paragraph outlines the requirements for that notice.

In addition to stating what their specific availability policy is in most cases, banks that may delay or extend the time when deposits are available on a case-by-case basis must: state that from time to time funds may be available for withdrawal later than the time periods in their specific policy disclosure; disclose the latest time that a customer may have to wait for deposited funds to be available for withdrawal when a case-by-case hold is placed; state that customers will be notified when availability of a deposit is delayed on a case-by-case basis; and advise customers to ask if they need to be sure of the availability of a particular deposit.

A bank that imposes delays on a case-by-case basis is still subject to the availability requirements of this regulation. If the bank imposes a delay on a particular deposit that is not longer than the availability required by §§ 229.11 or 229.12 for local and nonlocal checks, the reason for the delay need not be based on the exceptions provided in § 229.13. If the delay exceeds the time periods permitted under §§ 229.11 or 229.12, however, then it must be based on an exception provided in § 229.13, and the bank must comply with the § 229.13 notice requirements.

(2) *Notice at time of case-by-case delay.* In addition to including the disclosures required by paragraph (c)(1) of this section in their specific availability policy disclosure, banks that delay or extend the time period when funds are available for withdrawal on a case-by-case basis must give customers a notice when availability of funds from a particular deposit will be delayed or extended beyond the time when deposited funds are generally available for withdrawal. The notice must state that a delay is being imposed and indicate when the funds will be available. In addition, the notice must include the account number, the date and amount of the deposit, and the amount of the deposit being delayed.

If notice of the delay was not given at the time the deposit was made and the bank assesses overdraft or returned check fees on accounts when a case-by-case hold has been placed, the case-by-case hold notice provided to the customer must include a notice concerning overdraft or returned check fees. The notice must state that the customer may be entitled to a refund of any overdraft or returned check fees that result from the deposited funds not being available if the check that was deposited was in fact paid by the payor bank, and explain how to request a refund of any fees. (See § 229.16(c)(3).)

The requirement that the case-by-case hold notice state the day that funds will be made available for withdrawal may be met by stating the date or the number of business days after deposit that the funds will be made available. This requirement is satisfied if the notice provides information sufficient to indicate when funds will be available and the amounts that will be available at those times. For example, for a deposit involving more than one check, the bank need not provide a notice that discloses when funds from each individual item in the deposit will be available for withdrawal. Instead, the bank may provide a total dollar amount for each of the time periods when funds will be available, or provide the customer with an explanation of how to determine the amount of the deposit that will be held and when the held funds will be available for withdrawal.

For deposits made in person to an employee of the depositary bank, the notice generally must be given at the time of the deposit. The notice at the time of the deposit must be given to the person making the deposit, that is, the "depositor." The depositor need not be the customer holding the account. For other deposits, such as deposits received at an ATM, lobby deposit box, night depository, through the mail, or by armored car, notice must be mailed to the customer not later than the close of the business day following the banking day on which the deposit was made. Notice to the customer also may be provided not later than the close of the business day following the banking day on which the deposit was made if the decision to delay availability is made after the time of the deposit.

(3) *Overdraft and returned check fees.* If a depositary bank delays or extends the time when funds from a deposited check are available for withdrawal on a case-by-case basis and does not provide a written notice to its depositor at the time of deposit, the depositary bank may not assess any overdraft or returned check fees (such as an insufficient funds charge) or charge interest for use of an overdraft line of credit, if the deposited check is paid by the paying bank and these fees would not have occurred had the additional case-by-case delay not been imposed. A bank may assess an overdraft or returned check fee under these circumstances, however, if it provides notice to the customer in the notice required by paragraph (c)(2) of this section that the fee may be subject to refund, and refunds the fees upon the request of the customer when required to do so. The notice must state that the customer may be entitled to a refund of any overdraft or returned check fees that are assessed if the deposited check is paid, and indicate where such requests for a refund of overdraft fees should be directed.

(d) *Credit union notice of interest payment policy.* This paragraph sets forth the special disclosure requirement for credit unions that delay accrual of interest or dividends for all cash and check deposits beyond the date of receiving provisional credit for checks being deposited. (The interest payment requirement is set forth in § 229.14(a).) Such credit unions are required to describe their policy with respect to accrual of interest or dividends on deposits in their specific availability policy disclosure.

Section 229.17 Initial Disclosures

(a) *New accounts.* This paragraph requires banks to provide a notice of their availability policy to all potential customers prior to opening an account. The requirement of a notice prior to opening an account requires banks to provide disclosures prior to accepting a deposit to open an account. Disclosures must be given at the time the bank accepts an initial deposit regardless of whether the bank has opened the account yet for the customer. If a bank, however, receives a written request by mail from a person asking that an account be opened and the request includes an initial deposit, the bank may open the account with the deposit, provided the bank mails the required disclosures to the customer not later than the business day following the banking day on which the bank receives the deposit. Similarly, if a bank receives a telephone request from a customer asking that an account be opened with a transfer from a separate account of the customer's at the bank, the disclosure may be mailed not later than the business day following the banking day of the request.

(b) *Existing accounts.* This section requires banks to send a notice of their specific policy with respect to the availability of deposited funds to all existing account holders in the first scheduled mailing to such customers occurring after September 1, 1988. The notice must be sent not later than October 31, 1988. Thus, banks must include a notice in the first statement mailed to customers after September 1, 1988, unless, prior to the mailing of this statement, the bank has provided a notice to its customers of its availability policy that meets the requirements of § 229.16. A bank that has provided availability policy disclosures to its customers, either under a state law or as a matter of bank practices or policy, need not provide disclosures under this section if the disclosures that were previously given comply with the requirements of this regulation. A bank may disclose both its present policy and its policy for September 1, 1990, and beyond in a single notice.

The notice of specific policy may be sent alone in a separate mailing, instead of with an account statement, provided the mailing is made prior to the first statement mailing on the account after September 1, 1988. Banks may not furnish the required notice to customers by including the notice with promotional material, such as a solicitation for health or hospitalization insurance, unless that material is included with the account statement. A bank is permitted to provide the notice by furnishing the customer with a booklet or pamphlet that describes the terms and conditions of the bank's accounts generally. The bank, however, must then direct the customer's attention to the disclosures required by this section by, for example, use of a special insert or a letter.

If a customer has requested that the bank not mail any information regarding the account, the bank need not make a special mailing that includes the disclosure of the bank's specific availability policy. The disclosure should be made available to the customer in accordance with the customer's instructions to the bank for statements and other account information.

Section 229.18 Additional Disclosure Requirements

(a) *Deposit slips.* This paragraph requires banks to include a notice on all preprinted deposit slips. The deposit slip notice need only state, somewhere on the front of the deposit slip, that deposits may not be available for immediate withdrawal. The notice is required only on preprinted deposit slips—those printed with the customer's account number and name and furnished by the bank in response to a customer's order to the bank. A bank need not include the notice on deposit slips that are not preprinted and supplied to the customer—such as counter deposit slips—or on those special deposit slips provided to the customer under § 229.10(c). A bank is not responsible for ensuring that the notice appear on deposit slips that the customer does not obtain from or through the bank.

This paragraph applies to preprinted deposit slips furnished to customers on or after September 1, 1988. A bank need not mail deposit slips to customers to replace the customers' existing supply, and customers on or may continue to use any slips they were sent prior to September 1, 1988. In addition, a bank may mail or deliver to its customers after September 1, 1988, preprinted deposit slips requested by the customers prior to September 1, 1988, even though the deposit slips do not include the required notice.

(b) *Locations where employees accept consumer deposits.* This paragraph describes the statutory requirement that a bank post in each location where its employees accept consumer deposits a notice of its availability policy pertaining to consumer accounts. The notice that is required must specifically state the availability periods for the various deposits that may be made to consumer accounts. The notice need not be posted at each teller window, but the notice must be posted in a place where consumers seeking to make deposits are likely to see it before making their deposits. For example, the notice might be posted at the point where the line forms for teller service in the lobby. The notice is not required at any drive-through teller windows nor is it required at night depository locations, or at locations where consumer deposits are not accepted.

(c) *Automated teller machines.* This paragraph sets forth the required notices for ATMs. Paragraph (c)(1) provides that the depositary bank is responsible for posting a notice on all ATMs at which deposits can be made to accounts at the depositary bank. The depositary bank may arrange for a third party, such as the owner or operator of the ATM, to post the notice and indemnify the depositary bank from liability if the depositary bank is liable under § 229.21 for the owner or operator failing to provide the required notice.

The notice may be posted on a sign, shown on the screen, or included on deposit envelopes provided at the ATM. This disclosure must be given before the customer has made the deposit. Therefore, a notice provided on the customer's deposit receipt or appearing on the ATM's screen after the customer has made the deposit would not satisfy this requirement.

Paragraph (c)(2) requires a depositary bank that operates an off-premises ATM from which deposits are removed not more than two times a week to make a disclosure of this fact on the off-premises ATM. The notice must disclose to the customer the days on which deposits made at the ATM will be considered received.

(d) *Upon request.* This paragraph requires banks to provide written notice of their specific availability policy to any person upon that person's oral or written request. The notice must be sent within a reasonable period of time following receipt of the request.

(e) *Changes in policy.* This paragraph requires banks to send notices to their customers when the banks change their availability policies with regard to consumer accounts. A notice may be given in any form as long as it is clear and conspicuous. If the bank gives notice of a change by sending the customer a complete new availability disclosure, the bank must direct the customer to the changed terms in the disclosure by use of a letter or insert, or by highlighting the changed terms in the disclosure.

Generally, a bank must send a notice at least 30 calendar days before implementing any change in its availability policy. If the change results in faster availability of deposits—for example, if the bank changes its availability for nonlocal checks from the fifth business day after deposit to the fourth business day after deposit—the bank need not send advance notice. The bank must, however, send notice of the change no later than 30 calendar days after the change is implemented. A bank is not required to give a notice when there is a change in Appendix B (reduction of schedules for certain nonlocal checks).

A bank that has provided its customers with a list of ATMs under § 229.16(b)(5) shall provide its customers with an updated list of ATMs once a year if there are changes in the list of ATMs previously disclosed to the customers.

Section 229.19 Miscellaneous

(a) *When funds are considered deposited.* The time funds must be made available for withdrawal under this subpart is determined by the day the deposit is made. This paragraph provides rules to determine the day funds are considered deposited in various circumstances. Funds received at a staffed teller station or ATM are considered deposited when received by the teller or placed in the ATM. Funds mailed to the depositary bank are considered deposited on the banking day they are received by the depositary bank. The funds are received by the depositary bank at the time the mail is delivered to the bank, even if it is initially delivered to a mail room, rather than the check processing area.

In addition to deposits at staffed facilities, at ATMs, and by mail, funds may be deposited at a facility such as a night depository or a lock box. A night depository is a receptacle for receipt of deposits, typically used by corporate depositors when the branch is closed. Funds deposited at a night depository are considered deposited on the banking day the deposit is removed, and the contents of the deposit are accessible to

the depositary bank for processing. For example, some businesses deposit their funds in a locked bag at the night depository late in the evening, and return to the bank the following day to open the bag. Other depositors may have an agreement with their bank that the deposit bag must be opened under the dual control of the bank and the depositor. In these cases, the funds are considered deposited when the customer returns to the bank and opens the deposit bag.

A lock box is a post office box used by a corporation for the collection of bill payments or other check receipts. The depositary bank generally assumes the responsibility for collecting the mail from the lock box, processing the checks, and crediting the corporation for the amount of the deposit. Funds deposited through a lock box arrangement are considered deposited on the day the deposit is removed from the lock box and are accessible to the depositary bank for processing.

A special provision is made for certain off-premise ATMs that are not serviced daily. Funds deposited at such an ATM are considered deposited on the day they are removed from the ATM, if the ATM is not serviced more than two times each week. This provision is intended to address the practices of some banks of servicing certain remote ATMs infrequently. If a depositary bank applies this provision with respect to an ATM, a notice must be posted at the ATM informing depositors that funds deposited at the ATM may not be considered received on the day of deposit, in accordance with § 229.18.

This paragraph also provides that a deposit received on a day that the depositary bank is closed, or after the bank's cut-off hour, may be considered made on the next banking day. Generally, for purposes of the availability schedules of this subpart, a bank may establish a cut-off hour of 2:00 p.m. or later for receipt of deposits at its head office or branch offices. For receipt of deposits at ATMs or off-premises facilities, such as night depositories or lock boxes, the depositary bank may establish a cut-off hour of 12:00 noon or later. This earlier cut-off for ATM or off-premises deposits is intended to provide greater flexibility in the servicing of ATMs and other off-premises facilities.

Different cut-off hours may be established for different types of deposits. For example, a bank may establish a 2:00 p.m. cut-off for the receipt of check deposits, but a later cut-off for the receipt of wire transfers. Different cut-off hours may also be established for deposits received at different locations. For example, a different cut-off may be established for ATM deposits than for over-the-counter deposits, or for different teller stations at the same branch. With the exception of the 12:00 noon cut-off for deposits at ATMs and off-premise facilities, no cut-off hour for receipt of deposits for purposes of this subpart can be established earlier than 2:00 p.m. Nevertheless, a bank is not required to remain open until 2:00 p.m.

(b) *Availability at start of business day.* If funds must be made available for withdrawal on a business day, the funds must be available for withdrawal by the later of 9:00 a.m. or the time the depositary bank's teller facilities, including ATMs, are available for customer account withdrawals, except under the special rule for cash withdrawals set forth in §§ 229.11(b)(2) and 229.12(d). Thus, if a bank has no ATMs and its branch facilities are available for customer transactions beginning at 10:00 a.m., funds must be available for customer withdrawal beginning at 10:00 a.m. If the bank has ATMs that are available 24 hours a day, rather than establishing 12:01 a.m. as the start of the business day, this paragraph sets 9:00 a.m. as the start of the day with respect to ATM withdrawals. The Board believes that this rule provides banks with sufficient time to update their accounting systems to reflect the available funds in customer accounts for that day.

The start of business is determined by the local time of the branch or other location of the depositary bank at which the account is maintained. For example, if funds in a customer's account at a west coast bank are first made available for withdrawal at the start of business on a given day, and the customer attempts to withdraw the funds at an east coast ATM, the depositary bank is not required to make the funds available until 9:00 a.m. west coast time (12:00 noon east coast time).

(c) *Effect on policies of depositary bank.* This subpart establishes the maximum hold that may be placed on customer deposits. A depositary bank may provide availability to its customers in a shorter time than prescribed in this subpart. A depositary bank may also adopt different funds availability policies for different segments of its customer base, as long as each policy meets the schedules in the regulation. For example, a bank may differentiate between its corporate and consumer customers, or may adopt different policies for its consumer customers based on whether a customer has an overdraft line of credit associated with the account.

This regulation does not affect a depositary bank's right to accept or reject a check for deposit, to charge back the customer's account based on a returned check or notice of nonpayment, or to claim a refund for any credit provided to the customer.

Nothing in the regulation requires a depositary bank to have facilities open for customers to make withdrawals at specified times or on specified days. For example, even though the special cash withdrawal rule set forth in §§ 229.11(b)(2) and 229.12(d) states that a bank must make up to $400 available for cash withdrawals no later than 5:00 p.m. on specific business days, if a bank does not participate in an ATM system and does not have any teller windows open at or after 5:00 p.m., the bank need not join an ATM system or keep offices open. In this case, the bank complies with this rule if the funds that are required to be available for cash withdrawal at 5:00 p.m. on a particular day are available for withdrawal at the start of business on the following day. Similarly, if a depositary bank is closed for customer transactions, including ATMs, on a day funds must be made available for withdrawal, the regulation does not require the bank to open.

The special cash withdrawal rule in the Act recognizes that the $400 that must be made available for cash withdrawal by 5:00 p.m. on the day specified in the schedule may exceed a bank's daily ATM cash withdrawal limit and explicitly provides that the Act does not supersede a bank's policy in this regard. As a result, if a bank has a policy of limiting cash withdrawals from automated teller machines to $250 per day, the regulation would not require that the bank dispense $400 of the proceeds of the customer's deposit that must be made available for cash withdrawal on that day.

Even though the Act clearly provides that the bank's ATM withdrawal limit is not superseded by the federal availability rules on the day funds must first be made available, the Act does not specifically permit banks to limit cash withdrawals at ATMs on subsequent days when the entire amount of the deposit must be made available for withdrawal. The Board believes that the rationale behind the Act's provision that a bank's ATM withdrawal limit is not superseded by the requirement that funds be made available for cash withdrawal applies on subsequent days. Nothing in the regulation prohibits a depositary bank from establishing ATM cash withdrawal limits that vary among customers of the bank, as long as the limit is not dependent on the length of time funds have been in the customer's account, provided that the permissible hold has expired.

A number of small banks, particularly credit unions, due to lack of secure facilities, keep no cash on their premises and hence offer no cash withdrawal capability to their customers. Other banks limit the amount of cash on their premises due to bonding requirements or cost factors, and consequently reserve the right to limit the amount of cash each customer can withdraw over-the-counter on a given day. For example, some banks require advance notice for large cash withdrawals in order to limit the amount of cash needed to be maintained on hand at any time.

Nothing in the regulation is intended to prohibit a bank from limiting the amount of cash that may be withdrawn at a staffed teller station, if the bank has a policy limiting the amount of cash that may be withdrawn, and that policy is applied equally to all customers of the bank, is based on security, operating, or bonding requirements, and is not dependent on the length of time the funds have been in the customer's account, as long as the permissible hold has expired. The regulation, however, does not authorize such policies if they are otherwise prohibited by statutory, regulatory, or common law.

(d) *Use of calculated availability.* A depositary bank may provide availability to its nonconsumer accounts on a calculated availability basis. Under calculated availability, a specified percentage of funds from check deposits may be made available to the customer on the next business day, with the remaining percentage deferred until subsequent days. The determination of the percentage of deposited funds that will be made available each day is based on the customer's typical deposit mix as determined by a sample of the customer's deposits. Use of calculated availability is permitted only if

on average, the availability terms that result from the sample are equivalent to or more prompt than the requirements of this subpart.

(e) *Holds on other funds.* Section 607(d) of the Act (12 U.S.C. 4006(d)) provides that once funds are available for withdrawal under the Act, such funds shall not be frozen solely due to the subsequent deposit of additional checks that are not yet available for withdrawal. This provision of the Act is designed to prevent evasion of the Act's availability requirements.

This paragraph clarifies that, if a customer deposits a check, the bank may place a hold on any of the customer's funds to the extent that the funds held do not exceed the amount of the check deposited, and the total amount of funds held are made available for withdrawal within the times required in this subpart. For example, if a customer cashes a check (other than an "on us" check) over-the-counter, the depositary bank may place a hold on any of the customer's funds to the extent that the funds held do not exceed the amount of the check cashed, as long as the hold does not exceed the hold that could be placed on the check cashed over-the-counter, if the check had been deposited in the account.

(f) *Employee training and compliance.* The Act requires banks to take such actions as may be necessary to inform fully each employee that performs duties subject to the Act of the requirements of the Act, and to establish and maintain procedures reasonably designed to assure and monitor employee compliance with such requirements.

This paragraph requires a bank to establish procedures to ensure compliance with these requirements and provide these procedures to the employees responsible for carrying them out.

(g) *Effect of merger transaction.* After banks merge, there is often a period of adjustment before their operations are consolidated. This paragraph accommodates this adjustment period by allowing merged banks to be treated as separate banks for purposes of this subpart for a period of up to one year after consummation of the merger transaction, except that a customer of any bank that is a party to the transaction that has an established account with that bank may not be treated as a new account holder for any other party to the transaction for purposes of the new account exception of § 229.13(a), and a deposit in any branch of the merged bank is considered deposited in the bank for purposes of the availability schedules in accordance with § 229.19(a).

This rule affects the status of the combined entity in a number of areas. For example:

1. When the resulting bank is a "participant" in a check clearinghouse association (§ 229.2 (y) and (l) and § 229.11(b)(2)).

2. When an ATM is a "proprietary ATM" (§ 229.2(aa), § 229.11(d), and § 229.12(b)).

3. When a check is drawn on a branch of the depositary bank (§ 229.10(c)(1)(vi)). "Merger transaction" is defined in § 229.2(t).

Section 229.20 Relation to State Law

(a) *In general.* A number of states have enacted laws that govern when banks in those states must make funds available to their customers. The Act provides that any state law in effect on September 1, 1989, that provides that funds be made available in a shorter period of time than provided in this regulation, will supersede the time periods in the Act and the regulation. The Conference Report on the Act clarifies this provision by stating that any state law enacted on or before September 1, 1989, may supersede federal law to the extent that the law relates to the time funds must be made available for withdrawal. H.R. Rep. No. 261, 100th Cong. 1st Sess. at 182 (1987).

Thus, if a state wishes to adopt a law governing funds availability, it must do so, effective on or before September 1, 1989. Laws adopted after that date will not supersede federal law, even if they provide for shorter availability periods than are provided under federal law. If a state that has a law governing funds availability in effect before September 1, 1989, amends its law after that date, the amendment will not supersede federal law, but an amendment deleting a state requirement will be effective.

If a state provides for a shorter hold for a certain category of checks than is provided for under federal law, that state requirement will supersede the federal provision. For example, most state laws base some hold periods on whether the check being deposited is drawn on an in-state or out-of-state bank. If a state contains more than one check processing region, the state's hold period for in-state checks may be shorter than the federal maximum hold period for nonlocal checks. Thus, the state schedule would supersede the federal schedule to the extent that it applies to in-state, nonlocal checks.

The Act also provides that any state law that provides for availability in a shorter period of time than required by federal law is applicable to all federally insured institutions in that state, including federally chartered institutions. If a state law provides shorter availability only for deposits in accounts in certain categories of banks, such as commercial banks, the superseding state law continues to apply only to those categories of banks, rather than to all federally insured banks in the state.

(b) *Preemption of inconsistent law.* This paragraph reflects the statutory provision that other provisions of state law that are inconsistent with federal law are preempted. Preemption does not require a determination by the Board to be effective.

(c) *Standards for preemption.* This section describes the standards the Board will use in making determinations on whether federal law will preempt state laws governing funds availability. A provision of state law is considered inconsistent with federal law if it permits a depositary bank to make funds available to a customer in the same or a longer period of time than the maximum period permitted by the Act and this regulation. For example, a state law that permits a hold of four days or longer for local checks permits a hold that is longer than the maximum under the temporary schedule of the Act and this regulation, and therefore is inconsistent and superseded.

Under a state law, some categories of deposits could be available for withdrawal sooner or later than the time required by this subpart, depending on the composition of the deposit. For example, the Act and this regulation (§ 229.10(c)(1)(vii)) require next-day availability for the first $100 of the aggregate deposit of local or nonlocal checks on any day, and a state law could require next-day availability for any check of $100 or less that is deposited. Under the Act, if either one $150 check or three $50 checks are deposited on a given day, $100 must be made available for withdrawal on the next business day, and $50 must be made available in accordance with the local or nonlocal schedule. Under the state law, however, the two deposits would be subject to different availability rules. In the first case, none of the proceeds of the deposit would be subject to next-day availability; in the second case, the entire proceeds of the deposit would be subject to next-day availability.

In this example, because the state law would, in some of these situations, permit a hold longer than the maximum permitted by the Act, the provision of state law in this example is inconsistent and superseded in its entirety. The Board recognizes that this standard will eliminate the faster availability that would be obtained for some compositions of deposits if the provision of state law were superseded only partially. Nonetheless, superseding these state law provisions in their entirety avoids the necessity of forming very complex hybrids of state and federal law that could not have been contemplated by the state or federal legislatures.

Similarly, a provision of state law could establish a different method of calculating the exception for large-dollar deposits than the large-deposit exception in this subpart (see § 229.13(b)). Thus, a state law could exempt each check of more than $5,000 from its availability rules, rather than the Act's exemption of aggregate deposits in excess of $5,000. Such a provision of state law would allow for longer availability for the portion of a check under $5,000, and therefore the provision of state law would be superseded.

State laws that provide maximum availability periods for categories of deposits or institutions that are not covered by the Act would not be superseded. Thus, state funds availability laws that apply to funds in time and savings deposits or to deposits in money market mutual funds are not affected by the Act or this regulation.

Generally, state rules governing the disclosure of availability policies and actions applicable to accounts are also superseded. Nevertheless, a state law requiring disclosure of funds availability policies that apply to deposits other than "accounts," such as savings or time deposits, are not inconsistent with the Act or this subpart. Banks in these states would have to follow the state disclosure rules for these deposits.

(d) *Preemption determinations.* The Board may issue preemption determinations upon the request of an interested party in a state. The determinations will relate only to the provisions of Subparts A and B; generally the Board will not issue individual preemption determinations regarding the relation of state

U.C.C. provisions to the requirements of Subpart C.

(e) *Procedures for preemption determinations.* This provision sets forth the information that must be included in a request by an interested party for a preemption determination by the Board.

Section 229.21 Civil Liability

(a) *Civil liability.* This paragraph sets forth the statutory penalties for failure to comply with the requirements of this subpart. These penalties apply to provisions of state law that supersede provisions of this regulation, such as requirements that funds deposited in accounts at banks be made available more promptly than required by this regulation, but they do not apply to other provisions of state law. (See Commentary to § 229.20.)

(b) *Class action awards.* This paragraph sets forth the provision in the Act concerning the factors that should be considered by the court in establishing the amount of a class action award.

(c) *Bona fide errors.* A bank is shielded from liability under this section for a violation of a requirement of this subpart if it can demonstrate, by a preponderance of the evidence, that the violation resulted from a bona fide error and that it maintains procedures designed to avoid such errors. For example, a bank may make a bona fide error if it fails to give next-day availability on a check drawn on the Treasury because the bank's computer system malfunctions in a way that prevents the bank from updating its customer's account.

(d) *Jurisdiction.* The Act confers subject matter jurisdiction on courts of competent jurisdiction and provides a time limit for civil actions for violations of this subpart.

(e) *Reliance on Board rulings.* This provision shields banks from civil liability if they act in good faith in reliance on any rule, regulation, model form (if the disclosure actually corresponds to the bank's availability policy), or interpretation of the Board, even if it were subsequently determined to be invalid. Banks may rely on this Commentary, which is issued as an official Board interpretation, as well as on the regulation itself.

(f) *Exclusions.* This provision clarifies that liability under this § 229.21 does not apply to violations of the requirements of Subpart C of this regulation, or to actions for wrongful dishonor of a check by a paying bank's customer.

(g) *Record retention.* Banks must keep records to show compliance with the requirements of this subpart for at least two years. This record retention period is extended in the case of civil actions and enforcement proceedings. Generally, a bank is not required to retain records showing that it has actually given disclosures or notices required by this subpart to each customer, but it must retain evidence demonstrating that its procedures reasonably ensure the customers' receipt of the required disclosures and notices. A bank must, however, retain a copy of each notice provided pursuant to its use of the reasonable cause exception under § 229.13(g) as well as a brief description of the facts giving rise to the availability of that exception.

Section 229.30 Paying Bank's Responsibility for Return of Checks

(a) *Return of checks.* This section requires a paying bank that determines not to pay a check to return the check expeditiously. Generally, a check is returned expeditiously if the return process is as fast as the forward collection process. This paragraph provides two standards for expeditious return, the "two-day/four-day" test, and the "forward collection" test.

Under the "two-day/four-day" test, if a check is returned such that it would normally be received by the depositary bank two business days after presentment in the case of a local check, or four business days after presentment in the case of a nonlocal check, the check is considered returned expeditiously. In certain limited cases, however, these times are shorter than the time it would normally take a forward collection check deposited in the paying bank and drawn on the depositary bank to be collected. Therefore, the Board has included a "forward collection" test, whereby a check is nonetheless considered to be returned expeditiously if the paying bank uses transportation methods and banks for return comparable to those used for forward collection checks, even if the check is not received by the depositary bank within the two day or four day period.

(1) *Two-day/four-day test.* Under the first test, a paying bank must return the check so that the check would normally be received by the depositary bank within specified times, depending on whether the paying bank is a local paying bank or a nonlocal paying bank with respect to the depositary bank. Whether a paying bank is local or nonlocal for a particular check is determined using the definition of local paying bank in § 229.2(s).

For a local paying bank, a check is returned expeditiously if it is returned to the depositary bank by 4:00 p.m. (local time of the depositary bank) of the second business day after the banking day on which the check was presented to the paying bank. For example, a check presented on Monday to a local paying bank must be returned to the depositary bank by 4:00 p.m. on Wednesday. For a nonlocal paying bank, the deadline to complete return is 4:00 p.m. (local time of the depositary bank) of the fourth business day after the banking day on which the check was presented to the paying bank. For example, a check presented to a nonlocal paying bank on Monday must be returned to the depositary bank by 4:00 p.m. on Friday.

This two-day/four-day test does not necessarily require actual receipt of the check by the depositary bank within these times. Rather, the paying bank must send the check so that the check would normally be received by the depositary bank within the specified time. Thus, the paying bank is not responsible for unforeseeable delays in the return of the check, such as transportation delays.

Often, returned checks will be delivered to the depositary bank together with forward collection checks. Where the last day on which a check could be delivered to a depositary bank under this two-day/four-day test is not a banking day for the depositary bank, a returning bank might not schedule delivery of forward collection checks to the depositary bank on that day. Further, the depositary bank may not process checks on that day. Consequently, if the last day of the time limit is not a banking day for the depositary bank, the check may be delivered to the depositary bank before the close of the depositary bank's next banking day and the return will still be considered expeditious. Ordinarily, this extension of time will allow the returned checks to be delivered with the next shipment of forward collection checks destined for the depositary bank.

The times specified in this two-day/four-day test are based on estimated forward collection times, but take into account the particular difficulties that may be encountered in handling returned checks. It is anticipated that the normal process for forward collection of a check coupled with these return requirements will frequently result in the return of checks before the proceeds of local and nonlocal checks, other than those covered by § 229.10(c), must be made available for withdrawal under the temporary schedules in § 229.11.

Under this two-day/four-day test, no particular means of returning checks is required, thus providing flexibility to paying banks in selecting means of return. The Board anticipates that paying banks will often use returning banks (see § 229.31) as their agents to return checks to depositary banks. A paying bank may rely on the availability schedule of the returning bank it uses in determining whether the returned check would "normally" be returned within the required time under this two-day/four-day test, unless the paying bank has reason to believe that these schedules do not reflect the actual time for return of a check.

(2) *Forward collection test.* Under the second, "forward collection" test, a paying bank returns a check expeditiously if it returns a check by means as swift as the means similarly situated banks would use for the forward collection of a check drawn on the depositary bank.

Generally, the paying bank would satisfy the "forward collection" test if it uses a transportation method and collection path for return comparable to those used for forward collection, provided that the returning bank selected to process the return agrees to handle the returned check under the standards for expeditious return for returning banks under § 229.31(a). This test allows many paying banks a simple means of expeditious return of checks and takes into account the longer time for return that will be required by banks that do not have ready access to direct courier transportation.

The paying bank's normal method of sending a check for forward collection would not be expeditious, however, if it is materially slower than that of other banks of similar size and with similar check handling activity in its community.

Under the "forward collection" test, a paying bank must handle, route, and transport a returned check in a manner designed to be at least as fast as a similarly situated bank would collect a forward collection check (1) of similar amount, (2) drawn on the depositary bank, and (3)

received for deposit by a branch of the paying bank or a similarly situated bank by noon on the banking day following the banking day of presentment of the returned check.

This test refers to similarly situated banks to indicate a general community standard. In the case of a paying bank (other than a Federal Reserve Bank), a similarly situated bank is a bank of similar asset size, in the same community, and with similar check handling activity as the paying bank. (See § 229.2(ee).) A paying bank has similar check handling activity to other banks that handle similar volumes of checks for collection.

Under the forward collection test, banks that use means of handling returned checks that are less efficient than the means used by similarly situated banks must improve their procedures. On the other hand, a bank with highly efficient means of collecting checks drawn on a particular bank, such as a direct presentment of checks to a bank in a remote community, is not required to use that means for returned checks, i.e. direct return, if similarly situated banks do not present checks directly to that depositary bank.

Examples

1. If a check is presented to a paying bank on Monday and the depositary bank and the paying bank are participants in the same clearinghouse, the paying bank should arrange to have the returned check received by the depositary bank by Wednesday. This would be the same day the paying bank would deliver a forward collection check to the depositary bank if the paying bank received the deposit by noon on Tuesday.

2. If a check is presented to a paying bank on Monday and the paying bank would normally collect checks drawn on the depositary bank by sending them to a correspondent or a Federal Reserve Bank by courier, the paying bank could send the returned check to its correspondent or Federal Reserve Bank, provided that the correspondent has agreed to handle returned checks expeditiously under § 229.31(a). (All Federal Reserve Banks agree to handle returned checks expeditiously.)

The paying bank must deliver the returned check to the correspondent or Federal Reserve Bank by the correspondent's or Federal Reserve Bank's appropriate cut-off hour. The appropriate cut-off hour is the cut-off hour for returned checks that corresponds to the cut-off hour for forward collection checks drawn on the depositary bank that would normally be used by the paying bank or a similarly situated bank. A returned check cut-off hour corresponds to a forward collection cut-off hour if it provides for the same or faster availability for checks destined for the same depositary banks.

In this example, delivery to the correspondent or a Federal Reserve Bank by the appropriate cut-off hour satisfies the paying bank's duty, even if use of the correspondent or Federal Reserve Bank is not the most expeditious means of returning the check. Thus, a paying bank may send a local returned check to a correspondent instead of a Federal Reserve Bank, even if the correspondent then sends the returned check to a Federal Reserve Bank the following day as a qualified returned check. Where the paying bank delivers forward collection checks by courier to the correspondent or the Federal Reserve Bank, mailing returned checks to the correspondent or Federal Reserve Bank would not satisfy the forward collection test.

3. If a paying bank ordinarily mails its forward collection checks to its correspondent or Federal Reserve Bank in order to avoid the costs of a courier delivery, but similarly situated banks use a courier to deliver forward collection checks to their correspondent or Federal Reserve Bank, the paying bank must send its returned checks by courier to meet the forward collection test.

4. If a paying bank normally sends its forward collection checks directly to the depositary bank, which is located in another community, but similarly situated banks send forward collection checks drawn on the depositary bank to a correspondent or a Federal Reserve Bank, the paying bank would not have to send returned checks directly to the depositary bank, but could send them to a correspondent or a Federal Reserve Bank.

The dollar amount of the returned check has a bearing on how it must be returned. If the paying bank and similarly situated banks present large-dollar checks drawn on the depositary bank directly to the depositary bank, but use a Federal Reserve Bank or a correspondent to collect small-dollar checks, generally the paying bank would be required to send its large-dollar returns directly to the depositary bank (or through a returning bank, if the checks are returned as quickly), but could use a Federal Reserve Bank or a correspondent for its small-dollar returns.

In meeting the requirements of the forward collection test, the paying bank is responsible for its own actions, but not for those of the depositary bank or returning banks.[4] For example, if the paying bank starts the return of the check in a timely manner but return is delayed by a returning bank (including delay to create a qualified returned check), generally the paying bank has met its requirements. (See § 229.38.) If, however, the paying bank selects a returning bank that the paying bank should know is not capable of meeting its return requirements, the paying bank will not have met its obligation of exercising ordinary care in selecting intermediaries to return the check. The paying bank is free to use a method of return, other than its method of forward collection, as long as the alternate method results in delivery of the returned check to the depositary bank as quickly as the forward collection of a check drawn on the depositary bank or, where the returning bank takes a day to create a qualified returned check under § 229.31(a), one day later than the forward collection time.

Although paying banks may wish to prepare qualified returned checks because they will be handled at a lower cost by returning banks, the one business day extension provided to returning banks is not available to paying banks because of the longer time that a paying bank has to dispatch the check. Normally, paying banks will be able to convert a check to a qualified returned check at any time after the determination is made to return the check until late in the day following presentment, while a returning bank may receive returned checks late on one day and be expected to dispatch them early the next morning.

In effect, under either test, the paying bank acts as an agent or subagent of the depositary bank in selecting a means of return. Under § 229.30(a), a paying bank is authorized to route the returned check in a variety of ways:

1. It may send the returned check directly to the depositary bank by courier or other means of delivery, bypassing returning banks; or

2. It may send the returned check to any returning bank agreeing to handle the returned check for expeditious return to the depositary bank under § 229.31(a), regardless of whether or not the returning bank handled the check for forward collection.

If the paying bank elects to return the check directly to the depositary bank, it is not necessarily required to return the check to the branch of first deposit. The check may be returned to the depositary bank at any location permitted under § 229.32(a).

Except for the extension permitted by § 229.30(c), discussed below, this section does not relieve a paying bank from the requirement for timely return (i.e., midnight deadline) under U.C.C. §§ 4–301 and 4–302, which continue to apply. Under section 4–302, a paying bank is "accountable" for the amount of a demand item other than a documentary draft, if it does not pay or return the item or send notice of dishonor by its midnight deadline. Under U.C.C. §§ 3–418 and 4–213(1), late return constitutes payment and would be final in favor of a holder in due course or a person who has in good faith changed his position in reliance on the payment. Thus, retaining this requirement gives the paying bank an additional incentive to make a prompt return.

The expeditious return requirement applies to a paying bank that determines not to pay a check. This requirement applies to a payable through or a payable at bank that is defined as a paying bank (see § 229.2(z)) and that returns a check. This requirement begins when the payable through or payable at bank receives the check during forward collection, not when the payor returns the check to the payable through or payable at bank. Nevertheless, a check sent for payment or collection to a payable through or payable at bank is not considered to be drawn on that bank for purposes of the midnight deadline provision of U.C.C. § 4–301. (See discussion of § 229.36(a).) The liability section of this subpart (§ 229.38) provides that a paying bank is not subject to both "accountability" for missing the midnight deadline under the U.C.C. and liability for missing the timeliness requirements of this regulation.

This paragraph directly affects the following provisions of the U.C.C., and may affect other sections or provisions:

1. Section 4–212(2), in that direct return by the paying bank is now permitted in all jurisdictions even though not all jurisdictions have adopted this optional provision. Also,

[4] This is analogous to the responsibility of collecting banks under U.C.C. § 4–202(3).

the paying bank does not have to create a draft on the depositary bank.

2. Section 4–301(4), in that instead of returning a check through a clearinghouse or to the presenting bank, a paying bank may send a returned check to the depositary bank or to a returning bank.

3. Section 4–301(1), in that time limits specified in that section may be affected by the additional requirement to make an expeditious return and in that settlement for returned checks is made under § 229.31(c), not by revocation of settlement.

(b) *Unidentifiable depositary bank.* In some cases, a paying bank will be unable to identify the depositary bank through the use of ordinary care and good faith. The Board expects that these cases will be unusual as skilled return clerks will readily identify the depositary bank from the depositary bank indorsement required under § 229.35 and Appendix D. In cases where the paying bank is unable to identify the depositary bank, the paying bank may, in accordance with § 229.30(a), send the returned check to a returning bank that agrees to handle the returned check for expeditious return to the depositary bank under § 229.31(a). The returning bank may be better able to identify the depositary bank.

In the alternative, the paying bank may send the check back up the path used for forward collection of the check. The presenting bank and prior collecting banks will normally be able to trace the collection path of the check through the use of their internal records in conjunction with the indorsements on the returned check. In these limited cases, the paying bank may send such a returned check to any bank that handled the check for forward collection, even if that bank does not agree to handle the returned check for expeditious return to the depositary bank under § 229.31(a). A paying bank returning a check under this paragraph to a bank that has not agreed to handle checks expeditiously must advise that bank that it is unable to identify the depositary bank. This information will warn the bank that this check will require special research and handling in accordance with § 229.31(b). The return of a check to a bank that handled the check for forward collection is consistent with § 229.35(b), which requires a bank handling a check to take up the check it is has not been paid.

The sending of a check to a bank that handled the check for forward collection under this paragraph, but that has not agreed to handle returned checks expeditiously, is not subject to the requirements for expeditious return by the paying bank. Often, the paying bank will not have courier or other expeditious means of transportation to the collecting or presenting bank. Although the lack of a requirement of expeditious return will create risks for the depositary bank, in many cases the inability to identify the depositary bank will be due to the depositary bank's, or a collecting bank's, failure to use the indorsement required by § 229.35(a) and Appendix D. If the depositary bank failed to use the proper indorsement, it should bear the risks of less than expeditious return. Similarly, where the inability to identify the depositary bank is due to indorsements or other information placed on the back of the check by the depositary bank's customer or other prior indorser, the depositary bank should bear the risk that it cannot charge a returned check back to that customer. Where the inability to identify the depositary bank is due to subsequent indorsements of collecting banks, these collecting banks may be liable for a loss incurred by the depositary bank due to less than expeditious return of a check; those banks therefore have an incentive to return checks sent to them under this paragraph quickly.

This paragraph does not relieve a paying bank from the liability for the lack of expeditious return in cases where the paying bank is itself responsible for the inability to identify the depositary bank, such as when the paying bank's customer has used a check with printing or other material on the back in the area reserved for the depositary bank's indorsement, making the indorsement unreadable. (See § 229.38(d).)

A paying bank's return under this paragraph is also subject to its midnight deadline under U.C.C. § 4–301, Regulation J, and the exception provided in § 229.30(c). A paying bank also may send a check to a prior collecting bank to make a claim against that bank under § 229.35(b) where the depositary bank is insolvent or in other cases as provided in § 229.35(b). Finally, a paying bank may make a claim against a prior collecting bank based on a breach of warranty under U.C.C. § 4–207.

(c) *Extension of deadline for expedited delivery.* A paying bank may have a courier that leaves after midnight to deliver its forward collection checks. This paragraph removes the constraint of the midnight deadline for returned checks if the returned check reaches either the depositary bank or the returning bank to which it is sent on that bank's banking day following the expiration of the midnight deadline or other applicable time for return. The extension also applies if the check reaches the bank to which it is sent later than the close of that bank's banking day, if highly expeditious means of transportation are used. For example, a west coast paying bank may use this further extension to ship a returned check by air courier directly to an east coast depositary bank even if the check arrives after the close of the depositary bank's banking day.

The time limits that are extended are the paying bank's midnight deadline in U.C.C. §§ 4–301 and 4–302 and § 210.12 of Regulation J (12 CFR 210.12). As this extension is designed to speed the overall return of checks, no modification or extension of the expeditious return requirements in § 229.30(a) is required.

The paying bank satisfies its midnight deadline under the U.C.C. by dispatching returned checks to another bank by courier, including a courier under contract with the paying bank, prior to expiration of the midnight deadline.

This paragraph directly affects U.C.C. §§ 4–301 and 4–302 and § 210.12 of Regulation J (12 CFR 210.12) to the extent that this paragraph applies by its terms, and may affect other provisions.

(d) *Identification of returned check.* Most paying banks currently use some form of stamp indicating the reason for return. This paragraph makes this practice mandatory. No particular form of stamp is required, but the stamp must indicate the reason for return. A check is identified as a returned check by a reason for return stamp, even though the stamp does not specifically state that the check is a returned check. A reason such as "Refer to Maker" is permissible in appropriate cases. If the paying bank places the returned check in a carrier envelope, the carrier envelope should indicate that it is a returned check, but need not repeat the reason for return stated in the check if it in fact appears on the check.

(e) *Depositary bank without accounts.* Subpart B of this regulation applies only to "checks" deposited in transaction-type "accounts." Thus, a depositary bank with only time or savings accounts need not comply with the availability requirements of Subpart B. Collecting banks will not have couriers delivering checks to these banks as paying banks, because no checks are drawn on them. Consequently, the costs of using a courier or other expedited means to deliver returned checks directly to such a depositary bank may not be justified. Thus, the expedited return requirement of § 229.30(a) and the notice of nonpayment requirement of § 229.33 do not apply to checks being returned to banks that do not hold accounts. The paying bank's midnight deadline in U.C.C. §§ 4–301 and 4–302 and § 210.12 of Regulation J (12 CFR 210.12) would continue to apply to these checks. Returning banks would also be required to act on such checks within their midnight deadline. Further, in order to avoid complicating the process of returning checks generally, banks without accounts are required to use the standard indorsement, and their checks are returned by returning banks and paid for by the depositary bank under the same rules as checks deposited in other banks, with the exception of the expeditious return and notice of nonpayment requirements of §§ 229.30(a), 229.31(a), and 229.33.

The expeditious return requirements also apply to a check deposited in a bank that is not a depository institution. Federal Reserve Banks, Federal Home Loan Banks, private bankers, and possibly certain industrial banks are not "depository institutions" within the meaning of the Act, and are therefore not subject to the expedited availability and disclosure requirements of Subpart B. These banks do, however, maintain accounts as defined in § 229.2(a), and a paying bank returning a check to one of these banks would be required to return the check to the depositary bank, in accordance with the requirements of this section.

(f) *Notice in lieu of return.* A check that is lost or otherwise unavailable for return may be returned by sending a copy of both sides of the check or, if such a copy is not available to the paying bank, a written notice of nonpayment containing the information specified in § 229.33(b). The copy or written notice must clearly indicate it is a substitute for the returned check. Notice by telephone, telegraph, or other electronic transmission, other than a legible facsimile or similar image transmission of both sides of the check, does

not satisfy the requirements for a notice in lieu of return. The requirement for a writing and the indication that the notice is a substitute for the returned check is necessary so that the returning and depositary banks are informed that the notice carries value. Section 229.34(a)(4) includes a warranty that the original check has not been and will not be returned if a notice in lieu has been returned.

The requirement of this paragraph supersedes the requirement of U.C.C. § 4–301(1) as to the form and information required of a notice of dishonor or nonpayment. Reference in the regulation and this commentary to a returned check includes a notice in lieu of return unless the context indicates otherwise.

The notice in lieu of return is subject to the provisions of § 229.30 and is treated like a returned check for settlement purposes. If the original check is over $2,500, the notice of nonpayment under § 229.33 is still required, but may be satisfied by the notice in lieu of return if the notice in lieu meets the time and information requirements of § 229.33.

If not all of the information required by § 229.33(b) is available, the paying bank may make a claim against any prior bank handling the check as provided in § 229.35(b).

(g) *Reliance on routing number.* Although § 229.35 and Appendix D require that the depositary bank indorsement contain its nine-digit routing number, it is possible that a returned check will bear the routing number of the depositary bank in fractional, nine-digit, or other form. This paragraph permits a paying bank to rely on the routing number of the depositary bank as it appears on the check (in the depositary bank's indorsement) when it is received by the paying bank.

If there are inconsistent routing numbers, the paying bank may rely on any routing number designating the depositary bank. The paying bank is not required to resolve the inconsistency prior to processing the check. The paying bank remains subject to the requirement to act in good faith and use ordinary care under § 229.38(a).

Section 229.31 Returning Bank's Responsibility for Return of Checks

(a) *Return of checks.* The standards for return of checks established by this section are similar to those for paying banks in § 229.30(a). This section requires a returning bank to return a returned check expeditiously if it agrees to handle the returned check for expeditious return under this paragraph. In effect, the returning bank is an agent or subagent of the paying bank and a subagent of the depositary bank for the purposes of returning the check. A returning bank agrees to handle a returned check for expeditious return to the depositary bank if it:

(1) Publishes or distributes availability schedules for the return of returned checks and accepts the returned check for return;

(2) Handles a returned check for return that it did not handle for forward collection; or

(3) Otherwise agrees to handle a returned check for expeditious return.

As in the case of a paying bank, a returning bank's return of a returned check is expeditious if it meets either of two tests. Under the "two-day/four-day" test, the check must be returned so that it would normally be received by the depositary bank by 4:00 p.m. either two or four business days after the check was presented to the paying bank, depending on whether the paying bank is a local or a nonlocal paying bank with respect to the depositary bank. This is the same test as the two-day/four-day test applicable to paying banks. (See Commentary to § 229.30(a).) While a returning bank will not have first hand knowledge of the day on which a check was presented to the paying bank, returning banks may, by agreement, allocate with paying banks liability for late return based on the delays caused by each. In effect, the two-day/four day test protects all paying and returning banks that return checks from claims that they failed to return a check expeditiously, where the check is returned within the specified time following presentment to the paying bank, or a later time as would result from unforeseen delays.

The "forward collection" test is similar to the forward collection test for paying banks. Under this test, a returning bank must handle a returned check in the same manner that a similarly situated collecting bank would handle a check of similar size drawn on the depositary bank for forward collection. A similarly situated bank is a bank (other than a Federal Reserve Bank) that is of similar asset size and check handling activity in the same community. A bank has similar check handling activity if it handles a similar volume of checks for forward collection as the forward collection volume of the returning bank.

Under the forward collection test, a returning bank must accept returned checks, including both qualified and other returned checks ("raw returns"), at approximately the same times and process them according to the same general schedules as checks handled for forward collection. Thus, a returning bank generally must process even raw returns on an overnight basis, unless its time limit is extended by one day to convert a raw return to a qualified returned check.

A returning bank may establish earlier cut-off hours for receipt of returned checks than for receipt of forward collection checks, but the cut-off hour for returned checks may not be earlier than 2:00 p.m. The returning bank also may set different sorting requirements for returned checks than those applicable to other checks. Thus, a returning bank may allow itself more processing time for returns than for forward collection checks. All returned checks received by a cut-off hour for returned checks must be processed and dispatched by the returning bank by the time that it would dispatch forward collection checks received at a corresponding forward collection cut-off hour that provides for the same or faster availability for checks destined for the same depositary banks.

Examples

1. If a returning bank receives a returned check by its cut-off hour for returned checks on Monday and the depositary bank and the returning bank are participants in the same clearinghouse, the returning bank should arrange to have the returned check received by the depositary bank by Tuesday. This would be the same day that it would deliver a forward collection check drawn on the depositary bank and received by the returning bank at a corresponding forward collection cut-off hour on Monday.

2. If a returning bank receives a returned check, and the returning bank would normally collect a forward collection check drawn on the depositary bank by sending the forward collection check to a correspondent or a Federal Reserve Bank by courier, the returning bank could send the returned check in the same manner if the correspondent has agreed to handle returned checks expeditiously under § 229.31(a). The returning bank would have to deliver the check by the correspondent's or Federal Reserve Bank's cut-off hour for returned checks that corresponds to its cut-off hour for forward collection checks drawn on the depositary bank. A returning bank may take a day to convert a check to a qualified returned check. Where the forward collection checks are delivered by courier, mailing the returned checks would not meet the duty established by this section for returning banks.

A returning bank must return a check to the depositary bank by courier or other means as fast as a courier, if similarly situated returning banks use couriers to deliver their forward collection checks to the depositary bank.

For some depositary banks, no community practice exists as to delivery of checks. For example, a credit union whose customers use payable through drafts does not normally have checks presented to it because the drafts are normally sent to the payable through bank for collection. In these circumstances, the community standard is established by taking into account the dollar volume of the checks being sent to the depositary bank, and the location of the depositary bank, and determining whether similarly situated banks would normally deliver forward collection checks to the depositary bank, taking into account the particular risks associated with returned checks. Where the community standard does not require courier delivery, other means of delivery, including mail, are acceptable.

The expeditious return requirement for a returning bank in this regulation is more stringent in many cases than the duty of a collecting bank to act seasonably under U.C.C. § 4–202 in returning a check. A returning bank is under a duty to act as expeditiously in returning a check as it would in the forward collection of a check. Notwithstanding its duty of expeditious return, its midnight deadline under U.C.C. § 4–202 and § 210.12(a) of Regulation J (12 CFR 210.12(a)), under the forward collection test, a returning bank may take an extra day to qualify a returned check. A qualified returned check will be handled by subsequent returning banks more efficiently than a raw return. This paragraph gives a returning bank an extra business day beyond the time that would otherwise be required to return the returned check to convert a returned check to a qualified returned check. The qualified returned check must include the routing number of the depositary bank, the amount of the check, and a return identifier encoded on the check in magnetic ink. If the

returning bank is sending the returned check directly to the depositary bank, this extra day is not available because preparing a qualified returned check will not expedite handling by other banks.

If the returning bank makes an encoding error in creating a qualified returned check, it may be liable under § 229.38 for losses caused by any negligence. The returning bank would not lose the one-day extension available to it for creating a qualified returned check because of an encoding error.

Under § 229.31(a), the returning bank is authorized to route the returned check in a variety of ways:

1. It may send the returned check directly to the depositary bank by courier or other expeditious means of delivery; or

2. It may send the returned check to any returning bank agreeing to handle the returned check for expeditious return to the depositary bank under this section regardless of whether or not the returning bank handled the check for forward collection.

If the returning bank elects to send the returned check directly to the depositary bank, it is not required to send the check to the branch of the depositary bank that first handled the check. The returned check may be sent to the depositary bank at any location permitted under § 229.32(a).

In meeting the requirements of this section, the returning bank is responsible for its own actions, but not those of the paying bank, other returning banks, or the depositary bank. (See U.C.C. § 4–202(3) regarding the responsibility of collecting banks.) For example, if the paying bank has delayed the start of the return process, but the returning bank acts in a timely manner, the returning bank may satisfy the requirements of this section even if the delayed return results in a loss to the depositary bank. (See § 229.38.) A returning bank must handle a notice in lieu of return as expeditiously as a returned check.

This paragraph directly affects the following provisions of the U.C.C., and may affect other sections or provisions:

1. Section 4–212(2), in that direct return by the returning bank is now permitted in all jurisdictions even though not all jurisdictions have adopted this optional provision. Also, the returning bank does not have to create a draft on the depositary bank.

2. Section 4–202(2), in that time limits required by that section may be affected by the additional requirement to make an expeditious return.

3. Section 4–212(1), in that settlement for returned checks is made under § 229.31(c) and not by charge-back of provisional credit, and in that the time limits may be affected by the additional requirement to make an expeditious return.

(b) *Unidentifiable depositary bank.* This section is similar to § 229.30(b), but applies to returning banks instead of paying banks. In some cases a returning bank will be unable to identify the depositary bank with respect to a check. Returning banks agreeing to handle checks for return to depositary banks under § 229.31(a) are expected to be expert in identifying depositary bank indorsements. In the limited cases where the returning bank cannot identify the depositary bank, the returning bank may send the returned check to a returning bank that agrees to handle the returned check for expeditious return under § 229.31(a), or it may send the returned check to a bank that handled the check for forward collection even if that bank does not agree to handle returned checks expeditiously under § 229.31(a).

If the returning bank itself handled the check for forward collection, it may send the returned check to a collecting bank that was prior to it in the forward collection process, which will be better able to identify the depositary bank. If there are no prior collecting banks, the returning bank must research the collection of the check and identify the depositary bank. As in the case of paying banks under § 229.30(b), a returning bank's sending of a check to a bank that handled the check for forward collection under § 229.31(b) is not subject to the expeditious return requirements of § 229.31(a).

The returning bank's return of a check under this paragraph is subject to the midnight deadline under U.C.C. § 4–202(2). (See definition of returning bank in § 229.2(cc).)

Where a returning bank receives a check that it does not agree to handle expeditiously under § 229.31(a), such as a check sent to it under § 229.30(b), but the returning bank is able to identify the depositary bank, the returning bank must thereafter return the check expeditiously to the depositary bank. The returning bank returns a check expeditiously under this paragraph if it returns the check by the same means it would use to return a check drawn on it to the depositary bank or by other reasonably prompt means.

As in the case of a paying bank returning a check under § 229.30(b), a returning bank that sends a check to a collecting bank under this paragraph must advise the collecting bank that the returning bank is unable to identify the depositary bank.

(c) *Settlement.* Under the U.C.C., a collecting bank receives settlement for a check when it is presented to the paying bank. The paying bank may recover the settlement when the paying bank returns the check to the presenting bank. Under this regulation, however, the paying bank may return the check directly to the depositary bank or through returning banks that did not handle the check for forward collection. On these more efficient return paths, the paying bank does not recover the settlement made to the presenting bank. Thus, this paragraph requires the returning bank to settle for a returned check (either with the paying bank or another returning bank) in the same way that it would settle for a similar check for forward collection. To achieve uniformity, this paragraph applies even if the returning bank handled the check for forward collection.

Any returning bank, including one that handled the check for forward collection, may provide availability for returned checks pursuant to an availability schedule as it does for forward collection checks. These settlements by returning banks, as well as settlements between banks made during the forward collection of a check, are considered final when made subject to any deferment of availability. (See § 229.36(d).)

A returning bank may vary the settlement method it uses by agreement with paying banks or other returning banks. Special rules apply in the case of insolvency of banks. (See § 229.39.) If payment cannot be obtained from a depositary or returning bank because of its insolvency or otherwise, recovery can be had by returning, paying, and collecting banks from prior banks on this basis of the liability of prior banks under § 229.35(b).

This paragraph affects U.C.C. § 4–212(1) in that a paying or collecting bank does not ordinarily have a right to charge back against the bank from which it received the returned check, although it is entitled to settlement if it returns the returned check to that bank, and may affect other sections or provisions. Under § 229.36(d), a bank collecting a check remains liable to prior collecting banks and the depositary bank's customer under the U.C.C.

(d) *Charges.* This paragraph permits any returning bank, even one that handled the check for forward collection, to impose a fee on the paying bank or other returning bank for its service in handling a returned check. Where a claim is made under § 229.35(b), the bank on which the claim is made is not authorized by this paragraph to impose a charge for taking up a check. This paragraph preempts state laws to the extent that these laws prevent returning banks from charging fees for handling returned checks.

(e) *Depositary bank without accounts.* This paragraph is similar to § 229.30(e) and relieves a returning bank of its obligation to make expeditious return to a depositary bank that does not maintain any accounts. (See the Commentary to § 229.30(e).)

(f) *Notice in lieu of return.* This paragraph is similar to § 229.30(f) and authorizes a returning bank to originate a notice in lieu of return if the returned check is unavailable for return. (See the Commentary to § 229.30(f).)

(g) *Reliance on routing number.* This paragraph is similar to § 229.30(g) and permits a returning bank to rely on routing numbers appearing on a returned check such as routing numbers in the depositary bank's indorsement or on qualified returned checks. (See the Commentary to § 229.30(g).)

Section 229.32 Depositary Bank's Responsibility for Returned Checks

(a) *Acceptance of returned checks.* This regulation seeks to encourage direct returns by paying and returning banks and may result in a number of banks sending checks to depositary banks with no preexisting arrangements as to where the returned checks should be delivered. This paragraph states where the depositary bank is required to accept returned checks and written notices of nonpayment under § 229.33. (These locations differ from locations at which a depositary bank must accept electronic notices.) It is derived from U.C.C. § 3–504(2), which specifies that presentment for payment may be made at the place specified in the instrument or, if there is none, at the place of business of the party to pay. In the case of returned checks, the depositary bank does not print the check and can only specify the place of "payment" of the returned check in its indorsement.

The paragraph specifies four locations at which the depositary bank must accept returned checks:

1. The depositary bank must accept returned checks at any location at which it requests presentment of forward collection checks such as a processing center. A depositary bank does not request presentment of forward collection checks at a branch of the bank merely by paying checks presented over the counter.

2. (i) If the depositary bank indorsement states the name and address of the depositary bank, it must accept returned checks at the branch, head office, or other location, such as a processing center, indicated by the address. If the address is too general to identify a particular location, then the depositary bank must accept returned checks at any branch or head office consistent with the address. If, for example, the address is "New York, New York," each branch in New York City must accept returned checks.

(ii) If no address appears in the depositary bank's indorsement, the depositary bank must accept returned checks at any branch or head office associated with the depositary bank's routing number. The offices associated with the routing number of a bank are found in a publication of Rand McNally, *Key to Routing Numbers*, which lists a city and state address for each routing number.

(iii) If no routing number or address appears in its indorsement, the depositary bank must accept a returned check at any branch or head office of the bank. The indorsement requirement of § 229.35 and Appendix D requires that the indorsement contain a routing number, a name, and a location. Consequently, this provision, as well as paragraph (a)(2)(ii) of this section, only applies where the depositary bank has failed to comply with the indorsement requirement.

For ease of processing, a depositary bank may require that returning or paying banks returning checks to it separate returned checks from forward collection checks being presented.

(b) *Payment.* As discussed in the comment to § 229.31(c), under this regulation a paying or returning bank does not obtain credit for a returned check by charge-back but by, in effect, presenting the returned check to the depositary bank. This paragraph imposes an obligation to "pay" a returned check that is similar to the obligation to pay a forward collection check by a paying bank, except that the depositary bank may not return a returned check for which it is the depositary bank. Also, certain means of payment, such as remittance drafts, may only be used with the agreement of the returning bank.

The depositary bank must pay for a returned check by the close of the banking day on which it received the returned check. The day on which a returned check is received is determined pursuant to U.C.C. § 4–107, which permits the bank to establish a cut-off hour, generally not earlier than 2:00 p.m., and treat checks received after that hour as being received on the next banking day. If the depositary bank is unable to make payment to a returning or paying bank on the banking day that it receives the returned check, because the returning or paying bank is closed for a holiday or because the time when the depositary bank received the check is after the close of Fedwire, e.g., west coast banks with late cut-off hours, payment may be made on the next banking day of the bank receiving payment.

Payment must be made so that the funds are available for use by the bank returning the check to the depositary bank on the day the check is received by the depositary bank. For example, a depositary bank meets this requirement if it sends a wire transfer of funds to the returning or paying bank on the day it receives the returned check, even if the returning or paying bank has closed for the day. A wire transfer should indicate the purpose of the payment.

The depositary bank may use a net settlement arrangement. Banks with net settlement agreements could net the appropriate credits and debits for returned checks with the accounting entries for forward collection checks if they so desired. If, for purposes of establishing additional controls or for other reasons, the banks involved desired a separate settlement for returned checks, a separate net settlement agreement could be established.

The bank sending the returned check to the depositary bank may agree to accept payment at a later date if, for example, it does not believe that the amount of the returned check or checks warrants the costs of same-day payment. Thus, a returning or paying bank may agree to accept payment through an ACH credit or debit transfer that settles the day after the returned check is received instead of a wire transfer that settles on the same day.

This paragraph and this subpart do not affect the depositary bank's right to recover a provisional settlement with its nonbank customer for a check that is returned. (See also §§ 229.33(d) and 229.35(d).)

(c) *Misrouted returned checks.* This paragraph permits a bank receiving a check on the basis that it is the depositary bank to send the misrouted returned check to the correct depositary bank, if it can identify the correct depositary bank, either directly or through a returning bank agreeing to handle the check expeditiously under § 229.30(a). In these cases, the bank receiving the check is acting as a returning bank. Alternatively, the bank receiving the misrouted returned check must send the check back to the bank from which it was received. In either case the bank to which the returned check was misrouted could receive settlement for the check. The depositary bank would be required to pay for the returned check under § 229.32(b), and any other bank to which the check is sent under this paragraph would be required to settle for the check as a returning bank under § 229.31(c). If the check was originally received "free," that is, without a charge for the check, the bank incorrectly receiving the check would have to return the check, without a charge, to the bank from which it came. The bank to which the returned check was misrouted is required to act promptly but is not required to meet the expeditious return requirements of § 229.31(a), however, it must act within its midnight deadline. This paragraph does not affect a bank's duties under § 229.35(b).

(d) *Charges.* This paragraph prohibits a depositary bank from charging the equivalent of a presentment fee for returned checks. A returning bank, however, may charge a fee for handling returned checks. If the returning bank receives a mixed cash letter of returned checks, which includes some checks for which the returning bank is also the depositary bank, the fee may be applied to all the returned checks in the cash letter. In the case of a sorted cash letter containing only returned checks for which the returning bank is the depositary bank, however, no fee may be charged.

Section 229.33 Notice of Nonpayment

(a) *Requirement.* Notice of nonpayment as required by this section and written notice in lieu of return as provided in §§ 229.30(f) and 229.31(f) serve different functions. The two kinds of notice, however, must meet the content requirements of this section. The paying bank must send a notice of nonpayment if it decides not to pay a check of $2,500 or more. A paying bank may rely on an amount encoded on the check in magnetic ink to determine whether the check is in the amount of $2,500 or more. The notice of nonpayment carries no value, and the check itself (or the notice in lieu of return) must be returned. The paying bank must ensure that the notice of nonpayment is received by the depositary bank by 4:00 p.m. local time on the second business day following presentment. A bank identified by routing number as the paying bank is considered the paying bank under this regulation and would be required to create a notice of nonpayment even though that bank determined that the check was not drawn by a customer of that bank. (See Commentary to the definition of paying bank in § 229.2(z).)

The paying bank should not send a notice of nonpayment until it has finally determined not to pay the check. Under § 229.34(b), by sending the notice the paying bank warrants that it has returned or will return the check. If a paying bank sends a notice and subsequently decides to pay the check, the paying bank may mitigate its liability on this warranty by notifying the depositary bank that the check has been paid.

Because the return of the check itself may serve as the required notice of nonpayment, in many cases no notice other than the return of the check will be necessary. For example, in many cases the return of a check through a clearinghouse to another participant of the clearinghouse will be made in time to meet the time requirements of this section. If the check will not normally be received by the depositary bank within the time limits for notice, the return of the check will not satisfy the notice requirement. In determining whether the returned check will satisfy the notice requirement, the paying bank may rely on the availability schedules of returning banks as the time that the returned check is expected to be delivered to the depositary bank, unless the paying bank has reason to know the availability schedules are inaccurate.

(b) *Content of notices.* This paragraph provides that the notice must at a minimum contain eight elements which are specifically

enumerated. In the case of written notices, the name and routing number of the depositary bank are also required.

If the paying bank cannot identify the depositary bank from the check itself, it may wish to send the notice to the earliest collecting bank it can identify and indicate that the notice is not being sent to the depositary bank. The collecting bank may be able to identify the depositary bank and forward the notice, but is under no duty to do so. In addition, the collecting bank may actually be the depositary bank.

(c) *Acceptance of notice.* In the case of a written notice, the depositary bank is required to accept notices at the locations specified in § 229.32(a). In the case of telephone notices, the bank may not refuse to accept notices at the telephone numbers identified in this section, but may transfer calls or use a recording device. Banks may vary by agreement the location and manner in which notices are received.

(d) *Notification to customer.* This paragraph requires a depositary bank to notify its customer of nonpayment upon receipt of a returned check or notice of nonpayment. This requirement is similar to the requirement under the U.C.C. as interpreted in *Appliance Buyers Credit Corp.* v. *Prospect National Bank*, 708 F.2d 290 (7th Cir. 1983), that a depositary bank may be liable for damages incurred by its customer for its failure to give its customer timely advice that it has received a notice of nonpayment. Notice must also be given if a depositary bank receives a notice of recovery under § 229.35(b). The notice to the customer required under this paragraph may also satisfy the notice requirement of § 229.13(g) if the depositary bank invokes the reasonable cause exception of § 229.13(e) due to the receipt of a notice of nonpayment, provided the notice meets the other requirements of § 229.13(g).

Section 229.34 Warranties by Paying Bank and Returning Bank

(a) *Warranty of returned check.* This paragraph includes warranties that a returned check was returned by the paying bank within the deadline under the U.C.C., Regulation J, or § 229.30(c), that the paying or returning bank is authorized to return the check, that the returned check has not been materially altered, and that, in the case of a notice in lieu of return, the original check has not and will not be returned. The warranty does not include a warranty that the bank complied with the expeditious return requirements of §§ 229.30(a) and 229.31(a). These warranties do not apply to checks drawn on the United States Treasury, a state, or a unit of general local government.

(b) *Warranty of notice of nonpayment.* This paragraph provides for warranties for notices of nonpayment. This warranty does not include a warranty that the notice is accurate and timely under § 229.33. The requirements of § 229.33 that are not covered by the warranty are subject to the liability provisions of § 229.38. These warranties are designed to give the depositary bank more confidence in relying on notices of nonpayment. This paragraph imposes liability on a paying bank that gives notice of nonpayment and then subsequently returns the check. (See Commentary on § 229.33(a).)

(c) *Damages.* This paragraph adopts for the new warranties in § 229.34 (a) and (b) the warranty damages of U.C.C. § 4–207(3).

(d) *Tender of defense.* This paragraph adopts for this regulation the vouching-in provisions of U.C.C. § 3–803.

Section 229.35 Indorsements

(a) *Indorsement standards.* This section and Appendix D require banks to use a standard form of indorsement when indorsing checks during the forward collection and return process. The standard provides for indorsements by all collecting and returning banks, plus a unique standard for depositary bank indorsements. It is designed to facilitate the identification of the depositary bank and the prompt return of checks. The indorsement standard specifies the information each indorsement must contain and its location and ink color.

The indorsement standard requires that the nine-digit routing number of the depositary bank be wholly contained in an area on the back of the check from 3.0 inches from the leading edge to 1.5 inches from the trailing edge of the check. This permits banks to use encoding equipment that measures from either the leading or trailing edge of the check to place indorsements in this area. The standard does not require that the entire depositary bank indorsement be contained within the specified area, but checks will be handled most efficiently if depositary banks place as much information as possible within the designated area to ensure that the information is protected from being overstamped by subsequent indorsements. The location requirement for subsequent collecting bank indorsements (not including returning bank indorsements) limits these indorsements to the area on the back of the check from the leading edge to 3.0 inches from the leading edge of the check. The area from the trailing edge of the check to 1.5 inches from the trailing edge is commonly used for the payee indorsement.

The standard requires depositary banks to use either purple or black ink. The Board encourages depositary banks to indorse checks in purple ink where possible, because use of a unique ink color will facilitate the speedy identification of the depositary bank. Black ink, however, may be used when use of purple ink is not feasible, such as where a bank uses the same equipment to apply both depositary bank and subsequent collecting bank indorsements, and the equipment has only one source of ink. The standard requires subsequent collecting banks to use an ink color other than purple for their indorsements. The standard also requires the depositary bank's indorsement to include its nine-digit routing number set off by arrows, the bank's name and location, and the indorsement date, and permits the indorsement to include other identifying information.

The standard does not include the fractional routing number for depositary banks; however, a bank may include its fractional routing number or repeat its nine-digit routing number in its indorsement. If a depositary bank includes its routing number in its indorsement more than once, paying and returning banks will be able to identify the depositary bank more readily.

A depositary bank is not required to place a street address in its indorsement; however, a bank may want to do so in order to limit the number of locations at which it must accept returned checks under § 229.32(a). Banks should note, however, that § 229.32(a) also requires depositary banks to accept returned checks at the location(s) it accepts forward collection checks. The inclusion of a depositary bank's telephone number where it would receive notices of large-dollar returns in its indorsements is optional.

Under the U.C.C., a specific guarantee of prior indorsement is not necessary. (See U.C.C. §§ 3–417(1)(a) and 4–207(1), and official comment 2 to U.C.C. § 4–207.) Use of guarantee language in indorsements, such as "P.E.G." ("prior endorsements guaranteed"), may result in reducing the type size used in bank indorsements, thereby making them more difficult to read. Use of this language may make it more difficult for other banks to identify the depositary bank. Subsequent collecting bank indorsements may not include this language.

The standard for returning banks requires a returning bank to apply an indorsement that avoids the area on the back of the check from 3.0 inches from the leading edge of the check to the trailing edge—the area reserved for the payee and depositary bank indorsements. Returning bank indorsements may differ from subsequent collecting bank indorsements. The use of various methods to process returns using a variety of equipment may also cause returning bank indorsements to vary substantially in form, content, and placement on the check. Thus, a returning bank indorsement may be on the face of the check or on the back of the check. A returning bank indorsement may not be in purple ink. No content requirements have been adopted for the returning bank indorsement.

If the bank maintaining the account into which a check is deposited agrees with another bank (a correspondent, ATM operator, or lock box operator) to have the other bank accept returns and notices of nonpayment for the bank of account, the indorsement placed on the check as the depositary bank indorsement may be the indorsement of the bank that acts as correspondent, ATM operator, or lock box operator as provided in paragraph (d) of this section.

The backs of many checks bear pre-printed information or blacked out areas for various reasons. For example, some checks are printed with a carbon band across the back that allows the transfer of information from the check to a ledger with one writing. Also, contracts or loan agreements are printed on certain checks. Other checks that are mailed to recipients may contain areas on the back that are blacked out so that they may not be read through the mailer. On the deposit side, the payee of the check may place its indorsement or information identifying the drawer of the check in the area specified for the depositary bank indorsement, thus making the depositary bank indorsement unreadable.

The indorsement standard does not prohibit the use of a carbon band or other printed or written matter on the backs of checks and does not require banks to avoid placing their indorsements in these areas. Nevertheless, checks will be handled more efficiently if depositary banks design indorsement stamps so that the nine-digit routing number avoids the carbon band area. Indorsing parties other than banks, e.g., corporations, will benefit from the faster return of checks if they protect the identifiability and legibility of the depositary bank indorsement by staying clear of the area reserved for the depositary bank indorsement.

Section 229.38(d) allocates responsibility for loss resulting from a delay in return of a check due to indorsements that are unreadable because of material on the back of the check. The depositary bank is responsible for a loss resulting from a delay in return caused by the condition of the check arising after its issuance until its acceptance by the depositary bank that made the depositary bank's indorsement illegible. The paying bank is responsible for loss resulting from a delay in return caused by indorsements that are not readable because of other material on the back of the check at the time that it was issued. Depositary and paying banks may shift these risks to their customers by agreement.

The standard does not require the paying bank to indorse the check; however, if a paying bank does indorse a check that is returned, it should follow the indorsement standard for returning banks.

(b) *Liability of bank handling check.* When a check is sent for forward collection, the collection process results in a chain of indorsements extending from the depositary bank through any subsequent collecting banks to the paying bank. This section extends the indorsement chain through the paying bank to the returning banks, and would permit each bank to recover from any prior indorser if the claimant bank does not receive payment for the check from a subsequent bank in the collection or return chain. For example, if a returning bank returned a check to an insolvent depositary bank, and did not receive the full amount of the check from the failed bank, the returning bank could obtain the unrecovered amount of the check from any bank prior to it in the collection and return chain including the paying bank. Because each bank in the collection and return chain could recover from a prior bank, any loss would fall on the first collecting bank that received the check from the depositary bank. To avoid circuity of actions, the returning bank could recover directly from the first collecting bank. Under the U.C.C., the first collecting bank might ultimately recover from the depositary bank's customer or from the other parties on the check.

Where a check is returned through the same banks used for the forward collection of the check, priority during the forward collection process controls over priority in the return process for the purpose of determining prior and subsequent banks under this regulation.

Where a returning bank is insolvent and fails to pay the paying bank or a prior returning bank for a returned check, § 229.39(a) requires the receiver of the failed bank to return the check to the bank that transferred the check to the failed bank. That bank could then either continue the return to the depositary bank or recover based on this paragraph. Where the paying bank is insolvent, and fails to pay the collecting bank, the collecting bank could also recover from a prior collecting bank under this paragraph, and the bank from which it recovered could in turn recover from its prior collecting bank until the loss settled on the depositary bank (which could recover from its customer).

A bank is not required to make a claim against an insolvent bank before exercising its right to recovery under this paragraph. Recovery may be made by charge-back or by other means. This right of recovery is also permitted even where nonpayment of the check is the result of the claiming bank's negligence such as failure to make expeditious return, but the claiming bank remains liable for its negligence under § 229.38.

This liability is imposed on a bank handling a check for collection or return regardless of whether the bank's indorsement appears on the check. Notice must be sent under this paragraph to a prior bank from which recovery is sought reasonably promptly after a bank learns that it did not receive payment from another bank, and learns the identity of the prior bank. Written notice reasonably identifying the check and the basis for recovery is sufficient if the check is not available. Receipt of notice by the bank against which the claim is made is not a precondition to recovery by charge-back or other means; however, a bank may be liable for negligence for failure to provide timely notice. A paying or returning bank may also recover from a prior collecting bank as provided in §§ 229.30(b) and 229.31(b). This provision is not a substitute for a paying or returning bank making expeditious return under §§ 229.30(a) or 229.31(b). This paragraph does not affect a paying bank's accountability for a check under U.C.C. §§ 4–213(1) and 4–302.

This paragraph affects the following provisions of the U.C.C., and may affect other provisions:

1. Section 4–212(1), in that the right to recovery is not based on provisional settlement, and recovery may be had from any prior bank. Section 4–212(1) would continue to permit a depositary bank to recover a provisional settlement from its customer. (See § 229.33(d).)

2. Section 3–414 and related provisions (such as sections 3–502, 3–503(2), and 3–508), in that such provisions would not apply as between banks, or as between the depositary bank and its customer.

(c) *Indorsement by bank.* This section protects the rights of a customer depositing a check in a bank without requiring the words "pay any bank," as required by the U.C.C. (See U.C.C. § 4–201(2).) Use of this language in a depositary bank's indorsement will make it more difficult for other banks to identify the depositary bank. The indorsement standard in Appendix D prohibits such material in subsequent collecting bank indorsements. The existence of a bank indorsement provides notice of the restrictive indorsement without any additional words.

(d) *Indorsement for depositary bank.* This section permits a depositary bank to arrange with another bank to indorse checks. This practice may occur when a correspondent indorses for a respondent, or when the bank servicing an ATM or lock box indorses for the bank maintaining the account in which the check is deposited—i.e., the depositary bank. If the indorsing bank applies the depositary bank's indorsement, checks will be returned to the depositary bank. If the indorsing bank does not apply the depositary bank's indorsement, by agreement with the depositary bank it may apply its own indorsement as the depositary bank indorsement. In that case, the depositary bank's own indorsement on the check (if any) should avoid the location reserved for the depositary bank. The actual depositary bank remains responsible for the availability and other requirements of Subpart B, but the bank indorsing as depositary bank is considered the depositary bank for purposes of Subpart C. The check will be returned, and notice of nonpayment will be given, to the bank indorsing as depositary bank.

Because the depositary bank for Subpart B purposes will desire prompt notice of nonpayment, its arrangement with the indorsing bank should provide for prompt notice of nonpayment. The bank indorsing as depositary bank may require the depositary bank to agree to take up the check if the check is not paid even if the depositary bank's indorsement does not appear on the check and it did not handle the check. The arrangement between the banks may constitute an agreement varying the effect of provisions of Subpart C under § 229.37.

Section 229.36 Presentment of Checks

(a) *Payable through and payable at checks.* The regulation defines a payable through or payable at bank (which could be designated the collectible through or collectible at bank) as a paying bank. The requirements of § 229.30(a) and the notice of nonpayment requirements of § 229.33, are imposed on a payable through or payable at bank and are based on the time of receipt of the forward collection check by the payable through or payable at bank. This is consistent with looking to the location of the payable through or payable at bank when a check is sent to that bank for payment in order to determine whether a check is a local or a nonlocal check. This provision is intended to speed the return of checks that are payable through or at a bank to the depositary bank.

(b) *Receipt at bank office or processing center.* This paragraph seeks to facilitate efficient presentment of checks to promote early return or notice of nonpayment to the depositary bank, and clarifies the law as to the effect of presentment by routing number. This paragraph differs from § 229.32(b) because presentment of checks differs from delivery of returned checks.

The paragraph specifies four locations at which the paying bank must accept presentment of checks. Where the check is payable through a bank and the check is sent

to that bank, the payable through bank is the paying bank.

1. Delivery of checks may be made, and presentment is considered to occur, at a location (including a processing center) requested by the paying bank. This is the way most checks are presented by banks today. This provision adopts the common law rule of a number of legal decisions that the processing center acts as the agent of the paying bank to accept presentment and to begin the time for processing of the check. (See also U.C.C. § 4–204(3).) If a bank designates different locations for the presentment of forward collection checks bearing different routing numbers, for purposes of this paragraph it only requests presentment of checks bearing a particular routing number at the location designated for receipt of forward collection checks bearing that routing number.

2. Delivery may be made at an office of the bank associated with the routing number on the check. The office associated with the routing number of a bank is found in a publication of Rand McNally, *Key to Routing Numbers,* which lists a city and state address for each routing number. Checks are generally handled by collecting banks on the basis of the nine-digit routing number encoded in magnetic ink (or on the basis of the fractional form routing number if the magnetic ink characters are obliterated) on the check, rather than the printed name or address. The definition of a paying bank in § 229.2(z) includes a bank designated by routing number, whether or not there is a name on the check, and whether or not any name is consistent with the routing number.

There is no requirement in the regulation that the name and address on the check agree with the address associated with the routing number on the check. A bank may generally control the use of its routing number, just as it does the use of its name. The address associated with the routing number may be a processing center.

In some cases, a paying bank may have several offices in the city associated with the routing number. In such a case, it would not be reasonable or efficient to require the presenting bank to sort the checks by more specific branch addresses that might be printed on the checks, and to deliver the checks to each branch. A collecting bank would normally deliver all checks to one location. In cases where checks are delivered to a branch other than the branch on which they may be drawn, computer and courier communication among branches should permit the paying bank to determine quickly whether to pay the check.

3. If the check specifies the name of the paying bank but no address, the bank must accept delivery at any office. Where delivery is made by a person other than a bank, or where the routing number is not readable, delivery will be made based on the name and address of the paying bank on the check. If there is no address, delivery may be made at any office of the paying bank. This provision is consistent with U.C.C. § 3–504(2), which states that presentment for payment may be made at the place specified in the instrument, or, if there is none, at the place of business of the party to pay. Thus, there is a trade-off for a paying bank between specifying a particular address on a check to limit locations of delivery, and simply stating the name of the bank to encourage wider currency for the check.

4. If the check specifies the name and address of a branch or head office, or other location (such as a processing center), the check may be delivered by delivery to that office or other location. If the address is too general to identify a particular office, delivery may be made at any office consistent with the address. For example, if the address is "San Francisco, California," each office in San Francisco must accept presentment. The designation of an address on the check is generally in the control of the paying bank.

This paragraph may affect U.C.C. § 3–504(2)(c) to the extent that the U.C.C. requires presentment to occur at a place specified in the instrument.

(c) *Truncation.* Truncation includes a variety of procedures in which the physical check is held or delayed by the depositary or collecting bank, and the information from the check is transmitted to the paying bank electronically. Presentment takes place when the paying bank receives the electronic transmission. This process has the potential to improve the efficiency of check processing, but use of truncation has been limited, partly because of uncertainties about whether the U.C.C. permits it without the agreement of all parties. This paragraph allows truncation by agreement with the paying bank; however, such agreement may not prejudice the interests of prior parties to the check. For example, a truncation agreement may not extend the paying bank's time for return. Such an extension could damage the depositary bank, which must make funds available to its customers under mandatory availability schedules.

(d) *Liability of bank during forward collection.* This paragraph makes settlement between banks during forward collection final when made, subject to any deferrment of credit, just as settlements between banks during the return of checks are final. In addition, this paragraph clarifies that this change does not affect the liability scheme under U.C.C. § 4–20l during forward collection of a check. That U.C.C. section provides that, unless a contrary intent clearly appears, a bank is an agent or subagent of the owner of a check, but that Article 4 of the U.C.C. applies even though a bank may have purchased an item and is the owner of it. This paragraph preserves the liability of a collecting bank to prior collecting banks and the depositary bank's customer for negligence during the forward collection of a check under the U.C.C., even though this paragraph provides that settlement between banks during forward collection is "final" rather than "provisional." Settlement by a paying bank is not considered to be final payment for the purposes of U.C.C. § 4–213 (b) or (d), because a paying bank has the right to recover settlement from a returning or depositary bank to which it returns a check under this subpart. Other provisions of the U.C.C. not superseded by this subpart, such as section 4–202, also continue to apply to the forward collection of a check and may apply to the return of a check. (See definition of returning bank in § 229.2(cc).)

Section 229.37 Variations by Agreement

This section is similar to U.C.C. § 4–103, and permits consistent treatment of agreements varying Article 4 or Subpart C, given the substantial interrelationship of the two documents. To achieve consistency, the official comment to U.C.C. § 4–103(1) (which in turn follows U.C.C. § 102(3)) should be followed in construing this section. For example, as stated in Official Comment 2 to section 4–103, owners of items and other interested parties are not affected by agreements under this section unless they are parties to the agreement or are bound by adoption, ratification, estoppel, or the like. In particular, agreements varying this subpart that delay the return of a check beyond the times required by this subpart may result in liability under § 229.38 to entities not party to the agreement. This section is consistent with the limits on truncation agreements in § 229.36(c).

The Board has not followed U.C.C. § 4–103(2), which treats Federal Reserve regulations and operating letters, clearinghouse rules, and the like as agreements, and permits them to apply to parties that have not specifically assented. For this particular regulation, which seeks to protect many of those parties, that treatment does not appear warranted.

The following are examples of situations where variation by agreement is permissible, subject to the limitations of this section:

a. A depositary bank may authorize another bank to apply the other bank's indorsement to a check as the "depositary bank." (See § 229.35(d).)

b. A depositary bank may authorize returning banks to commingle qualified returned checks with forward collection checks. (See § 229.32(a).)

c. A depositary bank may limit its liability to its customer in connection with the late return of a deposited check where the lateness is caused by markings on the check by the depositary bank's customer or prior indorser in the area of the depositary bank indorsement. (See § 229.38(d).)

d. A paying bank may require its customer to assume the paying bank's liability for delayed or missent checks where the delay or missending is caused by markings placed on the check by the paying bank's customer that obscured a properly placed indorsement of the depositary bank. (See § 229.38(d).)

e. A collecting or paying bank may agree to accept forward collection checks without the indorsement of a prior collecting bank. (See § 229.35(a).)

f. A bank may agree to accept returned checks without the indorsement of a prior bank. (See § 229.35(a).)

The Board expects to review the types of variation by agreement that develop under this section and will consider whether it is necessary to limit certain variations.

Section 229.38 Liability

(a) *Standard of care; liability; measure of damages.* The standard of care established by this section applies to any bank covered

by the requirements of Subpart C of the regulation. Thus, the standard of care applies to a paying bank under §§ 229.30 and 229.33, to a returning bank under § 229.31, to a depositary bank under §§ 229.32 and 229.33, to a bank erroneously receiving a returned check or written notice of nonpayment as depositary bank under § 229.32(d), and to a bank indorsing a check under § 229.35. The standard of care is similar to the standard imposed by U.C.C. §§ 1–203 and 4–103(1).

A bank not meeting this standard of care is liable to the depositary bank, the depositary bank's customer, the owner of the check, or another party to the check. The depositary bank's customer is usually a depositor of a check in the depositary bank (but see § 229.35(d)). The measure of damages stated derives from U.C.C. §§ 4–103(5) and 4–202(3). This subpart does not absolve a collecting bank of liability to prior collecting banks under U.C.C. § 4–201.

Under this measure of damages, a depositary bank or other person must show that the damage incurred results from the negligence proved. For example, the depositary bank may not simply claim that its customer will not accept a charge-back of a returned check, but must prove that it could not charge back when it received the returned check and could have charged back if no negligence had occurred, and must first attempt to collect from its customer. (See *Marcoux* v. *Van Wyk*, 572 F.2d 651 (8th Cir. 1978); *Appliance Buyers Credit Corp.* v. *Prospect Nat'l Bank*, 708 F.2d 290 (7th Cir. 1983).) Generally, a paying or returning bank's liability would not be reduced because the depositary bank did not place a hold on its customer's deposit before it learned of nonpayment of the check.

This paragraph also states that it does not affect a paying bank's liability to its customer. Under U.C.C. § 4–402, for example, a paying bank is liable to its customer for wrongful dishonor, which is different from failure to exercise ordinary care and has a different measure of damages.

(b) *Paying bank's failure to make timely return.* Section 229.30(a) imposes requirements on the paying bank for expeditious return of a check and leaves in place the U.C.C. deadlines (as they may be modified by § 229.30(c)), which may allow return at a different time. This paragraph clarifies that the paying bank could be liable for failure to meet either standard, but not for failure to meet both. The regulation intends to preserve the paying bank's "accountability" for missing its midnight or other deadline under the U.C.C., (e.g., sections 4–213 and 4–302), provisions that are not incorporated in this regulation, but may be useful in establishing the time of final payment by the paying bank.

(c) *Comparative negligence.* This paragraph establishes a "pure" comparative negligence standard for liability under Subpart C of this regulation. This comparative negligence rule may have particular application where a paying or returning bank delays in returning a check because of difficulty in identifying the depositary bank. Some examples will illustrate liability in such cases. In each example, it is assumed that the returned check is received by the depositary bank after it has made funds available to its customer, that it may no longer recover the funds from its customer, and that the inability to recover the funds from the customer is due to a delay in returning the check contrary to the standards established by §§ 229.30(a) or 229.31(a).

(1) If a depositary bank fails to use the indorsement required by this regulation, and this failure is caused by a failure to exercise ordinary care, and if a paying or returning bank is delayed in returning the check because additional time is required to identify the depositary bank or find its routing number, the paying or returning bank's liability to the depositary bank would be reduced or eliminated.

(2) If the depositary bank uses the standard indorsement, but that indorsement is obscured by a subsequent collecting bank's indorsement, and a paying or returning bank is delayed in returning the check because additional time was required to identify the depositary bank or find its routing number, the paying or returning bank may not be liable to the depositary bank because the delay was not due to its negligence. Nonetheless, the collecting bank may be liable to the depositary bank to the extent that its negligence in indorsing the check caused the paying or returning bank's delay.

(3) If a depositary bank accepts a check that has printing, a carbon band, or other material on the back of the check that existed at the time the check was issued, and the depositary bank's indorsement is obscured by the printing, carbon band, or other material, and a paying or returning bank is delayed in returning the check because additional time was required to identify the depositary bank, the returning bank may not be liable to the depositary bank because the delay was not due to its negligence. Nonetheless, the paying bank may be liable to the depositary bank to the extent that the printing, carbon band, or other material caused the delay.

(d) *Responsibility for back of check.* The indorsement standard in § 229.35 is most effective if the back of the check remains clear of other matter that may obscure bank indorsements. Because bank indorsements are usually applied by automated equipment, it is not possible to avoid pre-existing matter on the back of the check. For example, bank indorsements are not required to avoid a carbon band or printed, stamped, or written terms or notations on the back of the check. Accordingly, this provision places responsibility on the paying bank or depositary bank, as appropriate, for keeping the back of the check clear for bank indorsements during forward collection and return.

The paying bank is responsible for the condition of the check when it is issued by it or its customer. (It would not be responsible for a check issued by a person other than its customer.) Thus, the paying bank would be responsible for the adverse effect (if any) of a carbon band or other material placed on the back of a check before issuance. The paying bank may contract with its customers with respect to such responsibility.

The depositary bank is responsible for the condition of the check arising after it is issued and before it is accepted by the depositary bank, as well as any condition of the check arising during its handling of the check. The depositary bank would be responsible for the adverse effect (if any) of a stamp placed on the check by its customer or a prior indorser. The depositary bank may refuse to accept a check whose back is unreasonably obscured or contract with its customers with respect to such responsibility.

Responsibility under this paragraph is treated as negligence for comparative negligence purposes, and the contribution to damages under this paragraph is treated in the same way as the degree of negligence under paragraph (c) of this section.

(e) *Timeliness of action.* This paragraph excuses certain delays. It adopts the standard of U.C.C. § 4–108(2) with the addition of "failure of equipment" and "interruption of computer facilities" as causes of delay.

(f) *Exclusion.* This paragraph provides that the civil liability and class action provisions, particularly the punitive damage provisions of sections 611 (a) and (b), and the bona fide error provision of 611(c) of the Act (12 U.S.C. 4010 (a), (b), and (c)) do not apply to regulatory provisions adopted to improve the efficiency of the payments mechanism. Allowing punitive damages for delays in the return of checks where no actual damages are incurred would only encourage litigation and provide little or no benefit to the check collection system. In view of the provisions of paragraph (a), which incorporate traditional bank collection standards based on negligence, the provision on bona fide error is not included in Subpart C.

(g) *Jurisdiction.* The Act confers subject matter jurisdiction on courts of competent jurisdiction and provides a time limit for civil actions for violations of this subpart.

(h) *Reliance on Board rulings.* This provision shields banks from civil liability if they act in good faith in reliance on any rule, regulation, or interpretation of the Board, even if it were subsequently determined to be invalid. Banks may rely on the Commentary to this regulation, which is issued as an official Board interpretation, as well as on the regulation itself.

Section 229.39 Insolvency of Bank

These provisions cover situations where a bank becomes insolvent during collection or return, and are derived from U.C.C. § 4–214. They are intended to apply to all banks.

(a) *Duty of receiver.* This paragraph requires a receiver of a closed bank to return a check to the prior bank if it does not pay for the check. This permits the prior bank, as holder, to pursue its claims against the closed bank or prior indorsers on the check.

(b) *Preference against paying or depositary bank.* This paragraph gives a bank a preferred claim against a closed paying or depositary bank that finally pays a check without settling for it. If the bank with a preferred claim under this paragraph recovers from a prior bank or other party to the check, the prior bank or other party to the check is subrogated to the preferred claim.

(c) *Preference against paying, collecting, or depositary bank.* This paragraph gives a bank a preferred claim against a closed collecting,

paying, or returning bank that receives settlement but does not settle for a check. (See Commentary to § 229.35(b) for discussion of prior and subsequent banks.) As in the case of § 229.39(b), if the bank with a preferred claim under this paragraph recovers from a prior bank or other party to the check, the prior bank or other party to the check is subrogated to the preferred claim.

(d) *Finality of settlement.* This paragraph provides that insolvency does not interfere with the finality of a settlement, such as a settlement by a paying bank that becomes final by expiration of the midnight deadline.

Section 229.40 Effect on Merger Transaction

When banks merge, there is normally a period of adjustment required before their operations are consolidated. To allow for this adjustment period, the regulation provides that the merged banks may be treated as separate banks for a period of up to one year after the consummation of the transaction. The term "merger transaction" is defined in § 229.2(t). This rule affects the status of the combined entity in a number of areas in this subpart. For example:

1. The paying bank's responsibility for expeditious return (§ 229.30).
2. The returning bank's responsibility for expeditious return (§ 229.31).
3. Whether a returning bank is entitled to an extra day to qualify a return that will be delivered directly to a depositary bank that has merged with the returning bank (§ 229.31(a)).
4. Where the depositary bank must accept returned checks (§ 229.32(a)).
5. Where the depositary bank must accept notice of nonpayment (§ 229.33(c)).
6. Where a paying bank must accept presentment of checks (§ 229.36(b)).

Section 229.41 Relation to State Law

This section specifies that state law relating to the collection of checks is only preempted to the extent that it is inconsistent with this regulation. Thus, this regulation is not a complete replacement for state laws relating to the collection or return of checks.

Section 229.42 Exclusions

Checks drawn on the United States Treasury, U.S. Postal Service money orders, and checks drawn on states and units of general local government that are presented directly to the state or unit of general local government and that are not payable through or at a bank are excluded from the coverage of the expeditious return and notice of nonpayment requirements of Subpart C of this regulation. Other provisions of this subpart continue to apply to the checks. This exclusion does not apply to checks drawn by the U.S. government on banks.

Appendix C.—Model Forms, Clauses, and Notices

Appendix C contains model forms and clauses that may be used by banks to meet their disclosure responsibilities under the regulation. Banks using the model forms and clauses properly will be in compliance with the disclosure requirements of the regulation.

Certain information that must be inserted by a bank using the forms is italicized within parentheses in the text of the forms. Some forms contain alternative clauses, and these are set forth in brackets and separated by the word "or." Banks may make certain changes in the format or content of the model forms and delete material that is inapplicable without losing the Act's protection from liability for banks that use the forms properly. For example, if a bank does not take advantage of the § 229.13 exceptions, it may delete the material relating to those exceptions. The rearrangement of the model forms may not be so extensive, however, as to affect the substance, clarity, or meaningful sequence of the forms. Acceptable changes include, for example:

- Using "customer" and "bank" instead of pronouns.
- Not using bold type for headings.
- Incorporating certain state law "plain English" requirements.

Shorter time periods for availability may always be substituted for time periods used in the model forms.

Banks may also add information related to their availability policies. For example, a bank might indicate that although funds have been made available to a customer and the customer has withdrawn them, the customer is still responsible for problems with the deposit, such as checks that were deposited being returned unpaid. Or a bank could provide in its disclosure a telephone number to be used if a customer has an inquiry regarding a deposit.

Banks are cautioned against using the forms without reviewing their own policies and practices, as well as state and federal laws regarding the time periods for availability of specific types of checks. A bank using a model form will be in compliance with the Act and the regulation only if its disclosures correspond to the bank's availability policy.

Models C–1 through C–7 generally. These forms are models for the specific availability policy disclosure described in § 229.16 of the regulation. The forms accommodate a variety of availability policies, ranging from policies of next-day availability to holds on a blanket basis up to the maximum time allowed in the regulation. Models C–3 and C–6 reflect the additional disclosures discussed in §§ 229.16 (b) and (c) for banks that have a policy of extending availability times on a case-by-case basis.

Except for Model C–7, the forms reflect the temporary schedules that are in effect from September 1, 1988 through August 31, 1990. Model C–7 reflects availability under the permanent schedule in § 229.12 effective September 1, 1990.

As already noted, there are several places in the forms where information must be inserted. This information includes the bank's name and cut-off times, limitations relating to next-day availability, and the first four digits of routing numbers for local banks. In disclosing when funds will be available for withdrawal, the bank must insert the ordinal number (such as first, second, etc.) of the business day the funds will become available.

Models C–1 through C–7 generally do not reflect any optional provisions of the regulation, or those that apply only to certain banks. Instead, disclosures for these provisions are included in the model clauses (Models C–8 through C–12). A bank using one of the model forms should also consider whether it must incorporate one or more of the model clauses.

Model C–1. A bank may use this form when its policy is to make funds from all deposits available on the first business day after a deposit is made. This form may also be used by banks that provide immediate availability by substituting the word "immediately" in place of "on the first business day after the day we receive your deposit."

Model C–2. A bank may use this form when its policy is to make funds from all deposits available to its customers on the first business day after the deposit is made, and to reserve the right to invoke the new account and other exceptions in § 229.13 of the regulation.

Model C–3. A bank may use this form when its policy, in most cases, is to make funds from all types of deposits available the day after the deposit is made, but to delay availability on some deposits on a case-by-case basis up to the maximum time periods allowed under the regulation. A bank using this form also reserves the right to invoke the exceptions listed in § 229.13 of the regulation.

Model C–4. A bank may use this form when its policy is to impose delays to the full extent allowed under the temporary schedule in § 229.11 and to reserve the right to invoke the § 229.13 exceptions.

Model C–5. A bank may use this form when its policy is the same as that outlined in Model C–4. The only difference between Model C–4 and Model C–5 is that in the latter a chart showing the bank's availability policy for local and nonlocal checks is substituted for the narrative description in the former.

Model C–6. A bank may use this form when its policy is to delay availability based on the deposit categories (next-day availability items and local and nonlocal checks) in the regulation, but to make funds available more quickly than is required by the regulation. A bank using this form would also reserve the right to place holds on a case-by-case basis up to the statutory limits and to invoke the § 229.13 exceptions.

Model C–7. A bank may use this form when its policy is to impose delays to the full extent allowed by the permanent schedule in § 229.12 and to reserve the right to invoke the § 229.13 exceptions.

Models C–8 through C–12 generally. These model clauses must be incorporated into a bank's specific availability policy disclosure under certain circumstances. The commentary to each clause indicates when the clause is required.

Model C–8. This clause must be incorporated in the specific availability policy disclosure by banks that reserve the right to place a hold on funds already on deposit when they cash a check for the customer, as discussed under § 229.19(e).

Model C–8A. This clause must be incorporated in the specific availability disclosure by banks that reserve the right to place a hold on funds in an account of the customer other than the account into which

the deposit is made, as discussed in § 229.19(e).

Model C–9. This clause must be incorporated in the specific availability policy disclosure by banks in check processing regions where the availability schedules for certain nonlocal checks have been reduced, as described in Appendix B of the regulation. Banks using Model C–4, C–6, or C–7 may insert this clause at the conclusion of the discussion titled "Nonlocal checks."

Model C–10. This clause must be incorporated in the specific availability policy disclosure by banks that reserve the right to delay availability of deposits at nonproprietary ATMs until the seventh business day following the day of the deposit, as permitted during the temporary schedule in § 229.11. A bank must choose among the alternative language based on how it chooses to differentiate between proprietary and nonproprietary ATMs, as required under § 229.16(b)(5).

Model C–11. This clause must be incorporated in the specific availability policy disclosure by banks that are not members of a local clearinghouse and that choose to limit their customers' ability to withdraw cash on the third business day following the deposit of a local check, as allowed during the temporary schedule under § 229.11. Banks using Model C–4 or C–6 may substitute this clause for the sections titled "Local checks" and "Nonlocal checks."

Model C–11A. This clause serves the same purpose as Model C–11 except that it reflects the § 229.11 rule for banks that are members of local clearinghouses. Banks using Models C–4 or C–6 may substitute this clause for the sections titled "Local checks" and "Nonlocal checks."

Model C–11B. This clause may be used to disclose cash withdrawal limitations under the permanent schedule in § 229.12. Banks using Model C–7 to disclose availability under the permanent schedule may substitute this clause for the sections titled "Local checks" and "Nonlocal checks." This clause should not be used in making disclosures under the temporary schedule in § 229.11.

Model C–12. This clause must be incorporated in the specific availability policy disclosure by credit unions seeking to satisfy the notice requirement of § 229.14(b). This model clause is only an example of a hypothetical policy. Credit unions may follow any policy for accrual provided the method of accruing interest is the same for cash and check deposits.

Models C–13 through C–18 generally. These forms are models for various notices required by the regulation.

Model C–13. This form satisfies the written notice required under § 229.13(g) of the regulation when a bank places a hold based on a § 229.13 exception. If a hold is being placed on more than one check in a deposit, each check need not be described, but if different reasons apply, each reason must be indicated. A bank may use the actual date when funds will be available for withdrawal rather than the number of the business day following the day of deposit. The bank must incorporate in the notice the material set out in brackets if it imposes overdraft fees after invoking a § 229.13 exception.

Model C–13A. This form satisfies the same requirement as Model C–13, and the same instructions apply, except that Model C–13A is for use by a bank that invokes the reasonable cause exception in § 229.13. The form provides the bank with a list of specific reasons that may be given for invoking the exception. If a hold is being placed on more than one check in a deposit, each check must be described separately, and if different reasons apply, each reason must be indicated. Banks may disclose of the reason for their doubting collectability by checking the appropriate reason on the form. If the "Other" category is checked, the reason must be given.

Model C–14. This form satisfies the notice required under § 229.16(b)(2) when a bank with a case-by-case hold policy imposes a delay on a deposit. This notice does not require a statement of the specific reason for the hold, as is the case when a § 229.13 exception hold is placed. A bank may specify the actual date when funds will be available for withdrawal rather than the number of the business day following the day of deposit when funds will be available. The bank must incorporate in the notice the material set out in brackets if it imposes overdraft fees after invoking a case-by-case hold.

Model C–15 and C–15A. Either of these forms satisfies the notice requirement of § 229.18(b) (notice at locations where employees accept consumer deposits). Model C–15 is based on an availability policy that is the same as the temporary schedules in the regulation and the policy reflected in Models C–4 and C–5. Model C–15A may be used by a bank with a case-by-case availability policy.

Model C–16. This form satisfies the ATM notice requirement of § 229.18(c)(1).

Model C–17. This form satisfies the ATM notice requirement of § 229.18(c)(2) when receipt of deposits at off-premises ATMs is delayed under § 229.29(a)(4). It is based on collection of deposits once a week. If collections occur more or less frequently, the description of when deposits are received must be adjusted accordingly.

Model C–18. This form satisfies the notice requirements of § 229.18(a) for deposit slips.

By order of the Board of Governors of the Federal Reserve System, May 13, 1988.

William W. Wiles,

Secretary of the Board.

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FEDERAL RESERVE SYSTEM

[Docket No. R-0621]

Federal Reserve Bank Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

SUMMARY: The Board has adopted a proposal for the Federal Reserve Banks to offer several new returned check services to depository institutions. These services will assist depository institutions in complying with the new rules for the collection and return of checks that the Board has, in Docket No. R-0620, adopted to implement the Expedited Funds Availability Act. The Board has also approved check truncation and extended MICR capture services as permanent Federal Reserve Bank services.

DATE: New services to facilitate expedited returns will be offered beginning September 1, 1988. Check truncation and extended MICR capture are authorized as permanent Federal Reserve Bank services beginning July 15, 1988.

FOR FURTHER INFORMATION CONTACT: Steven O. App, Manager (202/452-3760); Gayle Thompson, Program Leader (202/452-2934); or Kathleen M. Connor, Analyst (202/452-3917); Division of Federal Reserve Bank Operations. For the hearing impaired only: Telecommunications Device for the Deaf, Ernestine Hill or Dorothea Thompson (202/452-3254).

SUPPLEMENTARY INFORMATION: On December 3, 1987, the Board requested public comment on a proposed set of Federal Reserve Bank services to carry out the provisions of the proposed Regulation CC. (52 FR 47171 (Dec. 11, 1987).) This set of services was designed to facilitate bank compliance with Regulation CC requirements to expedite returns and improve the check collection system. The services include establishing new returned check services and expanding Reserve Bank truncation and extended MICR capture services from pilot programs to permanent services. In order to achieve the objectives of the proposed regulatory requirements to speed the return of checks, it is essential that the Federal Reserve Banks and private sector correspondent banks provide new returned check services. The Board anticipates that a number of correspondent banks will provide an array of services similar to those offered by the Reserve Banks.

The comment period for the proposed Federal Reserve Bank services expired on February 8, 1988. In addition, the Board requested comment on a number of longer-term initiatives to improve the check collection and return process, including digitized image technology and bar code endorsements. (Docket No. R-0622, 52 FR 47176 (Dec. 11, 1987).) The comment period for these longer-term initiatives expired on April 8, 1988. The Board will act on the proposals on longer-term initiatives at a later date.

Summary of Comments

The Board received approximately 1,000 comments on the proposed Regulation CC and the accompanying Federal Reserve Bank services. Two hundred sixty-eight of the comments discussed Federal Reserve Bank services. A list of these commenters, identified by category of respondent, is reflected in the following table:

Bank holding companies	17
Clearinghouses	3
Commercial banks	183
Corporations (banking-related business)	9
Credit unions	14
Federal home loan banks	8
Savings and loan associations	27
Trade associations	5
Other	2
Total	268

Returned Check Services

Direct Returns

The current returned check system is a slow process due to the number of returning banks that process a check during its trip from the paying bank back to the depositary bank. Returned checks handled by the Federal Reserve generally are returned to the bank that deposited the check with the Federal Reserve for forward collection. In many cases, the Federal Reserve Bank sends the returned check to a correspondent bank that, in turn, sends it to its indorser that ultimately returns the check to the depositary bank.

The Board proposed that Federal Reserve Banks begin delivering returns directly to the depositary bank, bypassing other returning banks in the indorsement chain, in order to minimize the number of banks that must handle a returned check. Generally, the Federal Reserve anticipates that most of the volume of the returned checks could be delivered to the depositary bank by using existing couriers; the Federal Reserve Banks currently deliver to approximately 10,500 endpoints via courier. The Federal Reserve's transportation expenses for delivery of returned checks could increase substantially, however, if delivery of returns were made via courier to all depositary banks. (The Federal Reserve estimates that it may sort to approximately 26,000 endpoints under a direct return procedure.) Recognizing the desirability of providing prompt return of checks, while seeking to minimize increases in transportation costs, the Board requested comment on the following:

- A depositary bank may receive returned checks from the Federal Reserve, at no charge, at a location where the Federal Reserve currently delivers the bank's forward collection checks, or at a location where the Federal Reserve currently provides courier delivery, or at another designated location through the U.S. mail.
- A depositary bank that wishes its returned checks delivered by courier to a location where the Federal Reserve does not currently provide courier service may be charged for newly instituted transportation.

A total of 158 comments were received on the proposal that Federal Reserve Banks return checks directly to the depositary bank. One hundred ten commenters agreed with the direct return service as proposed and many of the commenters stated that the service should eliminate several steps in the current returned check process, thereby expediting the flow of returned checks to the depositary bank. Other commenters that favored the service stated that direct return was an excellent idea and critical to expediting returns, in order to reduce the exposure to depositary banks complying with the new funds availability schedules. Some of the commenters were critical of the proposed guidelines for delivery of returned checks by courier because the guidelines allowed Reserve Banks to occasionally use the mail to send returned checks directly to the depositary bank.

While most of these commenters generally agreed with the concept of direct return, a few commenters expressed reservations about whether they could receive checks at third-party processing centers or use other intercept arrangements. Several commenters did not want to receive returned checks via the mail. Finally, there were a few general remarks regarding the Federal Reserve Bank fee schedules and some opposition was raised about the Federal Reserve Banks passing on any additional courier costs through the basic returned check fee, because such a procedure may discriminate against banks that supply private courier

services to pick up returned checks from the Federal Reserve office.

In view of the benefits provided by the Federal Reserve Banks returning unpaid checks directly to the depositary bank, the Board adopted the direct return service that was published for comment. Effective September 1, 1988, the Federal Reserve Banks will send return checks under the guidelines for delivery of returned checks described in Appendix A. The guidelines for delivery of returned checks have been modified to provide for minimal use of the mail by Federal Reserve offices, consistent with the Federal Reserve Banks' expeditious return responsibilities under § 229.31(a). In addition, the guidelines allow depositary banks to designate a third-party processor for the delivery of returned checks.

Universal Returns and Expedited Processing of Returns

Currently, unpaid checks are sent back through the indorsement chain. In order to assist paying banks in meeting the new requirements for prompt return, the Board proposed that Federal Reserve Banks accept from paying or returning banks all returned checks, regardless of whether or not the returned checks were collected originally through the Federal Reserve (universal returns). Paying banks would not be obligated to send their returned checks to the Federal Reserve.

The Board proposed to establish, effective September 1, 1988, new returned check deposit deadlines at Federal Reserve offices, supported by expanded processing capabilities, such that local returns would, in most instances, be returned to the local depositary bank the day following dispatch by the paying bank. The objective of the proposal was to provide for overnight processing and dispatch of returned checks similar to current processing and presentment time frames for forward collection checks.

In its proposal, the Board included estimated price ranges for returned check services. Currently, the Federal Reserve Banks do not explicitly price for returned checks. The costs of handling returned checks are incorporated in the forward collection fees. With the introduction of new returned check services, returns will be priced explicitly, with the returned check fees assessed on the paying or returning bank depositing returns with a Federal Reserve Bank. Forward collection fees will be reduced through the elimination of the return cost component.

The Board requested comment on the effect of the proposed deadline and fee changes on the operations of banks. In addition, the Board also requested specific comment on a proposed deposit option wherein paying banks would place the depositary bank's nine-digit routing number on the face of the returned check before sending it to the Federal Reserve.

A total of 77 comments were received on the proposal for Federal Reserve Banks to accept for deposit returned checks that had not been collected through the Federal Reserve. Seventy commenters agreed that the universal return service would be beneficial. Some of the commenters mentioned that it would be appropriate for Federal Reserve Banks to process returns not originally collected through the Federal Reserve, provided that returned checks were explicitly priced.

Six commenters expressed concerns about the universal return service. Most of these commenters were concerned about the competitive aspects of the service; some stated that the Federal Reserve's proposed fee schedules and deposit deadlines were not specific, and that the lack of product announcements by correspondent banks left them with few alternatives but to use Federal Reserve services until competing services become available. A few other commenters were concerned about the unbundling of returned check prices and subsequent reductions in forward collection prices, and the effect such reductions would have on correspondent banks.

The Board received a total of 117 comments on the proposal for Federal Reserve Banks to offer new deposit deadlines for returned check services, supported by expanded processing hours, such that local returned checks would, in most instances, be returned to the local depositary bank the day following dispatch by the paying bank. There were 84 comments on the proposed fees for return check services. Forty-two commenters agreed with the proposed fees. There were 37 commenters that expressed concerns about the proposed fees. Several of these commenters agreed that a fee should be assessed, but indicated that the 300 percent range that was published for comment was too large to determine the effect on banks. These commenters stated that lack of information about alternative products limited their ability to determine whether they would use the service. It was recommended that the Federal Reserve publish a specific fee schedule as soon as possible so that other banks could decide whether to develop competing services. A few commenters noted that the Federal Reserve should not make expedited returned check processing a profit-making venture. Five commenters disagreed with the proposed price ranges and noted that the proposed fees were too high.

There were 57 comments on the proposed deposit deadlines for returned check services. Forty-eight commenters agreed with the proposed deadlines. Several commenters noted that the deposit deadlines were reasonable and necessary to support next-day delivery of local returned checks. Several commenters indicated that the proposal to set the deadline for returns to correspond with a forward collection deadline was valid because banks would be able to use existing transportation arrangements to deliver their returns to the Federal Reserve Banks. Several other commenters stated that Reserve Banks should be required to offer a raw return deposit option to assist banks of all sizes in complying with Regulation CC. There were other requests that the Federal Reserve publish the deposit deadlines as early as possible so banks would be able to determine how best to deal with the new regulation.

Several commenters stated that the 8:00 p.m. return deposit deadline for raw returns was too early. The commenters stated that the 8:00 p.m. deadline would require, at a minimum, a complete reorganization of transportation schedules and would result in a significant increase in the number of cash letters being delivered to the Federal Reserve.

There were 81 comments on the proposed deposit option wherein paying banks would place the nine-digit routing number of the depositary bank on the face of the returned check prior to sending it to a Reserve Bank for subsequent processing. Eleven commenters supported the proposed option and noted that it would speed the return process. Several commenters requested that the Federal Reserve consider mandating this practice as a regulatory requirement for the paying bank. Five commenters disagreed with this deposit option because the process was too time consuming and not cost effective. Sixty-five commenters expressed concern about determining whether the paying bank writing the nine-digit number or the returning bank encoding the nine-digit number would be liable if a returned check was sent by mistake to a bank other than the depositary bank. Several other commenters noted that this concept had merit but needed a uniform standard for format and placement. Most commenters stated that the proposed

option should only be used when preparing QRCs.

The Board believes that changes to Federal Reserve Bank returned checks services are necessary to expedite the return of unpaid checks to the depositary banks. The Board has approved the proposal to allow Federal Reserve Banks to accept for deposit, from paying and returning banks, returned checks that had not been collected through the Federal Reserve. In addition, the Board has approved the proposal to establish deposit deadlines and explicitly price for returned check services. In response to the concerns expressed by the commenters that the proposed price ranges were too large, the Board published narrower price ranges and specific deposit deadlines for each Federal Reserve office on April 4, 1988. (53 FR 11960 (April 11, 1988))

Based on the mixed response received to the proposal wherein paying banks would place the nine-digit routing number of the depositary bank on the face of the returned check prior to sending it to a Reserve Bank for subsequent processing, the Board decided to make the service optional to the Reserve Banks, which may offer it as a deposit option to paying or returning banks.

The Reserve Banks are currently in the process of developing deposit deadlines and prices for returned check services. To address the concerns of the commenters, Reserve Banks will be establishing multiple deposit deadlines. Generally, Reserve Banks will be establishing a deposit deadline for raw returns that corresponds to the deposit deadline for RCPC forward collection checks. Reserve Banks may require that raw returns be sorted as to local or nonlocal at this deadline. If sorting is required, the Reserve Banks will offer an earlier deposit deadline (no earlier than 8:00 p.m.) where no sorting is required. The Board plans to publish the final deposit deadlines and fees for Federal Reserve Bank returned check services in mid-June.

High-Speed Processing of Returns

The proposed Regulation CC allowed paying and returning banks to qualify returned checks for high-speed processing by placing a strip on the bottom of the returned check or placing the returned check in a carrier envelope and encoding that strip or envelope with the nine-digit routing number of the depositary bank, the amount of the check, and a return identifier (a "2" in position 44 of the MICR line; see American National Standards Committee on Financial Services, *Specifications for the Placement and Location of MICR Printing, X9.13* (Sept. 8, 1983)). This process was proposed because the automation of returned checks being handled by multiple banks should expedite the return of unpaid checks to the depositary bank.

The Board proposed that the Federal Reserve Banks accept for deposit returned checks that have been qualified by paying and returning banks. In addition, the Board proposed that Federal Reserve Banks qualify returned checks received raw when doing so would speed the return process. Generally, this would occur for nonlocal returned checks being processed by more than one Federal Reserve office; however, in some cases, Reserve Banks may qualify local returns when doing so would facilitate more efficient and cost-effective processing of local returns.

The Board proposed that the processing of returned checks via the QRC process would be separate from the processing of forward collection checks. Thus, banks depositing qualified returned checks with Federal Reserve Banks generally would deposit QRCs in separate return letters. It was also proposed that Reserve Banks may, as a separate deposit option, accept QRCs intermixed with forward collection checks. QRCs being dispatched by the Federal Reserve Banks would not be intermixed with forward collection checks unless the depositary bank agreed that returns be included in its Federal Reserve forward collection cash letter.

The Board requested comment on the use of the QRC process for expediting the handling of returned checks by returning banks. Specifically, the Board requested comment on the likelihood of paying banks initiating this process.

The Board received a total of 172 comments on the proposed QRC process. One hundred commenters supported the proposed QRC process and agreed that it was an excellent means for expediting the handling of returned checks. Several of these commenters stated that the QRC process should be mandatory because it was the only way to ensure that banks of all sizes would use the process. Approximately one-third of the 172 commenters indicated that they would qualify returns. Other commenters stated that paying banks would turn to the Federal Reserve or their correspondent bank for QRC processing.

Eleven commenters disagreed with the proposed QRC process. These commenters indicated that the costs of preparing a QRC would not be offset by the benefits. Several other commenters indicated that they did not have the appropriate software and hardware to create QRCs. Some commenters also noted that the separation of QRCs from forward collection checks would neutralize many of the advantages of high-speed processing of returned checks.

Approximately 60 commenters expressed some concerns about certain aspects of the proposed QRC process. Several commenters expressed concern over the use of a carrier envelope. They stated that returned checks are often separated from open-faced carrier envelopes and that there was no audit trail when this occurred. It was also noted that using carrier envelopes is not conducive to microfilming or high-speed processing. It was recommended that the carrier envelopes only be used for mutilated checks. Similar concerns were expressed about the application of strips to the bottom of returned checks. Commenters were concerned that a strip might be removed if the returned check is rejected, and the returned check would then be released into the forward collection stream and represented to the paying bank.

For purposes of clear identification, several commenters recommended that QRCs have a unique color strip or carrier. A few commenters also recommended that the carrier envelope should be identified as carrying a QRC. These commenters also urged the Federal Reserve to develop a standard cash letter advice form for returned checks. The unique color strip or carrier, the identification of the carrier as carrying a QRC, and the standard cash letter advice would alert personnel handling the returned checks that the checks are returns and require special handling.

Commenters also expressed concern about the placement of liability if encoding errors were made on the envelope or strip and the returned check was mishandled as a result. It was recommended that the qualifying bank's routing number also be included on the carrier or strip.

Several commenters also noted that the use of the QRC option would depend on the cost difference between raw and qualified returns. It was stated that a significant per transaction fee for raw returns would serve as an incentive to qualify returns.

The Board believes that the QRC process will expedite the processing of returns and has approved the proposal that Reserve Banks accept for deposit QRCs prepared by paying or returning banks beginning September 1, 1988. The Board believes that the QRC process will be effective using either carrier envelopes or strips and that either

should be allowed so that each bank may individually make the most cost-effective choice. The Board believes it is unnecessary to require that the strips or envelopes be of a unique color because the returned check identifier in position 44 of the MICR-line should be sufficient to distinguish the returned check from a forward collection check. The Federal Reserve offices will also qualify raw returns received for deposit when this process will expedite the return process. In recognition of the fact that many banks process returned checks separately from forward collection checks, the Board adopted a policy that the processing of returned checks via the QRC process would generally be kept separate from the processing of forward collection checks. Qualified returned checks dispatched by the Federal Reserve Banks will not be intermixed with forward collection checks unless the depositary bank agrees that the returns be included in its Federal Reserve cash letter. As the banking industry gains experience with the new procedures for handling returned checks, the Board may permit all banks to mix their QRC's with their forward collection checks.

Notice of Nonpayment

Regulation CC, adopted by the Board in a related action today (see Docket No. R-0620) requires notice of all large-dollar returned checks of $2,500 or more, regardless of whether the returned checks were collected through the Federal Reserve. Under the proposal, the paying bank must notify the depositary bank by 4:00 p.m. (local time of the depositary bank) on the second business day following presentment of the check to the paying bank.

The Board proposed several changes to its notice of nonpayment service in support of the proposed regulation. Specifically, it proposed that the Federal Reserve Banks provide a same-day notice service beginning September 1, 1988. The proposed new deadlines and fees for notice of nonpayment are as follows:

Origination by—	Deadline	Fee
Wire	12 noon	$1.75
Telephone call to Fed	9 a.m.	4.25
Physical check to Fed	do	5.25

The Board also proposed that, beginning January 1, 1989, any bank with an on-line electronic connection with the Federal Reserve be required to take notices over its connection or a designated third-party connection.

A total of 106 comments were received on the proposed modifications to the Federal Reserve's notice of nonpayment service. A majority of the commenters agreed with the proposed modifications. Several commenters, however, expressed some concern with the proposal. Some of these commenters opposed requiring banks to use their electronic connections to accept notices. One commenter suggested that the Federal Reserve Banks use facsimile systems for notice because it was relatively inexpensive compared to wire notice.

The Board believes that the proposed modifications to the Federal Reserve Banks' notice of nonpayment service are necessary to meet the requirements of Regulation CC and approved this proposal. Further, the Board approved that any depositary bank with an on-line electronic connection with the Federal Reserve will be required to receive all notices from the Federal Reserve over an electronic connection either directly or through a designated third party. Electronic connections, for this purpose, include only connections for funds transfer applications and, therefore, do not include electronic connections used solely for tape transmission of ACH items or other activities such as cash ordering.

Truncation and Extended MICR Capture Services

The Act directed the Federal Reserve to consider several electronic alternatives to improve the check processing system, including check truncation. In truncation, the MICR-line information on the check is captured and presented to the paying bank electronically, while the paper checks are retained by the presenting bank. During 1985, the Federal Reserve implemented a pilot program of the truncation process at four Reserve Banks. By the end of 1986, two additional Reserve Banks became participants in the pilot program. The objectives of the pilot included developing, testing, and refining the Federal Reserve's ability to: (1) Provide local storage and retrieval services to paying banks; (2) participate in a pilot sponsored by the National Association for Check Safekeeping (NACS), which offers the potential benefits of truncating eligible checks earlier in the collection stream; and (3) work with NACS representatives to expand the NACS program to include all types of checks.

In December 1987, the Board proposed that all Federal Reserve Banks be permitted to provide truncation services as a permanent service. As part of the proposed service, the Federal Reserve Banks would participate in the NACS truncation program. Initially, the Reserve Banks would truncate checks for local paying banks, expanding into truncation for nonlocal paying banks as the rules and procedures of NACS become more fully developed.

Under the Federal Reserve pilot program, a Reserve Bank truncates checks for local paying banks. In providing this service, the Reserve Bank captures the complete payment information from the MICR-line of each check, including the nine-digit routing number, account number, check number, and dollar amount. Checks rejected during high-speed processing are also included on the MICR output file. All MICR-captured checks are microfilmed, and unique sequence numbers are inserted into the MICR file and printed on both the microfilm and the physical check. These sequence numbers facilitate Reserve Bank processing of returned checks and retrieval requests. The Reserve Bank delivers the captured MICR-line data and related totals to the paying bank or its agent on magnetic tape or by data transmission, as requested by the paying bank. Under this service, presentment to the paying bank is based on the receipt of electronic presentment, because the paying bank does not receive the physical paper checks. The Federal Reserve Bank stores the physical checks and microfilm for a negotiated period, usually 90 days and seven years, respectively, after which time both are destroyed.

Upon receipt of the MICR data, the paying bank processes and posts the MICR data to the appropriate customer accounts. If a decision is made to return a check, the paying bank notifies the Reserve Bank no later than the published deadline on the business day following the day the MICR data are presented. The Federal Reserve Bank retrieves the physical checks and initiates the return process to the depositary bank. The paying bank may also request retrieval services, such as information from a truncated check, a copy of a check, or the original physical check (provided the request is received before the check has been destroyed).

The pilot program incorporates a standard pricing structure and common set of pricing principles used by the Reserve Banks. Local pricing is used to reflect the different processing costs at each office. The prices have remained in effect throughout the pilot program, with minor adjustments. The fee structure contains a basic per item fee and separate fees for returned checks

(initiated by telephone or automated means), retrievals, fine-sort processing, and over-the-counter processing. Reject reentry and microfilming costs are part of the basic per item fee, while large-dollar notice of nonpayment costs are part of the returned check fee.

In the proposal, the Board anticipated that fees at most Reserve offices will approximate those in the pilot. Fee ranges at the six pilot Reserve Banks are as follows:

Basic per item:
—Via tape, $0.011–$0.020
—Via transmission, $0.014–$0.025
Return item:
—Telephone, $1.60–$2.80
—Automated, $1.35–$2.30
Retrieval per item, $1.00–$2.00
Fine sort:
—Per package, $0.00–$2.00
—Per item, $0.006–$0.020
Over-the-counter:
—Per package, $0.50–$0.50
—Per item, $0.014–$0.018

The Board received 155 comments on the truncation service. Eighty-one commenters supported the implementation of truncation services at the Federal Reserve Banks, 24 commenters were opposed, and 50 commenters were silent as to agreement or opposition to the proposed truncation service. Commenters supporting the proposal indicated that truncation is necessary to provide a less costly checking product. These commenters stated that the primary benefit would be the reduction in paper flow.

Commenters opposed to the proposed truncation service stated various reasons for opposition. Eight commenters indicated that receipt of the physical checks is preferred because their customers want the paid checks to be included in the customers' monthly statements. In addition, commenters indicated a need to review the physical check before deciding whether or not to pay the check (i.e., inspections of large-dollar checks, inspections for payable-through checks).

Commenters that did not indicate whether they favored or opposed the Federal Reserve's proposal to provide a truncation service pointed out specific concerns about the technical details of the proposal. These commenters were concerned that the proposed truncation service would not be easily integrated with current bulkfiling, statement cycle, and other operational procedures at paying banks. These commenters indicated that the potential for the service to be successful in the short term was minimal due to low demand; expanded use of truncation by the industry needed to occur first. In addition, commenters were concerned about the legal aspects associated with properly payable items, proof of payment, and timeliness. While a few commenters pointed out that a mandatory system would receive the maximum benefits because paying banks would not have to maintain dual processing systems for electronic and paper presentments, other commenters indicated that, because of the legal concerns about properly payable items, a voluntary system would be preferable.

Several commenters indicated that it is inappropriate for Federal Reserve Banks to offer local truncation services because private sector service providers currently offer an adequate level of service. One commenter stated that the Federal Reserve should build and support private sector systems already in place, rather than offering its own truncation service. The commenter stated that the Federal Reserve program should foster, not stifle, alternative systems in the intermediate local stages leading toward national truncation. One commenter indicated that the provision of a local truncation service would place undue burden on the Federal Reserve offices.

Federal Reserve policy regarding the provision of new services was set forth by the Board on August 14, 1984, in a paper entitled "The Federal Reserve in the Payments System." The criteria for the Federal Reserve to enter a new service include: (1) Full recovery of costs in the long run; (2) yield of a clear public benefit, including, for example, improving the efficiency of the payments mechanism or reducing the use of real resources; and (3) a finding that other providers alone cannot be expected to provide the service with reasonable effectiveness, scope, and equity, including, for example, a finding that the Federal Reserve's presence is needed to ensure an adequate level of service nationwide, or to avoid undue delay in the development and implementation of the service.

The Federal Reserve Bank's truncation service meets these criteria. It will be priced to recover its costs, including the private sector adjustment factor. Ultimate provision of this service on a nationwide level will promote the efficiency of the payments mechanism and reduce the use of real resources, once sufficient numbers of checks are truncated. The Federal Reserve Banks, which handle approximately 35 percent of all checks written, must be involved to ensure an adequate level of service nationwide. Experience under the NACS program indicates that private sector providers of local truncation services are unwilling to participate in interbank truncation until a sufficient volume of checks are eligible for truncation. Thus, Federal Reserve involvement should hasten the development and implementation of a nationwide truncation service. Provision of a local truncation service by the Federal Reserve is a necessary first step to a full nationwide interbank truncation service.

The Board approved the offering of the truncation service by the Reserve Banks as a permanent service, effective July 15, 1988. This service will not be a mandatory service, but rather would be offered to paying banks that choose to participate in the truncation program. The fee structure for the truncation service will correspond to that used in the pilot program. Paying banks that participate in the Federal Reserve's local truncation service may establish a dollar limit on the checks eligible for truncation. Under interbank truncation, this dollar limit is governed by NACS rules, which currently set a $2,500 limit on checks eligible for truncation.

The Board also requested comment on a proposed service that offers many of the same benefits of truncation without stopping the flow of the paper check—the extended MICR capture service. Under this service, which has also been provided as a pilot program, Reserve Banks would deliver payment information by electronic transmission or magnetic tape, provide returned check and retrieval services identical to the truncation service, and deliver the checks to the paying bank several days later using less time-critical transportation. The paying banks are charged for the checks based on the electronic presentment of the MICR data. In addition, paying banks are charged for return and retrieval services identical to the truncation service.

The Board received 80 comments on the extended MICR capture service. In general, commenters agreed with the concept of the extended MICR capture service, with 43 comments in favor, 6 opposed, and 31 neutral. Commenters in favor of the proposal indicated that extended MICR would assist in evaluating the operational components of truncation without experiencing the problems associated with nonreceipt of checks. In addition, customer habits would not need to change because the paying bank could continue to send the physical checks to the customer.

Commenters opposed to the proposal indicated that there is no need for the Federal Reserve to become involved in the extended MICR capture service. One commenter indicated that, while the delivery of check information would be faster, the delivery of paper checks

would be slower, causing potential problems for the paying bank.

The Board believes that the extended MICR capture service will expedite the returned check process. Offering of this service is consistent with the criteria listed in the paper "The Federal Reserve in the Payments System," which is discussed above. This service will not be a mandatory service but rather would be offered to the paying banks that choose to participate in the program. The Board has approved the extended MICR capture service as a permanent service to be offered by the Reserve Banks, effective July 15, 1988. The service will be provided as described above in the pilot program.

Competitive Issues

An important factor considered in the development of the regulatory framework for expedited returns and related Reserve Bank services was the impact on competition in the check collection system. In this regard, the Board requested comment on whether there are any returned check services or other procedural changes for returning banks that the Federal Reserve has not proposed that might assist the returning bank in providing returned check services.

Commenters that supported implementation of the proposed Federal Reserve services indicated that the services are designed to encourage competition as well as improve the check collection and return process. One trade association added that the public and the majority of depository institutions have benefited from the competitive environment that has existed between the Federal Reserve and the correspondent banks.

Other commenters expressed concern that correspondents will lose a significant portion of their returned check income, because the Federal Reserve will become the predominant provider of returned check services, given the availability schedules and deadlines that will be provided by the Federal Reserve Banks. Several commenters urged that the Federal Reserve delay offering returned check services or, at a minimum, delay unbundling returned check costs from forward collection prices until correspondent banks and other interested parties could develop their own returned check products and get some experience with the market pricing mechanism.

The Board implemented the requirements in Subpart C of Regulation CC to improve the check return process effective September 1, 1988, in conjunction with the effective date of the funds availability and disclosure requirements mandated by the Act. Industry representatives indicated that implementation of these improvements concurrent with the effective date of the funds availability requirements is important to minimize risks to the depositary bank from making funds available on a more prompt basis.

To enable banks to comply with these requirements, the Federal Reserve Banks will begin offering returned check services that would meet the requirements in the Act on September 1, 1988. Handling of returned checks by the Federal Reserve must be explicitly priced with the introduction of these new services, since return costs cannot be recovered through the Federal Reserve Banks' forward collection fees as they are today. Some returned checks handled by the Federal Reserve under the new services will not have been collected through the Federal Reserve, and thus will not have been subject to the Federal Reserve's forward collection fees. In addition, paying banks and returning banks will be able to deposit returned checks with the Federal Reserve in various ways that result in different costs being incurred by the Reserve Banks. To provide correspondent banks with as much advance notice as possible in order to develop competing returned check services, the Board published, on April 4, 1988, estimated price ranges and deadlines for the new Federal Reserve returned check services. The Board retained consulting services to survey banks about the published price ranges and deadlines and provide feedback on the likelihood that banks would offer competing returned check services. This effort revealed that the price differentials between raw and qualified returned check services would provide incentives for banks to qualify their returns prior to deposit at the Federal Reserve office. In addition, banks indicated that they would offer returned check services.

A number of commenters focused on the general role of the Federal Reserve in the check collection system, rather than discussing specifically the competitive impact of the proposed Federal Reserve returned check services. These commenters indicated that the competitive presence of the Federal Reserve disadvantages private sector service providers. They asserted that the Federal Reserve has an unfair competitive advantage due to its dual role as regulator and service provider, and its lower price structure, which they believe is due, in part, to the fact that the Federal Reserve does not incur certain costs, such as presentment fees, that private sector competitors must pay.

The Board has carefully analyzed the proposed services, and believes that they meet the standards that the Federal Reserve established for priced services, as they will recover costs; yield clear public benefits by speeding the handling of returned checks; and because adequate returned check services are unlikely to be provided by the private sector. In this regard, staff notes that the requests for delay in the check return rules from correspondent banks argue in favor of the Federal Reserve providing check return services.

Appendix A—Federal Reserve Policy on Delivery of Returned Checks

The Federal Reserve's policy on the delivery of returned checks is based on the Regulation CC provision governing where a depositary bank must accept its returned checks and Reserve Bank's duties as returning banks. Under § 229.32(a) of the regulation, a depositary bank must accept returned checks at the location(s) in accordance with its indorsement, or at any location at which the bank accepts checks as a paying bank. The Federal Reserve cannot receive payment for the returned checks until the checks are delivered to the depositary bank. Returning banks, including Federal Reserve Banks, are required to handle returned checks expeditiously, under § 229.31(a).

Federal Reserve arrangements for delivery of returned checks will depend on the following factors:

(1) Whether a depositary bank is subject to the expeditious return rule (i.e. whether the bank has transaction accounts);

(2) How quickly the checks will be returned to the depositary bank;

(3) Preference of the depositary bank;

(4) Established courier routes;

(5) The dollar volume of returns to the depositary bank, recognizing the particular risks associated with returned checks;

(6) Minimization of overall costs of providing Federal Reserve check services.

These factors allow for a Federal Reserve delivery policy that meets the Federal Reserve Banks' duty for expeditious return, while allowing for delivery arrangements suited to the individual needs of depositary banks.

The Federal Reserve policy on delivery of returned checks is as follows:

—A depositary bank with transaction accounts may receive returned checks from the Federal Reserve, at no charge, at a location where the Federal Reserve currently delivers the bank's forward collection checks, or in the case of a depository institution that issues payable through drafts, at a location based on the indorsement on the returned check.

—In the case of certain depository institutions, primarily credit unions, that issue payable through drafts, the Reserve Banks would determine the manner of expeditious return based on the location of

the depositary bank and the dollar volume of returned checks, taking into account the risk associated with returned checks.

—In instances where the depositary bank does not want its returns delivered to the same place as its forward collection checks, or in instances where an institution that issues payable through drafts does not want returns by mail where mail would constitute expeditious return, Reserve Banks may consider the following delivery alternatives:

(1) The depositary bank may arrange to have the Federal Reserve deliver the returned checks to a correspondent bank or service bureau that is on an existing courier route, at no charge;

(2) The depositary bank may arrange to pick up the returned checks at the Federal Reserve;

(3) The depositary bank may elect to have a facsimile or other information concerning the returned checks transmitted by means of an approved depositary bank service or truncation arrangement, to a specified location, with the physical check to follow;

(4) The depositary bank and the local Federal Reserve office may agree to an alternative arrangement tailored to meet the needs of the depositary bank. If the costs of that arrangement exceed the costs of delivery to a location where the Federal Reserve would offer delivery at no charge, the depositary bank may be required to absorb the costs of returned check delivery.

Board Action

For the reasons stated above, the Board has adopted a proposal for the Federal Reserve Banks to offer depository institutions several new returned check services and services to improve the collection of checks. These services will assist depository institutions in complying with the new rules for the collection and return of checks that the Board has, in Docket No. R–0620, adopted to implement the Expedited Funds Availability Act. The Board has also approved check truncation and extended MICR capture services as permanent Federal Reserve Bank services.

By order of the Board of Governors of the Federal Reserve System, May 13, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88–11268 Filed 5–26–88; 8:45 am]

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Federal Register

Friday
May 27, 1988

Part III

Department of Health and Human Services

Health Care Financing Administration

42 CFR Parts 412 and 413

Medicare Program; Changes to the Inpatient Hospital Prospective Payment System and Fiscal Year 1989 Rates; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 412 and 413

[BERC-465-P]

Medicare Program; Changes to the Inpatient Hospital Prospective Payment System and Fiscal Year 1989 Rates

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: We are proposing to revise the Medicare inpatient hospital prospective payment system to implement necessary changes arising from legislation and our continuing experience with the system. In addition, in the addendum to this proposed rule, we are proposing changes in the methods, amounts, and factors necessary to determine prospective payment rates for Medicare inpatient hospital services. These changes would be applicable to discharges occurring on or after October 1, 1988. We are also setting forth proposed rate-of-increase limits for hospitals and hospital units excluded from the prospective payment systems.

DATE: Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5:00 p.m. on July 26, 1988.

ADDRESS: Mail comments to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: BERC-465-P, P.O. Box 26676, Baltimore, Maryland 21207.

If you prefer, you may delivery your comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Ave. SW., Washington, DC

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

In commenting, please refer to file code BERC-465-P. Comments received timely will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, in Room 309-G of the Department's offices at 200 Independence Ave. SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone: 202-245-7890).

For individual copies of this proposed rule, contact the following: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

The charge for individual copies is $1.50 for each issue or for each group of pages as actually bound, payable by check or money order to the Superintendent of Documents.

FOR FURTHER INFORMATION CONTACT:

Thomas Hoyer—Physician Attestation, (301) 966-4607

Linda Magno—All Other Issues, (301) 966-4529.

To obtain copies of this document, see the "Address" section, above. To obtain data used in deriving the standardized amounts and DRG relative weights, see section IV.B., Public Requests for Data.

SUPPLEMENTARY INFORMATION:

I. Background

A. Summary

Under section 1886(d) of the Social Security Act (the Act), a system for payment of inpatient hospital services under Medicare Part A (Hospital Insurance) based on prospectively-set rates was established effective with hospital cost reporting periods beginning on or after October 1, 1983. Under this system, Medicare payment is made at a predetermined, specific rate for each hospital discharge. All discharges are classified according to a list of diagnosis-related groups (DRGs). The regulations governing the inpatient hospital prospective payment system are located in 42 CFR Part 412.

Sections 1886(d)(1)(A), (C), and (D) of the Act provide for the implementation of the prospective payment system over a four-year transition period. During the transition period, payment to hospitals is based on a combination of the Federal prospective payment rates and hospital-specific rates, the proportions of which change with the hospital's cost reporting period. In addition, during that period, the Federal rate is a combination of regional and national rates, the proportions of which change with the Federal fiscal year.

On September 1, 1987, we published a final rule (52 FR 33034) to update the prospective payment rates for the first year after the four-year transition period (that is, for Federal fiscal year (FY) 1988). Technical corrections to that final rule were issued on September 18, 1987 (52 FR 35350) and October 9, 1987 (52 FR 37769). However, on September 29, 1987, the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (Pub. L. 100-119) was enacted. Section 107(a)(1) of Pub. L. 100-119 made several changes to payment for inpatient hospital services under the prospective payment system in FY 1988. On October 23, 1987, we published a notice (52 FR 39637) that identified these statutory changes as follows:

- For discharges occurring on or after October 1, 1987 and before November 21, 1987, the applicable percentage increase used to update the inpatient hospital prospective payment system average standardized amounts for FY 1988 is zero percent.
- The prospective payment transition period was extended as follows:

—For the period October 1, 1987 through November 20, 1987, the national/regional blend of the Federal portion of a hospital's prospective payment rate remained at 50 percent national and 50 percent regional

—For the first 51 days of a hospital's cost reporting period beginning during FY 1988, the hospital's prospective payment rate continues to be composed of 75 percent of the Federal rate and 25 percent of the hospital-specific rate. The applicable hospital-specific rate for this period is the hospital's rate that was in effect for its cost reporting period that began during FY 1987.

—For hospitals and hospital units excluded from the prospective payment system, the applicable percentage increase used to update the hospital's rate-of-increase limits is zero percent for the first 51 days of its cost reporting period beginning in FY 1988.

Subsequently, on December 22, 1987, the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100-203) was enacted. Portions of section 4002, 4005, 4008, and 4009 of Pub. L. 100-203 affected FY 1988 payments to prospective payment hospitals and hospitals excluded from the prospective payment system. On April 5, 1988, we published a notice with comment period (53 FR 11134) to describe these statutory changes as follows:

- For discharges in FY 1988 occurring on or after April 1, 1988, the applicable percentage increase used to update the standardized amounts for prospective payment system hospitals is—

—3.0 percent for hospitals located in rural areas;

—1.5 percent for hospitals located in large urban areas; and

—1.0 percent for hospitals located in other urban areas.

- A "large urban area" is defined as an urban area that the Secretary determines has a population of more than 1,000,000 based on the most recent available population data published by the Bureau of the Census. In addition, any New England County Metropolitan

Area (NECMA) with a population of more than 970,000 is a large urban area.

• For discharges occurring in a fiscal year beginning on or after October 1, 1987, the Secretary computes average standardized amounts for hospitals located in rural, large urban, and other urban areas. For FY 1988 discharges occurring on or after April 1, 1988, the average standardized amounts for large urban and other urban areas are computed by applying the applicable update factor to the urban average standardized amount that was in effect for the 51-day period beginning October 1, 1987.

• For discharges occurring on or after April 1, 1988 and before October 1, 1990, "regional floors" for the standardized amounts are established. The regional floor for a region is the greater of the national average standardized amount or the sum of 85 percent of the national average standardized amount and 15 percent of the average standardized amount for the region.

• Hospitals and hospital units excluded from the prospective payment system receive a 2.7 percent increase for cost reporting periods beginning in FY 1988, excluding the first 51 days of these cost reporting periods for which the increase is zero percent.

• For cost reporting periods beginning on or after October 1, 1987, a sole community hospital's hospital-specific portion is increased by zero percent for the first 51 days of the cost reporting period, 2.7 percent for the next 132 days, and for the remainder of the cost reporting period by the same percentage increase as is used in updating the applicable Federal rate (that is, 3.0 percent for hospitals located in rural areas, 1.5 percent for hospitals located in large urban areas, and 1.0 percent for hospitals located in other urban areas).

• Effective with discharges on or after April 1, 1988, rural hospitals may qualify as rural referral centers if they have 275 or more beds.

• For discharges occurring on or after April 1, 1988 and before October 1, 1989 that are classified in DRGs relating to burn cases, the marginal cost factor to be used in computing payments for outliers is 90 percent.

The comment period for the April 5, 1988 notice ends on June 6, 1988.

B. Major Contents of this Proposed Rule

This proposed rule would be effective for the sixth year of operation of the prospective payment system. Following is a summary of the major changes that we are proposing to make to the system:

1. Changes to DRG Classification and Weighting Factors

As required by section 1886(d)(4)(C) of the Act, we must adjust the DRG classifications and weighting factors at least annually. Our proposed changes for FY 1989 are set forth in section II of this preamble.

2. Changes in the Wage Index

We are proposing to update the wage index by basing it entirely on 1984 wage data. In addition, we would make adjustments to the wage data to reflect the provisions of sections 4004(b) and 4005(a) of Pub. L. 100–203. These proposed changes are set forth in section III of this preamble.

3. Other Decisions and Regulations Changes

In section IV of this preamble, we discuss several current provisions of the regulations in 42 CFR Parts 412 and 413, and set forth certain proposed changes concerning—

• Physician attestation;

• Updating the prospective payment rates and rate-of-increase limits;

• Changes in geographic classifications;

• Creation of a regional floor for standardized amounts;

• Payment for outlier cases;

• Payments to sole community hospitals;

• Referral center criteria;

• Payment for disproportionate share hospitals;

• Classification of capital-related costs and direct medical education costs;

• Elimination of interim payments for the indirect costs of medical education;

• Payment for the indirect costs of medical education; and

• Ceiling on rate of hospital cost increases.

4. Determining Prospective Payment Rates and Rate-of-Increase Limits

In the addendum to this proposed rule, we set forth proposed changes to the methods, amounts, and factors for determining the FY 1989 prospective payment rates. We are also proposing new target rate percentages for determining the rate-of-increase limits for FY 1989 for hospitals and hospital units excluded from the prospective payment system.

5. Impact Analysis

In Appendix A, we set forth an analysis of the impact that the proposed changes described in this rule would have on affected entities.

6. Report to Congress on the Update Factor

Section 1886(e)(3)(B) of the Act requires the Secretary to report to Congress no later than March 1, 1988 on our initial estimate of an update factor for FY 1989 for both prospective payment hospitals and hospitals excluded from the prospective payment system. This report is included as Appendix B of this proposed rule.

7. Proposed Recommendation of Update Factor

As required by sections 1886 (e)(4) and (e)(5) of the Act, Appendix C provides our recommendation of the appropriate percentage change for FY 1989 in the—

• Large urban, other urban, and rural average standardized amounts for inpatient hospital services paid for under the prospective payment system; and

• Target rate-of-increase limits to the allowable operating costs of inpatient hospital services furnished by hospitals and hospital units excluded from the prospective payment system.

8. Discussion of Prospective Payment Assessment Commission Recommendations

The Prospective Payment Assessment Commission (ProPAC) is directed by section 1886(d)(4)(D) of the Act to make recommendations to the Secretary with respect to adjustments to the DRG classifications and weighting factors and to report to Congress with respect to its evaluation of any adjustments made by the Secretary. ProPAC is also directed, by the provisions of sections 1886 (e)(2) and (e)(3) of the Act, to make recommendations to the Secretary on the appropriate percentage change factor to be used in updating the average standardized amounts beginning with FY 1986 and thereafter. These recommendations for FY 1989 were submitted to the Secretary on March 1, 1988.

We are printing ProPAC's report, which includes its recommendations, as Appendix D of this document. The recommendations, and the actions we are proposing to take with regard to them (when an action is recommended), are discussed in detail in the appropriate sections of this preamble. Those recommendations that are not specifically relevant to matters presented below are discussed in section V of this preamble. For a brief summary of the ProPAC recommendations, we refer the reader to pages 5 through 8 of the ProPAC report as set forth in Appendix D of this

proposed rule. ProPAC also produced a volume of technical appendixes to its March 1, 1988 report that provides background material and detailed analyses used in preparation of the ProPAC report. For further information relating specifically to the ProPAC report or to obtain copy of the technical appendixes, contact ProPAC at (202) 453–3986.

II. Changes to DRG Classifications and Weighting Factors

A. Background

Under the prospective payment system, we pay for inpatient hospital services on the basis of a rate per discharge that varies by the DRG to which a beneficiary's stay is assigned. The formula used to calculate payment for a specific case takes an individual hospital's payment rate per case and multiplies it by the weight of the DRG to which the case is assigned. Each DRG weight represents the average resources required to care for cases in that particular DRG relative to the national average of resources used to treat all Medicare cases. Thus, cases in a DRG with a weight of 2.0 would, on average, require twice as many resources as the average Medicare case.

Congress recognized that it would be necessary to recalculate the DRG relative weights periodically to account for changes in resource consumption. Accordingly, section 1886(d)(4)(C) of the Act requires that the Secretary adjust the DRG classifications and weighting factors annually beginning with discharges occurring in FY 1988. These adjustments are made to reflect changes in treatment patterns, technology, and any other factors that may change the relative use of hospital resources. The proposed changes to the DRG classification system and the proposed recalibration of the DRG weights for discharges occurring on or after October 1, 1988 are discussed below.

B. Reclassification of DRGs

1. General

Cases are classified into DRGs for payment under the prospective payment system based on the principal diagnosis, up to four additional diagnoses, and any procedures performed during the stay, as well as age, sex, and discharge status of the patient. The diagnostic and procedure information is expressed by the hospital using codes from the International Classification of Diseases, Ninth Edition, Clinical Modification (ICD–9–CM). The intermediary enters the information into its claims system and subjects it to a series of automated screens called the Medicare Code Editor (MCE). These screens are designed to identify cases that require further review before classification into a DRG can be accomplished.

After screening through the MCE and any further development of the claims, cases are classified by the GROUPER software program into the appropriate DRG. The GROUPER program was developed as a means of classifying each case into a DRG on the basis of the diagnosis and procedure codes and demographic information (that is, sex, age, and discharge status). It is used to classify past cases in order to measure relative hospital resource consumption to establish the DRG weights and to classify current cases for purposes of determining payment.

The list of DRGs currently contains 475 specific categories in 23 major diagnostic categories (MDCs). Most MDCs are based on a particular organ system of the body (for example, MDC 6, Diseases and Disorders of the Digestive System); however, some MDCs are not constructed on this basis since they involve multiple organ systems (for example, MDC 22, Burns).

Principal diagnosis determines MDC assignment. Within most MDCs, cases are then divided into surgical DRGs (based on a surgical hierarchy that orders individual procedures or groups of procedures by resource intensity) and medical DRGs. Medical DRGs generally are differentiated on the basis of diagnosis, age, and presence or absence of complications or comorbidities (hereafter CC) only. Generally, GROUPER does not consider other procedures; that is, nonsurgical procedures or minor surgical procedures generally not done in an operating room are not listed as operating room (OR) procedures in the GROUPER decision tables. However, there are a few non-OR procedures that do affect DRG assignment for certain principal diagnoses, such as extracorporeal shock wave lithotripsy for patients with a principal diagnosis of urinary stones.

We are proposing to make some changes to the DRG classification system on the basis of problems identified over the past year. These proposed changes are set forth below.

2. MDC 3: Diseases and Disorders of the Ear, Nose and Throat

We have received a few comments observing that the DRG assignment, hence, weighting factors and payment levels, for surgical treatment of metastases of mouth carcinomas varies widely based on the exact site of the primary cancer within the mouth. For example, cases involving major surgical procedures such as glossectomy, radical neck dissection, or mandibulectomy are assigned to DRG 49 (Major Head and Neck Procedures) with a weighting factor of 2.8923 if the principal diagnosis is a malignant neoplasm of the tongue. The same case with a principal diagnosis of malignant neoplasm of the mouth floor groups to DRG 168 or 169 (Mouth Procedures) [1] with weights of 1.4067 and .6689, respectively. This anomaly stems from the original treatment of the mouth as part of the digestive system (MDC 6). The list of mouth procedures in MDC 6 duplicates a range of procedures that are assigned to a variety of DRGs in MDC 3, because the anatomical proximity of the mouth to the ears, nose, tongue and throat results in diagnoses in one area necessitating procedures in another.

Based on our review of the types of cases brought to our attention and the overall logic of the DRG classification scheme, we are proposing to restructure MDC 3 and MDC 6 by removing mouth-related diagnoses and procedures from MDC 6 and adding them to MDC 3, which would now be titled "Diseases and Disorders of the Ear, Nose, Mouth and Throat." We would move DRGs 168 and 169 (Mouth Procedures) and DRGs 185 and 186 (Dental and Oral Disease) and 187 (Dental Extractions and Restorations) from MDC 6 to MDC 3. The diagnosis and procedure codes in these three DRGs would be deleted from MDC 6.

The mouth malignancy diagnosis codes (140.0–145.9) in DRGs 185, 186, and 187 fit more appropriately with other MDC 3 malignancy codes in DRG 64 (Ear, Nose and Throat Malignancy). Therefore we would delete codes 140.0–145.9 from DRGs 185, 186, and 187 and add them to DRG 64, which would now be retitled Ear, Nose, Mouth and Throat Malignancy. In addition, several mouth-related diagnosis codes currently in DRGs 73 and 74 (Other Ear, Nose and Throat Diagnoses) would fit more appropriately in DRGs 185, 186, and 187. Therefore, the diagnosis codes listed below would be deleted from DRGs 73 and 74 and added to DRGs 185, 186, and 187.

Diagnosis code	Description
210.1	Benign neoplasm tongue.
744.81–744.84	Congenital anomalies of the mouth.
749.00–749.04	Cleft palate.
749.10–749.14	Cleft lip.

[1] A single title combined with two DRG numbers is used to signify pairs, the first DRG of which is cases with CC and the second of which is cases without CC. If a third number is included, it represents cases of patients who are age 0–17

Diagnosis code	Description
749.20–749.25	Cleft palate with cleft lip.

DRGs 73 and 74 would now be retitled Other Ear, Nose, Mouth and Throat Diagnoses) to conform with the rest of the restructured MDC 3.

Finally, four neoplasm codes included in DRGs 188, 189, and 190 (Other Digestive System Diagnoses) would be better classified in the revised DRGs 185, 186, and 187 in MDC 3. We propose to delete diagnosis codes 210.0, 210.3, 210.4, and 213.1, benign neoplasms of the lip, mouth floor, mouth, and lower jawbone, respectively, from MDC 6 and add them to DRGs 185, 186, and 187 now in MDC 3.

As noted above, all of the procedure codes in the surgical DRGs 168 and 169 are presently assigned to clinically coherent DRGs in MDC 3. Thus, merely moving DRGs 168 and 169 into MDC 3 would produce a situation in which a case involving one of the mouth procedures could be assigned to multiple DRGs or, alternatively, a situation in which DRGs 168 and 169 would be empty. In order to prevent such an outcome, we propose deleting from DRGs 168 and 169 all procedures except the following, which are very specific to the mouth:

Procedure code	Description
24.2	Gingivoplasty.
24.4	Excision of dental lesion of jaw.
24.5	Alveoloplasty.
25.1	Excision or destruction of lesion or tissue of tongue.
25.59	Other repair and plastic operations on tongue.
25.94	Other glossotomy.
25.99	Tongue operation NEC.
27.0	Drainage of face and floor of mouth.
27.1	Incision of palate.
27.21	Biopsy of bony palate.
27.22	Biopsy of uvula and soft palate.
27.31	Local excision or destruction of lesion or tissue of bony palate.
27.42	Wide excision of lesion of lip.
27.43	Other excision of lesion or tissue of lip.
27.49	Other excision of mouth.
27.53	Closure of fistula of mouth.
27.55	Full-thickness skin graft to lip and mouth.
27.56	Other skin graft to lip and mouth.
27.57	Attachment of pedicle or flap graft to lip and mouth.
27.59	Other plastic repair of mouth.
27.61	Suture of laceration of palate.
27.71	Incision of uvula.
27.72	Excision of uvula.
27.73	Repair of uvula.
27.79	Other operations on uvula.
27.92	Incision of mouth, unspecified structure.
27.99	Other operations on oral cavity.

Since these procedures are also presently assigned to DRG 63 (Other Ear, Nose and Throat Procedures), we would remove them from DRG 63. By removing these procedures from DRG 63 and including them in the restructured DRGs 168 and 169 in MDC 3, we create a specific DRG pair for mouth-related procedures in MDC 3. Cases involving all other procedures currently in DRGs 168 and 169 would now be assigned to DRGs 49 through 62. We propose to add DRGs 168 and 169 to the revised surgical hierarchy for MDC 3 described below in section II.B.4. of the preamble. To conform with the restructured MDC, DRG 63 would be retitled Other Ear, Nose, Mouth and Throat Procedures. Also, DRG 55 would be retitled Miscellaneous Ear, Nose, Mouth and Throat Procedures.

3. Reclassification of MDC 7

Recently, a problem with the DRG assignment of certain cases involving multiple biliary tract procedures in MDC 7 (Diseases and Disorders of the Hepatobiliary System and Pancreas) was brought to our attention. If a patient is admitted for a biliary tract disorder and a choledochoenterostomy is performed, the discharge is assigned to DRG 193 or 194 (Biliary Tract Procedures Except Total Cholecystectomy). However, a patient with the same diagnosis who has both a choledochoenterostomy and a cholecystectomy performed is assigned to DRG 197 or 198 (Total Cholecystectomy without Common Duct Exploration). DRGs 197 and 198 have lower relative weights than DRGs 193 and 194, respectively, although more resources are involved in treating the patient who has both procedures performed.

This result occurs because, within the biliary tract section of the surgical hierarchy, the first determinant of DRG assignment is performance of a cholecystectomy, regardless of what other procedures might also have been performed. If a cholecystectomy was performed, a case will group to either DRG 195 or 196 (Total Cholecystectomy with Common Duct Exploration) if a common bile duct exploration (procedure code 51.41, 51.42, or 51.51) was also performed. However, a discharge with cholecystectomy performed and no bile duct exploration will group to DRG 197 or 198. Therefore, we decided to review the way surgical procedures were used to distinguish surgical patients.

Based on our review, we propose that, for operating room procedures done on the biliary tract, procedures first be differentiated on the basis of whether a total cholecystectomy, with or without common bile duct exploration, was the only procedure performed, or whether some other biliary tract procedure was also performed. If, in addition to cholecystectomy with or without common bile duct exploration, another biliary tract procedure was performed, the case would group to DRG 193 or 194. If a cholecystectomy and common bile duct exploration are the only procedures performed, the case would be assigned to DRG 195 or 196.

Finally, DRGs 197 and 198 would be reserved for those cases in which the only biliary tract procedure performed is a cholecystectomy.

In MDC 7, another problem in the surgical hierarchy was found in DRG 191 (Major Pancreas, Liver and Shunt Procedures) and DRG 192 (Minor Pancreas, Liver and Shunt Procedures). The relative weights suggested that DRG 192 was more resource intensive than DRG 191 and, therefore, should be ordered above it in the surgical hierarchy. Logically, however, minor procedures should not be ordered above major procedures. Consequently, this occurrence suggested that something was amiss in our delineation of major and minor procedures.

First, we decided to determine whether individual procedures should be changed from minor to major or major to minor. However, in reviewing the standardized charges for each procedure in DRGs 191 and 192, we could not find a discernible pattern. In both DRGs 191 and 192, there were some procedures with low average standardized charges and others with high average standardized charges. We again reviewed the data on the basis of whether a CC was present. This resulted in more homogeneous groups with standardized charges for a procedure with a CC resembling the standardized charges for other procedures with a CC. Therefore, we are proposing to combine all the procedures in DRGs 191 and 192 and group discharges having these procedures based on the presence or absence of a CC. DRG 191 would now be entitled "Pancreas, Liver and Shunt Procedures with CC," and DRG 192 would be entitled "Pancreas, Liver and Shunt Procedures without CC."

As part of our ongoing review, we are also examining the data to determine if procedures involving the pancreas should be separated from the other procedures in DRGs 191 and 192. In the first analysis, pancreas procedures had higher standardized charges than most other procedures. Based on this review, we may conclude that the procedures should be grouped in a different manner.

4. Surgical Hierarchies

Some inpatient stays entail multiple surgical procedures, each one of which, occurring by itself, could result in assignment of the case to a different DRG within the MDC to which the particular principal diagnosis is assigned. It is therefore necessary to have a decision rule by which such cases are assigned to a single DRG. The surgical hierarchy, an ordering of groups of procedures from most to least resource intensive, performs that function. Its application ensures that cases involving multiple surgical procedures are assigned to the DRG associated with the most resource-intensive procedure group.

Because the relative resource intensity of procedure groups can shift as a function of DRG reclassification and recalibration, we reviewed the surgical hierarchy of each MDC, as we have for previous reclassifications, to determine if the ordering of procedures coincided with the intensity of resource utilization, as measured by the same billing data used to compute the DRG relative weights.

The surgical hierarchy is based upon procedure groups. Consequently, in many cases, hierarchy has an impact on more than one DRG. The methodology for determining the most resource-intensive procedure groups, therefore, involves weighting each DRG for frequency to determine the average resources for each procedure group. For example, assume procedure group A includes DRGs 1 and 2 and procedure group B includes DRGs 3, 4, and 5, and that the weighting factor for DRG 1 is higher than that for DRG 3, but the weights for DRGs 4 and 5 are higher than the weight for DRG 2. To determine the surgical hierarchy, we would weight the weighting factor of each DRG by frequency to determine average resource consumption for the group of procedures and order the procedure groups from that with the highest to that with the lowest average resource utilization, with the exception of "other OR procedures" as discussed below.

This methodology may occassionally result in a case involving multiple procedures being assigned to the lower weighted DRG of the available alternatives. However, given that the logic underlying the surgical hierarchy provides that the GROUPER searches for procedures that sometimes occur in cases involving multiple procedures, this result is unavoidable.

We would like to point out, notwithstanding the foregoing discussion, that there are a few instances where a procedure group with a smaller average relative weight is ordered above a procedure group with a higher average relative weight. First, the "other OR procedures" group is uniformly ordered last in the surgical hierarchy of each MDC in which it occurs regardless of the fact that the weighting factor for the DRG or DRGs in that procedure group may be higher than that for other procedure groups in the MDC. The "other OR procedures" group is a group of procedures that are least likely to be related to the diagnoses in the MDC but are occasionally performed on patients with these diagnoses. Therefore, these procedures should only be considered if no other procedure more closely related to the diagnoses in the MDC has been performed.

The second type of situation occurs when the difference between the two average weights for two procedure groups is very small. We have found that small differences generally do not warrant reordering the hierarchy since, by virtue of the hierarchy change, the weighting factors are likely to shift such that the higher-ordered procedure group has a lower average weight than the group ordered below it.

Based on the preliminary recalibration of the DRGs, we are proposing to modify the surgical hierarchy as set forth below. As discussed below in section II.C. of this preamble, we anticipate that the final recalibrated weights will be somewhat different than those proposed since they will be based on more complete data. Consequently, further revision of the hierarchy, using the above principles, may be necessary in the final rule.

At this time, we would revise the surgical hierarchy for MDCs 3, 5, 6, and 8 as follows:

a. As discussed above in section II.B.2 of this preamble, we are proposing to move all mouth diagnoses and procedures into MDC 3 to create one MDC for the Ear, Nose, Mouth and Throat. Accordingly, DRGs 168 and 169 would move from MDC 6 into MDC 3 and must be placed into the surgical hierarchy for MDC 3. Based on this change and the resulting relative weights, we propose to reorder the procedure groups in MDC 3 as follows:

Major Head and Neck Procedures (DRG 49)
Tonsillectomy and Adenoidectomy Procedure Except Tonsillectomy and/or Adenoidectomy Only (DRGs 57 and 58)
Mouth Procedures (DRGs 168 and 169)
Cleft Lip and Palate Repair (DRG 52)
Myringotomy with Tube Insertion (DRGs 61 and 62)
Sialoadenectomy (DRG 50)
Sinus and Mastoid (DRGs 53 and 54)
Salivary Gland Except Sialoadenectomy (DRG 51)
Miscellaneous Ear, Nose, Mouth and Throat (DRG 55)
Rhinoplasty (DRG 56)
Tonsillectomy and/or Adenoidectomy Only (DRGs 59 and 60)
Other Ear, Nose, Mouth and Throat OR Procedures (DRG 63)

b. In MDC 5, we would reorder Other Cardiothoracic or Vascular Procedures with Pump (DRG 108) above Coronary Bypass (DRGs 106 and 107).

c. In MDC 6, Mouth Procedures (DRGs 168 and 169) would be removed from the hierarchy and placed into MDC 3.

d. In MDC 8, we would reorder Soft Tissue (DRGs 226 and 227) above Local Excision and Removal of Internal Fixation Devices of Hip and Femur (DRG 230).

e. As noted in section II.B.3 of this preamble, we are proposing to separate pancreas, liver, and shunt procedures based on the presence or absence of a CC. However, the surgical hierarchy would not change. (DRG 191 (Pancreas, Liver and Shunt Procedures with CC) would be ordered above (DRG 192 (Pancreas, Liver and Shunt Procedures without CC).

5. Refinement of Complications and Comorbidities List

There is a standard list of diagnoses that are considered complications and comorbidities (CCs). This list was developed by physician panels to include those diagnoses that, when present as a secondary condition, would be considered a substantial complication or comorbidity. A substantial CC, in turn, is defined as a condition that, because of its presence with a specific principal diagnosis, would cause an increase in length of stay by at least one day for at least 75 percent of the patients.

In the September 1, 1987 final notice concerning changes to the DRG classification system (52 FR 33143), we modified the GROUPER Logic so that certain diagnoses included on the standard list of complications and comorbidities would not be considered a valid CC in combination with a particular principal diagnosis. (Thus we created the CC Exclusions List.) We made these changes to preclude coding of closely related conditions, to preclude duplicative coding or inconsistent coding from being treated as complications or comorbidities, and to ensure that cases are appropriately classified between the complicated and uncomplicated DRGs in a pair.

In the May 19, 1987 proposed notice concerning changes to the DRG classification system (52 FR 33143), we explained that the excluded secondary diagnoses were established using the following five principles:

- Chronic and acute manifestations of the same condition should not be considered CCs for one another (as subsequently corrected in the September 1, 1987 final notice (52 FR 33154)).
- Specific and nonspecific (that is, not otherwise specified (NOS)) diagnosis codes for a condition should not be considered CCs for one another.
- Conditions that may not co-exist, such as partial/total, unilateral/bilateral, obstructed/unobstructed, and benign/malignant, should not be considered CCs for one another.
- The same condition in anatomically proximal sites would not be considered as CCs for one another.
- Closely related conditions would not be considered as CCs for one another.

We indicated in the September 1, 1987 final notice (52 FR 33154) that the creation of the CC Exclusions List was a major project involving hundreds of thousands of codes and that the FY 1988 revisions were intended to be only a first step toward refinement of the CC list in that the criteria used for eliminating certain diagnoses from consideration as CCs were intended to identify only the most obvious diagnoses that should not be considered complications of another diagnosis. For that reason and in light of comments and questions on the CC list, we have continued to review the remaining CCs to identify additional exclusions, as appropriate.

We are proposing a limited revision of the CC Exclusion Lists, which includes corrections of errors in the existing list, addition of a number of excluded CCs, and the deletion of a number of excluded CCs. These proposed changes are being made in accordance with the principles established when we created the Exclusions List in 1987.

Tables 6d and 6e in section IV of the addendum to this proposed rule contain the proposed revisions to the CC Exclusions List that would be effective for discharges occurring on or after October 1, 1988. Although 72 principal diagnoses have both deletions from and additions to the diagnoses that are excluded as CCs, for clarity we have shown the additions and deletions to the CC Exclusions List in separate tables. The tables show the principal diagnoses with proposed changes to the excluded CCs. Each of these principal diagnoses is shown with an asterisk and the revisions to the CC Exclusions List are provided in an indented column immediately following the affected principal diagnosis.

CCs that would be added to the list are in Table 6d—Additions to the CC Exclusions List. (Currently, the indented diagnoses are recognized by the GROUPER as valid CCs for the asterisked principal diagnosis but would be excluded and thus ignored by the GROUPER beginning with discharges on or after October 1, 1988.)

CCs that would be deleted from the list are in Table 6e—Deletions from the CC Exclusions List. (Currently, the indented diagnoses are excluded and are not recognized by the GROUPER as valid CCs for the asterisked principal diagnosis but would be recognized as valid CCs beginning with discharges on or after October 1, 1988.)

Copies of the original CC Exclusions List applicable to FY 1988 can be obtained from the National Technical Information Service (NTIS) of the Department of Commerce. It is available in hard copy for $59.95 and on microfiche for $17.50. A request for the FY 1988 CC Exclusions List (which should include the identification accession number, ((PB) 88–133970), should be made to the following address:

National Technical Information Service, United States Department of Commerce, Springfield, Virginia 22161

or by calling (703) 487–4650.

Users should be aware of the fact that the revisions in Tables 6d and 6e must be incorporated into the list purchased from NTIS in order to obtain the CC Exclusions List applicable for discharges occurring on or after October 1, 1988.

Alternatively, the complete documentation of the GROUPER logic, including the current CC Exclusions List is available from Health Systems International (HSI). HSI, under contract with HCFA, is responsible for updating and maintaining the GROUPER program. The current DRG Definitions Manual, Fourth Revision is available for $165.00, which includes $15.00 for shipping and handling. The fifth revision of this manual, which will include the changes proposed on this document as finalized in response to public comment, will be available in September 1988 for $165.00. These manuals may be obtained by writing HSI at:

100 Broadway, New Haven, Connecticut 06511

or by calling (203) 562–2101.

Please specify the revisions requested.

6. Additional Procedure Code Changes in DRG 468

Each year, we review cases assigned to DRG 468 (Unrelated Operating Room Procedures) in order to determine whether, in conjunction with certain principal diagnoses, there are certain procedures performed that are not currently included in the surgical hierarchy for the MDC in which the diagnosis falls. Since DRG 468 is reserved for those cases in which none of the operating room (OR) procedures is related to the principal diagnosis, it is intended to capture atypical medical cases, that is, those not occurring with sufficient frequency to represent a distinct recognizable clinical group. For that reason, we conduct our review of procedures producing DRG 468 assignments on the basis of volume of cases with each procedure. Our medical consultants then identify those procedures occurring in conjunction with certain diagnoses with sufficient frequency to justify adding them to one of the surgical DRGs for the MDC in which the diagnosis falls. On the basis of this review, we are proposing several DRG classification changes in order to reduce unnecessary assignment of cases to DRG 468.

In MDC 5 (Diseases and disorders of the circulatory system), when procedure code 54.93 (Creation of cutaneoperitoneal fistula) is performed with a principal diagnosis such as mechanical complication of other vascular device, implant and graft (diagnosis code 996.1), the discharge is assigned to DRG 468. We are proposing to add procedure code 54.93 to the list of operating room procedures in DRG 120 (Other Circulatory System OR Procedures). We are also proposing in DRG 120 to include procedure code 54.95 (Incision of peritoneum), which now, if paired with a principal diagnosis in MDC 5 such as mechanical complication of other vascular device, implant and graft (diagnosis code 996.1), groups to DRG 468.

In DRGs 170 and 171 (Other Digestive System OR Procedures), we are proposing to add procedure code 39.27 (Arteriovenostomy for renal dialysis) as one of the operating room procedures. This would preclude assignment of a discharge to DRG 468 if this procedure is performed with a principal diagnosis such as diagnosis code 567.2 (Suppurative peritonitis).

Currently, procedure code 39.25 (Aorta-iliac-femoral bypass), when combined with a diagnosis code such as 707.1 (Chronic leg ulcer) in MDC 9 (Diseases and disorders of the skin,

subcutaneous tissue and breast), results in assignment to DRG 468 (Unrelated OR Procedures). We are proposing to include procedure code 39.25 as an oeprating room procedure in DRGs 269 and 270 (Other Skin, Subcutaneous Tissue and Breast Procedures). We are also proposing to add procedure code 39.29 (Vascular shunt and bypass not elsewhere classified (NEC)) to the operating room procedures included in DRGs, 269 and 270.

Currently, procedure code 54.95 (Incision of peritoneum) if performed with a principal diagnosis in MDC 11 (Diseases and disorders of the kidney and urinary tract) such as 585 (Chronic renal failure) groups to DRG 468. We are proposing to add this procedure code to the list of operating room procedures in DRG 315 (Other Kidney and Urinary Tract OR Procedures).

Diagnosis code 617.5 (Intestinal endometriosis) is currently classified in MDC 13 (Diseases and disorders of the female reproductive system), while surgical procedures on the intestine are in MDC 6. Hence, if this condition is treated surgically, the discharge is assigned to DRG 468. While endometriosis has its origins in a disorder of the female reproductive system, the occurrence of intestinal endometriosis sufficiently severe to necessitate hospitalization is a disorder of the digestive system. This is analogous to renal manifestations of diabetes, the diagnoses of which are included in MDC 11 (Diseases and disorders of the kidney and urinary tract) where the problems occur rather than in MDC 10 (Endocrine, nutritional, and metabolic diseases and disorders) where the problems originate. Therefore, we would remove diagnosis code 617.5 from MDC 13 and place it into MDC 6. Medical cases would be assigned to DRGs 182, 183 and 184 (Esophagitis, Gastroenteritis and Miscellaneous Digestive Disorders).

Similarly, diagnosis code 617.6 (Endometriosis in scar) is classified in MDC 13 while the surgical procedures performed with this diagnosis are in MDC 9 (Diseases and disorders of the skin, subcutaneous tissue and breast). We propose to remove diagnosis code 617.6 from MDC 13 and add it to MDC 9, in DRGs 283 and 284 (Minor Skin Disorders).

In MDC 14 (Pregnancy, childbirth and puerperium), we are proposing to add three procedure codes to the operating room procedures in DRG 374 (Vaginal Delivery With Sterilization and/or D&C). Currently these procedures, when combined with a principal diagnosis in MDC 14 such as 665.41 (High vaginal laceration), group to DRG 468. The three procedure codes to be added to DRG 374 are procedure codes 66.4 (Total unilateral salpingectomy), and code 66.69 (Other partial salpingectomy), and 66.92 (Unilateral destruction or occlusion of fallopian tube).

Currently, if procedure code 54.93 (Creation of cutaneoperitoneal fistula) is performed as part of treating a principal diagnosis in MDC 21 (Injury, poisoning and toxic effects of drugs) such as Infection or inflammation of a device or graft (diagnosis code 996.6), the discharge groups to DRG 468. We are proposing to add procedure code 54.93 as part of the operating procedures in DRGs 442 and 443 (Other OR Procedures for Injuries). In addition, we are also proposing to add procedure code 54.95 (Incision of peritoneum) to the list of the operating room procedures in DRGs 442 and 443.

Patients hospitalized for a long period of time run the risk of developing decubitus ulcers for which wound debridement may be the appropriate treatment. Currently, procedure code 86.22 (Wound debridement) with a principal diagnosis in MDC 2 (Diseases and disorders of the eye), MDC 4 (Diseases and disorders of the respiratory system), MDC 7 (Diseases and disorders of the hepatobiliary system and pancreas), MDC 13 (Diseases and disorders of the female reproductive system), and MDC 16 (Diseases and disorders of the blood and blood-forming organs and immunological disorders) groups to DRG 468. We are proposing to add procedure code 86.22 to the list of operating room procedures in DRGs 40 and 41 (Extraocular Procedures Except Orbit), DRGs 76 and 77 (Other Respiratory System OR Procedures), DRG 201 (Other Hepatobiliary or Pancreas OR Procedures), DRG 365 (Other Female Reproductive System OR Procedures), and DRG 394 (Other OR Procedures of Blood and Blood Forming Organs).

7. Refinement of DRG 468

ProPAC, as stated in its Recommendation No. 16, believes that refinements to DRG 468 are needed to improve the accuracy of patient classification. ProPAC recommends that all cases currently assigned to DRG 468 should be reassigned to existing surgical DRGs, using secondary, rather than principal, diagnoses. Cases that could be reassigned to more than one DRG should be assigned to the DRG with the highest relative weight.

DRG 468 is reserved specifically for those cases in which none of the surgical procedures furnished to a patient is related to the patient's principal diagnosis. It was established as a means of identifying those cases that do not readily lend themselves to classifications within groups of clinically similar patients because the cases themselves do not reflect typical treatment patterns. For example, cases in which the patient develops pressing medical-surgical needs related to a secondary diagnosis or complication are assigned to DRG 468.

Adoption of ProPAC's recommendation would result in cases that are currently assigned to DRG 468 being moved to one of the existing surgical DRGs. We believe that this would not produce improved DRG definitions. For example, currently a patient who is admitted and treated for pneumonia, and who, during the stay, has a transurethral prostatectomy because of temporary urinary retention is assigned to DRG 468. A patient admitted for pneumonia who has a transurethral prostatectomy is clearly atypical both clinically and from a resource perspective when compared to patients admitted for a transurethral prostatectomy. The transurethral prostatectomy is the single procedure that results in the highest frequency of cases assigned to DRG 468, accounting for some 10 percent of all cases in DRG 468.

Patients admitted for a transurethral prostatectomy are assigned to DRGs 306, 307, 336, and 337. The average Medicare length of stay for these patients is 10.3, 6.1, 7.2, and 5.0 days, respectively. Medicare patients who are assigned to DRG 468 as a result of a transurethral prostatectomy have an average length of stay of 17.9 days. Thus, the redistribution of DRG 468 cases to DRGs 306, 307, 336, and 337 would add to those DRGs patients whose resource profile is very atypical for the patients in those DRGs. This would tend to increase the coefficient of variation in those DRGs and make a significant proportion of the DRG 468 cases outliers. The net effect of the redistribution of DRG 468 cases would make the current DRGs less homogeneous from both a clinical and statistical perspective.

A second difficulty with the redistribution of DRG 468 cases is the recommendation that the relative weights be used to select the precise DRG to which a case would be reassigned. Across MDCs, the weights of many DRG are similar. Each year, the recalibration of the relative weights results in minor changes in the individual DRG weights even when there are no clinical logic changes for a particular DRG. Therefore, if the ProPAC recommendation were adopted,

over the years, patients with identical clinical characteristics could be assigned to different DRGs solely as a result of small fluctuations in the relative weights.

Further, some Blue Cross plans, Medicaid agencies, and State commissions are using DRGs for payment purposes. In general, these payors use the Medicare DRG definitions with their own relative weights. Thus, if we were to adopt ProPAC's recommendation, a hospital would obtain a different DRG assignment for a patient based on which payor's weights are being used. This would be very confusing to hospitals and would appear illogical to physicians. As a general principal, we believe that DRG assignment should be based exclusively on patient characteristics and not on the attributes of the payment system. The DRG definitions should be based on clinical logic and should remain independent of the logic of the payment system.

However, we agree with ProPAC that there are problems with the current definition of DRG 468. Our original expectation was that the patients assigned to DRG 468 would be those who experienced significant unanticipated complications that were not associated with the patient's principal diagnosis and that necessitated performance of a surgical procedure. We expected that these types of patients would be atypical and would have a high use of hospital resources as evidenced by the high payment weight for DRG 468. However, in examining the discharges in DRG 468 and procedures associated with these discharges, we found that there are two additional distinct types of discharges in DRG 468.

The first distinct type of discharge is that of a male patient admitted for a medical problem who, after treatment for the medical problem, experiences urinary retention. A transurethral prostatectomy is performed and the discharge is then grouped to DRG 468.

The second distinct type of discharge is that of a patient admitted for a medical problem who, after treatment for the medical problem, has an unrelated elective or diagnostic procedure performed, for example, a polypectomy of cataract extraction. The performance of the unrelated procedure results in the discharge being grouped to DRG 468. We believe the high relative weight associated with DRG 468 may provide a financial incentive for hospitals to perform these procedures on patients admitted for unrelated medical reasons.

In order to address these problems in DRG 468, we are proposing to add the following two new DRGs to the current list:

- DRG 476—Unrelated Prostatic OR Procedure. DRG 476 would be assigned to those discharges in which one of the following prostatic procedures is performed that is unrelated to the principal diagnosis:

60.2—Transurethral prostatectomy
60.61—Local excision of lesion of prostate
60.69—Prostatectomy NEC
60.94—Control of postoperative hemorrhage of prostate

- DRG 477—Unrelated Non-extensive OR Procedure Only. DRG 477 would be assigned to those discharges in which the only procedure performed is a nonextensive procedure that is unrelated to the principal diagnosis.

In Table 6c in section VI of the addendum to this proposed rule, we have listed the ICD–9–CM procedure codes for all of the procedures we would consider nonextensive procedures if performed with an unrelated principal diagnosis. These cases would be grouped in DRG 477.

We believe that the addition of these two DRGs would result in the grouping of discharges that are more clinically coherent and homogeneous. We also believe that the relative weights for the new DRG 476 and DRG 477 and resulting revised weight for DRG 468 would be more reflective of the resources used in treating patients.

In reviewing the date on discharges that has previously grouped to DRG 468, we found that discharges with an unrelated, nonextensive OR procedure were a large volume of the total discharges but were not as resource intensive as other discharges. We also found that the average length of stay for these discharges was lower than the average length of stay for other discharges in DRG 468.

8. Changes to the ICD–9–CM Coding System

As discussed above in section II.B.1. of this preamble, ICD–9–CM is a coding system for the reporting of diagnostic information and procedures performed on a patient. In September 1985, the ICD–9–CM Coordination and Maintenance Committee was formed. This is a Federal interdepartmental committee charged with the mission of maintaining and updating the ICD–9–CM. This includes approving new coding changes, developing errata, addenda, and other modifications to the ICD–9–CM to reflect newly developed procedures and technologies and newly identified diseases. The Committee is also responsible for promoting the use of Federal and non-Federal educational programs and other communication techniques with a view toward standardizing coding applications and upgrading the quality of the classification system.

The Committee is co-chaired by the National Center for Health Statistics (NCHS) and HCFA. The NCHS has primary responsibility for the ICD–9–CM diagnoses codes included in Volumes 1 and 2—Diseases: Tabular List and Diseases: Alphabetic Index, while HCFA has primary responsibility for the ICD–9–CM procedure codes included in Volume 3—Procedures: Tabular List and Alphabetic Index.

The Committee encourages participation in the above process by major health-related organizations. In this regard, the Committee holds public meetings for discussion of educational issues and proposed coding changes. These meetings provide an opportunity for input into coding matters from representatives from recognized organizations in the coding fields, such as the American Medical Record Association, the American Hospital Association, and the Commission on Professional and Hospital Activities, as well as physicians, medical record administrators, and other members of the public. Considering the opinions expressed at the public meetings, the Committee formulates recommendations, which then must be approved by the co-chair agency heads (that is, the Administrator of HCFA and the Director of NCHS) before adoption for general use.

The Committee presented proposals for coding changes at a public meeting held in Washington, DC on December 4, 1987 and finalized the coding changes after consideration of comments received at that meeting and in writing in the 30 days following the meeting. The initial meeting for consideration of coding issues for resolution in FY 1989 was held on April 14, 1988. Copies of the minutes of these meetings may be obtained by writing to the co-chairpersons representing NCHS and HCFA. We encourage commenters to address suggestions on coding issues involving diagnosis codes to: Ms. Sue Meads, R.R.A., Co-Chairperson, ICD–9–CM Coordination and Maintenance Committee, NCHS, Rm 2–19, Center Building, 3700 East-West Highway, Hyattsville, Maryland 20782.

Questions and comments concerning the procedure codes should be addressed to: Ms. Patricia E. Brooks, Co-Chairperson, ICD–9–CM Coordination and Maintenance Committee, HCFA, Office of Coverage Policy, Rm 309, East

High Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207.

The additional new ICD–9–CM codes that have been recommended by the Committee and approved by both agency heads will become effective October 1, 1988. The new ICD–9–CM codes are listed, along with their proposed DRG classifications, in Tables 6a and 6b in section VI of the addendum. As we stated above, the code numbers and their titles were aired for public comment in the ICD–9–CM Coordination and Maintenance Committee meetings. Both oral and written comments were considered before the codes were approved. Therefore, we are soliciting comments on the proposed DRG classification only.

Further, the Committee has recommended, and the agency heads have approved, the deletion of ICD–9–CM procedure code 48.66 (Hartmann resection of the rectum). This procedure will be classified under ICD–9–CM procedure code 45.75 (Left hemicolectomy), which is classified by the GROUPER program as follows:

MDC 6 DRGs 148 and 149
MDC 10 DRGs 292 and 293
MDC 17 DRGs 400, 406, and 407
MDC 21 DRGs 442 and 443

9. Other Issues

a. Cochlear Implants. In the September 1, 1987 final notice on changes to the DRG classification system (52 FR 33143), we agreed to evaluate the placement of cochlear implant discharges in DRG 49 (Major Head and Neck Procedures). While cochlear implant cases may not be clinically coherent with other discharges assigned to DRG 49, the Medicare data do not indicate there would be a material difference in the weighting factors if a separate DRG were created for cochlear implants.

We examined the mean standardized charge for all cochlear implants and separately examined the mean standardized charges for single channel and multichannel implants. The mean standardized charge for all cochlear implants was approximately 10 percent less than the mean standardized charge for all other procedures in DRG 49. However, cochlear implant discharges only represent one percent of the total discharges in DRG 49. In addition to the very small number of cases, if we were to remove cochlear implants from DRG 49 to create a separate DRG, payment for cochlear implants would be less since the lower mean standardized charge would result in a lower relative weighting factor. Thus, we find no compelling reason to create a new DRG at this time.

b. Tissue Plasminogen Activator (TPA). We have received inquiries concerning whether HCFA has any plans to pay for tissue plasminogen activator (TPA), a thrombolytic agent used in treating blockages of coronary arteries, in a special manner. Those making inquiries assert that hospitals need to be shielded from the effects of TPA's high price.

We have considered this issue and the arguments presented. However, at this point, we have determined that TPA should not be singled out for special treatment. That is, we believe that the update factors established in section 1886(b)(3)(B)(i) of the Act, combined with continuing improvements in hospital efficiency, are adequate to finance appropriate care of Medicare patients.

Our belief is based on the fact that the annual prospective payment system update determined by Congress is meant to recognize, among other factors, the impact of new technologies. In addition, section 1886(d)(4)(C) of the Act requires that we recalibrate the DRG weighting factors each year. Thus, the resource use associated with TPA will be reflected in these weighting factors, once the charges for TPA that are included in the patient bills are incorporated into our data base. The recalibration process ensures the fair distribution of available Medicare funds across the DRGs.

Given the fact that the prospective payment system already takes into account the impact of new technologies, there is a question as to whether the circumstances involving TPA are so unique as to justify some special accommodation. We have concluded, as has ProPAC (see Appendix D of this proposed rule at 26), that a special accommodation for TPA would not be appropriate. Despite the drug's initial high price, preliminary evidence from at least one study indicates that there may be significant reductions in length of stay for patients with acute myocardial infarctions treated with TPA. Such reductions could help to offset the incremental costs of the drug, and may even result in cost savings. It is too early to know what the exact outcome of increased use of TPA will be.

There are additional reasons we are especially reluctant to make a special payment provision for this drug at this time. Our review of the issues, which included medical input, indicates that there is reason for caution about the widespread use of TPA. The contraindications and warnings associated with TPA include factors likely to be more prevalent in the Medicare population than in the general population. For example, almost fifty percent of Medicare beneficiaries admitted for an acute myocardial infarction in FY 1986 were 75 years or older, an age cohort for which physicians are cautioned to weigh the expected benefits of TPA against the risks. Other contraindications that are more common in the Medicare population than in the general population include uncontrolled hypertension and history of cerebrovascular accident or disease. In addition, it is not clear at this point that TPA, a thrombolytic agent, is significantly better than other such agents.

Given the uncertainties with respect to cost and medical appropriateness for large numbers of Medicare patients, we agree with ProPAC that TPA (or indeed any thrombolytic agent) should not be singled out as a special case requiring special treatment, and that "clinical data have not fully identified the short- and long-term relative benefits and risks of different agents." (Appendix D at 26.) We believe that the update factors provided for in the Act, as well as the annual recalibration process, provide sufficient recognition of TPA. We will, of course, continue to analyze the issue of the appropriate payment for thrombolytic agents by the Medicare program and will consider additional options in the future if necessary.

C. Recalibration of DRG Weights

One of the basic issues in recalibration is the choice of a data base that allows us to construct relative DRG weights that most accurately reflect current relative resource use. Since FY 1986, the DRG weights have been based on charge data. The latest recalibration, which was published as a part of the FY 1988 prospective payment final rule, used hospital charge information from the FY 1986 Medicare provider analysis and review (MEDPAR) file. For a discussion of the options we considered and the reasons we chose to use charge data beginning in FY 1986, we refer the reader to the rules published on June 10, 1985 (50 FR 24372) and September 3, 1985 (50 FR 35652).

We are proposing to use the same methodology for the FY 1989 recalibration as we did for FY 1988. That is, we would recalibrate the weights based on charge data for Medicare discharges. However, we would use the most current charge information available, the FY 1987 MEDPAR file, rather than the FY 1986 MEDPAR file. The MEDPAR file is based on fully-coded diagnostic and surgical procedure

data for all Medicare inpatient hosptial bills.

The proposed recalibrated DRG relative weights are constructed from FY 1987 MEDPAR data, received by HCFA through December 1987, from all hospitals subject to the prospective payment system and short-term acute care hospitals in waiver States. The MEDPAR file currently included data for approximately 9.5 million Medicare discharges.

The methodology used to calculate the proposed DRG weights from the MEDPAR file is as follows:

- All the claims were regrouped using the revised DRG classifications discussed above in section II.B. of this preamble.
- Charges were standardized to remove the effects of differences in area wage levels, indirect medical education costs, disproportionate share payments, and, for hospitals in Alaska and Hawaii, the applicable cost-of-living adjustment.
- The average standardized charge per DRG was calculated by summing the standardized charges for all cases in the DRG and dividing that amount by the number of cases classified in the DRG.
- We then eliminated statistical outliers using the same criterion as was used in computing the current weight. That is, all cases outside of 3.0 standard deviations from the mean of the log distribution of charges per case for each DRG were eliminated.
- The average charge for each DRG was then recomputed excluding the statistical outliers and divided by the national average standardized charge per case to determine the weighting factor.
- We established the weighting factor for heart transplants (DRG 103) in a manner consistent with the methodology for all other DRGs except that the heart transplant cases that were used to establish the weight were limited to those Medicare-approved heart transplant centers that have cases in the FY 1987 MEDPAR file.
- Kidney acquisition costs continue to be paid on a reasonable cost basis but, unlike other excluded costs, kidney acquisition costs are concentrated in a single DRG (DRG 302, Kidney Transplant). For this reason, it was necessary to make an adjustment to prevent the relative weight for DRG 302 from including the effect of kidney acquisition costs, since these costs are paid separately from the prospective payment rate. Kidney acquisition charges were subtracted from the total charges for each case involving a kidney transplant prior to computing the average charge for the DRG and prior to eliminating statistical outliers.
- Heart acquisition costs, like kidney acquisition costs, continue to be paid on a reasonable cost basis and are similarly concentrated in a single DRG (DRG 103, Heart Transplant). Accordingly, for the heart transplant cases in the updated MEDPAR file used for recalibration, we subtracted from the total charges of each case an estimate of heart acquisition charges prior to computing the average charge for the DRG and prior to eliminating statistical outliers, identical to the adjustment we make for removing kidney acquisition charges from cases in DRG 302. For additional information about the methodology for estimating heart acquisition costs, see the September 1, 1987 final rule at 52 FR 33037.

The weights developed according to the methodology described above, using the revised GROUPER program, result in an average case weight that is different from the average case weight before recalibration. Therefore, the new weights were normalized by an adjustment factor so that the average case weight after recalibration is equal to the average case weight prior to recalibration. This adjustment is intended to ensure that recalibration by itself neither increases nor decreases total payments under the prospective payment system.

When we recalibrated the DRG weights for FY 1986 and FY 1988, we set a threshold of 10 cases as the minimum number of cases required to compute a reasonable weight. In FY 1988, there were 32 DRGs that contained fewer than 10 cases. We propose to use that same case threshold in recalibrating the DRG weights for FY 1989. In the FY 1988 recalibration, we computed the weight for the 32 low-volume DRGs by adjusting the original weights of these DRGs by the percent change in the weight of the average case in the remaining DRGs. However, we note that normalization (discussed above) results in holding constant the weight for low-volume DRGs since the adjustment factor is the same as the percent change in the weight of the average case across all DRGs. We propose to use this same methodology for the FY 1989 recalibration. Using the FY 1987 MEDPAR data set, there are 35 DRGs that contain fewer than 10 cases.

ProPAC, in its Recommendation 15, has recommended that, starting with the FY 1989 recalibration, the DRG weights be recalibrated annually on the basis of costs rather than charges. However, ProPAC indicates concern about the current Medicare cost-finding methods for estimating costs because the limitations of the Medicare cost report data may in some cases produce imprecise DRG weights. Therefore, ProPAC recommends that the Secretary verify the accuracy of the cost report data and implement changes as necessary.

While time constraints preclude us from adopting ProPAC's recommendation for FY 1989, we believe that recalibration of the DRG weights using costs does warrant further consideration. We plan to examine the feasibility of developing cost-based DRG relative weights for FY 1990. However, as we have noted previously, we continue to believe that the disadvantages associated with charge-based weights are compensated for by the fact that for purposes of recalibration, charge data are available on a more timely basis than cost data. For example, for the proposed recalibrated weights for FY 1989, we used FY 1987 Medicare billing data from the MEDPAR file. However, we have yet to obtain a full file of FY 1986 Medicare cost reports. Thus, any cost data we were to use for recalibration would be at least one year and perhaps as much as two years older than the most recent available charge data.

In addition, since costs are not accumulated on an individual case basis, DRG by DRG, it is necessary even in developing cost-based weights to link ancillary charge data from the claims file to cost report data as part of the process of estimating the average costs of cases in each DRG. To maintain consistency and to accurately determine relative resource use, charge data for the same period as the cost data should be used in cost-based recalibration. Therefore, both the charge and cost data that would be used would be significantly older than the most recently available charge data.

We believe that using old data is inappropriate, particularly given the rapid advance in medical technology and resulting changes in treatment patterns. We further believe that it is in the best interest of the hospitals and Medicare beneficiaries that the resource use associated with these major new medical advances be reflected in the DRG weights as soon as possible. This can be accomplished by the use of charge-based weights computed on an annual recalibration schedule. We are concerned that use of cost-based weights would significantly delay recognition of new technologies or greatly complicate the recalibration process by necessitating a number of special adjustments to take such new technologies into account. Therefore, if we decided to adopt cost-based weights in the future, we believe it is essential

that we address the timeliness problem and take steps to ensure that changing technologies are reflected in the DRG relative weights on a timely basis.

III. Proposed Changes to the Hospital Wage Index

A. Background

Section 1886(d)(2)(C)(ii) of the Act required, as a part of the process of developing separate urban and rural standardized amounts for FY 1984, that we standardize the average cost per case of each hospital for differences in area wage levels. Section 1886(d)(2)(H) of the Act required that the standardized urban and rural amounts be adjusted for area variations in hospital wage levels as part of the methodology for determining prospective payments to hospitals for FY 1984. To fulfill both requirements, we constructed an index that reflects average hospital wages in each urban or rural area as a percentage of the national average hospital wage.

For purposes of determining the prospective payments to hospitals in FY 1984 and 1985, we constructed the wage index using calendar year 1981 hospital wage and employment data obtained from the Bureau of Labor Statistics' ES 202 Employment, Wages and Contributions file for hospital workers. Beginning with discharges occurring on or after May 1, 1986, we have been using a hospital wage index based on HCFA surveys of hospital wage and salary data as well as data on paid hours in hospitals. The HCFA hospital wage index was developed in an attempt to overcome the limitation of the BLS data with regard to full-time and part-time employment. The methodology used to compute the first HCFA wage index, which was based on 1982 wage data, was set forth in detail in the September 3, 1985 final rule (50 FR 35661).

In the September 1, 1987 final rule, we made a change in the methodology for computing the national average hourly wage, which serves as the basis for indexing the area wage levels (51 FR 33039). To minimize the impact on the national average hourly wage when the wage data for hospitals in an area are adjusted or when hospitals are reclassified from one area to another, we moved from an area-weighted national average hourly wage index to an hour-weighted wage index. That is, we now compute the national average hourly wage by dividing the total wages for all hospitals in the data base by the total paid hours for all hospitals in the data base.

In the September 1, 1987 final rule, we also updated the wage index by using wage data from 1984. However, we did not not base the new wage index solely on 1984 data. Because adoption of a wage index based solely on 1984 data would have resulted in abrupt, large changes in wage index values for some areas because of economic changes in certain areas that had occurred between 1982 and 1984, we adopted a blended wage index that incorporated both 1982 and 1984 wage data. The blended index was based on area wage index values computed from 1982 data on an hour-weighted basis and wage index values computed from 1984 data on an hour-weighted basis, equally weighted to produce average area wage index values.

Although we are not proposing to change the methodology for computing the wage index for use in FY 1989, we are proposing to base the wage index solely on 1984 wage data. We have also made a number of corrections to the 1984 wage data based on our continuing analysis of those data.

Section 4005(a) of Pub. L. 100–203 enacted a new section 1886(d)(8)(B) of the Act. Under this new provision, for discharges occurring on or after October 1, 1988, hospitals in certain rural counties adjacent to one or more Metropolitan Statistical Areas (MSAs) would be considered to be located in one of the adjacent MSAs if certain standards are met. (These requirements are explained in greater detail in section IV. of this preamble.) Because of this provision, it was necessary to reclassify the wage data for those rural areas as if the hospitals in those areas were located in the adjacent MSAs and to recompute the wage index values for the affected MSAs and rural areas. The table in section IV.A of this preamble indicates in which MSAs hospitals in certain rural counties would be considered to be located for purposes of the wage index adjustment. The wage index tables in section IV of the addendum reflect these revised urban and rural designations.

In accordance with the provisions of section 4004(b) of Pub. L. 100–203, effective October 1, 1988, we would include in the calculation of the wage index certain wage costs for organizations related to hospitals that had received a waiver authorized by section 602(k) of the Social Security Amendments of 1983 (Pub. L. 98–21). For cost reporting periods beginning before October 1, 1986, hospitals that qualified for this waiver were allowed to continue billing for inpatient nonphysician services under Part B and to be paid for those services under Part B even though all other hospitals subject to the prospective payment system were required to bill those inpatient nonphysician services under Part A.

The wage costs that would now be included in the calculation of the wage index would be those for employees of a related organization described above who are directly involved in the delivery and administration of care provided by the related organization to the inpatients of a hospital that received the waiver under section 602(k) of Pub. L. 98–21. Section 4004(b) of Pub. L. 100–203 specifies that these wage costs do not include costs of overhead or home office administrative salaries or any costs not incurred in the MSA in which the hospital is located. We are currently in the process of collecting the data to implement this provision and intend to include the data in the calculation of the wage index set forth in the final rule.

The method used to compute the proposed wage index is as follows:

Step 1—Each of the non-Federal acute care hospitals subject to the prospective payment system for which 1984 data have been received was classified into its appropriate urban or rural area based on the urban area definitions to be used in the prospective payment system in FY 1989.

Step 2—For each hospital, the total gross hospital salaries as reported for hospital fiscal years that began in FY 1984 were inflated from the end of the hospital's cost reporting year through August 31, 1985 using the percentage change in average hourly earnings of hospital industry workers (S.I.C. 806) in BLS Employment and Earnings Bulletin. This was done to eliminate any distortion in the data caused by differing hospital cost reporting years.

(August 31, 1985 was the latest end date for hospital cost reporting years in the data collection.)

Step 3—For each hospital, the inflated gross hospital salaries computed in step 2 were divided by the reported number of total paid hours to yield an average hourly wage. Hospitals with an aberrant average hourly wage, which was defined as an average hourly wage either less than $3.35 (the minimum wage in 1984) or greater than $23.61 (2½ times the national average hourly wage as computed from the data collection at the time the 1984 data were first used in computing a wage index), were excluded.

Step 4—Within each urban or rural area, the result computed in step 2 was summed for all remaining hospitals to yield the total gross hospital salaries in each area.

Step 5—The total gross hospital salary result computed in step 4 was divided

by the corresponding total number of paid hours in the area to yield an average hourly wage for each urban or rural area.

Step 6—The inflated gross hospital salaries computed in Step 2 for all hospitals not eliminated due to aberrant wage data were divided by the reported number of total paid hours in these hospitals to obtain the national average hourly hospital wage based on gross salaries. This national average is $9.76, which remains unchanged from the national average hourly wage used to calculate the wage index based on 1984 data for the September 1, 1987 final rule.

Step 7—For each urban or rural area, the hospital wage index value was calculated by dividing the average hourly wage computed in step 5 by the national average hourly wage.

IV. Other Decisions and Proposed Changes to the Regulations

A. Physician Attestation (Section 412.46)

Currently, § 412.46(a) requires that, as a part of DRG validation, the attending physician must, shortly before, at, or shortly after discharge (but before a claim is submitted), attest to the principal diagnosis, secondary diagnoses, and names of major procedures that have been performed. The information must be in writing in the medical record. Below the diagnostic and procedural information, and on the same page, the following statement must immediately precede the physician's signature:

> I certify that the narrative descriptions of the principal and secondary diagnoses and the major procedures performed are accurate and complete to the best of my knowledge.

In addition, when the claim is submitted, the hospital must have on file a current signed acknowledgement from the attending physician that the physician has received the following notice:

> NOTICE TO PHYSICIANS: Medicare payment to hospitals is based in part on each patient's principal and secondary diagnoses and the major procedures performed on the patient, as attested to by the patient's attending physician by virtue of his or her signature in the medical record. Anyone who misrepresents, falsifies, or conceals essential information required for payment of Federal funds, may be subject to fine, imprisonment, or civil penalty under applicable Federal laws.

The acknowledgement must have been completed within the year prior to the submission of the claim.

HCFA has received a number of requests from hospitals and hospital corporations for permission to install automated systems for executing physician attestations. These hospitals often already use automated systems to generate the list of diagnoses and procedures and the certification that the physician must sign; however, the physician must still personally sign the document. It cannot be electronically prepared and "signed" entirely by computer because the physician needs to be physically present to affix his or her signature to the hard copy. For example, with a fully automated system, a physician could record the appropriate information and attest to it from his home or office. Hospitals have asserted that the use of fully automated systems is critical for the efficient use of staff, including physician staff, prompt and accurate completion of medical records, and timely submission of claims.

We have reviewed materials submitted by various hospitals and have concluded that it would be acceptable for physician attestations to be completed electronically so long as the procedures a hospital establishes are sufficient to achieve the program objectives of the existing requirements. That is, the physician would personally execute the attestation by computer and the system would contain safeguards to ensure that the physician's identifier is confidential and to enable the physician to determine whether the attestation had been correctly recorded. The physician would be informed of the penalty for making false statements and for allowing others to complete the required attestations using his or her identifier.

Therefore, we would amend § 412.46(a) to provide that a physician attestation may, at the request of a hospital, be completed electronically if the intermediary determines that the hospital's system meets standards established by the Secretary.

Based on information received to date, we expect that two types of physician attestation systems would be approved. The first type involves the use of alpha/numeric identifiers for physicians. First, the physician would gain access to the hospital's records system by entering a physician-specific identification code. Then, the physician would enter diagnosis and procedure information onto a computer and affirm its accuracy.

The second type of physician attestation system involves the use of biometrics. The physician would attest to the diagnoses and the procedure information as discussed above but would gain access to the record system through a computer-assisted device that identifies the physician, for example, by reading his or her fingerprint.

In making this option for electronic signatures available, we anticipate requiring hospitals to take some additional safeguards to ensure that physicians making use of the option are aware of the attestations that have been made and that there is documentation in hard copy to support their attestations. In cases where an alpha-numeric code is used, we would expect a hospital to generate a periodic hard copy list of attestations made by the physician and send it to the physician for his or her signature as a means by which the physician can confirm that the appropriate diagnoses and procedures were reported. In the case of biometric equipment, we would expect the hospital to send the physician a copy of each attestation for his or her records so that there would be a document against which the hospital's reports could be judged.

We note that this option would not be a requirement for physicians. Instead, it is an alternative means of meeting the existing requirement at § 412.46(a). This alternative would be acceptable to us in cases where a hospital and its medical staff determine that they would prefer this alternative and request to use it. Therefore, this change in the regulations would not constitute a new Federal requirement.

We have also made a clarifying change in these regulations by explicitly stating that the physician attestation and acknowledgement be dated as well as signed. We have received a number of inquiries concerning whether the physician attestation must be dated. Since § 412.46(a) has always required that the attestation be provided "shortly before, at, or shortly after discharge (but before a claim is submitted)," it is clear that a date is needed to demonstrate compliance. We made this point in the preamble of the September 3, 1985 final rule (50 FR 35672); however, continued questions on the issue have indicated the need to clarify the language of the regulation. We would now explicitly state this requirement in § 412.46(a) to ensure that the attestation be signed and dated. We would also make a similar change in current § 412.46(b) (which we are redesignating as § 412.46(c)) to clarify that the physician acknowledgement must be signed and dated. Again, the date must be included to meet the existing requirement in that paragraph that the acknowledgement be completed "within the year prior to the submission of the claim."

B. Increase in the Prospective Payment Rates and Rate-of-Increase Limits (Sections 412.63, 412.73, 412.208, 412.210, and 413.40)

Section 4002(a) of Pub. L. 100–203 amended section 1886(b)(3)(B)(i) of the Act to provide that the applicable percentage increases for prospective payment hospitals for FY 1988 effective with discharges on or after April 1, 1988 are—

- 3.0 percentage points for hospitals located in rural areas;
- 1.5 percentage points for hospitals located in large urban areas; and
- 1.0 percentage points for hospitals located in other urban areas.

However, under 4002(g)(1)(B) of Pub. L. 100–203, for the purposes of determining the standardized amounts for discharges occurring on or after October 1, 1988 (for FY 1989), the applicable percentage increases effective April 1, 1988 are deemed to have been in effect for the entire FY 1988.

Amended section 1886(b)(3)(B)(i) of the Act also sets forth the applicable percentage increases for FY 1989 as—

- The market basket percentage increase minus 1.5 percentage points for hospitals located in rural areas;
- The market basket percentage increase minus 2.0 percentage points for hospitals in large urban areas; and
- The market basket percentage increase minus 2.5 percentage points for hospitals in other urban areas.

In addition, the applicable percentage increase for FY 1990 and each subsequent fiscal year for hospitals in all areas is the market basket percentage increase.

Section 1886(b)(3)(B) of the Act also governs the target rate-of-increase limits for hospitals and units excluded from the prospective payment system. Section 4002(e) of Pub. L. 100–203 amended section 1886(b)(3)(B)(ii) of the Act to provide that the applicable percentage increase for FY 1988 for these hospitals and units is the market basket percentage increase minus 2.0 percentage points. However, section 4002(g)(3) of Pub. L. 100–203 provided that for a hospital's cost reporting period beginning during FY 1988, payment is made as though the applicable percentage increase equals 2.7 percent times the ratio of 315 to 366. This results in an actual applicable percentage increase for FY 1988 of 2.328 percent. However, for purposes of updating the target rate-of-increase limits for FY 1989, the applicable percentage increase for FY 1988 is deemed to have been 2.7 percent for the entire period.

Section 4002(e) of Pub. L. 100–203 amended section 1886(b)(3)(B)(ii) of the Act to provide that for FY 1989 and subsequent fiscal years the applicable percentage increase for excluded hospitals and units is the market basket percentage increase.

The percentage increases applicable in FY 1988 to hospitals both included in and excluded from the prospective payment system were described in the April 5, 1988 notice at 53 FR 11135. As a part of this proposed rule, we would amend §§ 412.63, 412.73, 412.210 and 413.40 to implement the provisions of section 1886(b)(3)(B) (i) and (ii) of the Act. A conforming change would be made to § 412.212(b).

We are also proposing to revise §§ 412.62(k), 412.63(k) (currently § 412.63(j)), 412.208(i), and 412.210(c)) to clarify in the regulations that when we refer to "geographic areas" in the context of adjusting the rates for different area wage levels, we mean urban and rural areas.

C. Changes in Geographic Classification (Sections 412.63, 412.208, and 412.210)

Prior to the enactment of Pub. L. 100–203, section 1886(d)(2)(D) of the Act required the Secretary to compute separate average standardized amounts for hospitals located in urban and rural areas. The term "urban area" is defined as an area within a Metropolitan Statistical Area (MSA). Urban areas in New England are defined as New England County Metropolitan Areas (NECMAs).) However, under section 601(g) of Pub. L. 98–21, certain nonurban New England counties were deemed to be parts of urban areas. For purposes of the prospective payment system, we have treated those counties as part of the NECMAs of which they were a part in 1979. The only other exception to the strict use of MSA and NECMA definitions in identifying urban areas has been for a rural county that qualifies for reclassification into an MSA under § 412.63(b)(3). In these two instances, the population of the rural counties deemed to be urban is included in calculating the population of the MSA or NECMA to which the county has been appended for Medicare prospective payment purposes.

1. Establishment of Large Urban Areas

Section 4002(c)(1) of Pub. L. 100–203 amended section 1886(d)(3) of the Act to require the Secretary to compute three average standardized amounts for discharges occurring in a fiscal year beginning on or after October 1, 1987: One for hospitals located in rural areas; one for hospitals located in large urban areas; and one for hospitals located in other urban areas. Section 4002(b) of Pub. L. 100–203 amended section 1886(d)(2)(D) of the Act to define a "large urban area" as an urban area with a population of more than 1,000,000. In addition, section 4009(i) of Pub. L. 100–203 provides that an NECMA with a population of more than 970,000 is classified as a large urban area. As required by section 1886(d)(2)(D) of the Act, population size is determined by the Secretary based on the latest population data published by the Bureau of the Census. Under that section as now amended, urban areas that do not meet the criteria for large urban areas are referred to as "other urban areas."

Based on 1986 population estimates published by the Bureau of the Census, we identified 46 urban areas that meet the criteria to be defined as large urban areas for FY 1988. A list of these areas was set forth in the April 5, 1988 notice at 53 FR 11138. We are proposing no change in these areas for purposes of this proposed rule. If new population estimates are published by the Bureau of the Census before we publish the final rule, we would include any resulting additions to and deletions from the list of large urban areas in that rule.

As part of this proposed rule, we would amend §§ 412.63 and 412.210 to implement the provision of 1886(d)(3) of the Act. In addition, in Table 4a in section VI of the addendum to this proposed rule, which sets forth the wage index values for urban areas, we have specifically designated those urban areas that qualify as large urban areas for the convenience of the reader.

2. Revision of Standards for Including a Hospital Located in a Rural County in an Urban Area

Section 4005(a) of Pub. L. 100–203 revised 1886(d)(8) of the Act to provide that, if certain conditions are met, the Secretary would treat a hospital located in a rural county adjacent to one or more urban areas as being located in the urban area to which the greatest number of workers in the county commute. As specified in section 1886(d)(8)(B) of the Act, the conditions that must be met for a hospital located in a rural county adjacent to one or more urban areas to be treated as being located in the urban area to which the greatest number of workers commute are as follows:

- The rural county would otherwise be considered part of an MSA but for the fact that the rural county does not meet the standard established by the Executive Office of Management and Budget (EOMB) relating to the commuting rate of workers between the

county and the central county or counties of any adjacent MSA.

• The rural county meets one of the following commuting standards:

—At least 15 percent of the residents of the rural county who are employed commute to the central county or counties of all adjacent urban areas.

—The sum of the number of resident of the rural county who commute to the central county or counties of all adjacent urban areas and the number of residents of all adjacent urban areas who commute to the rural county equals at least 20 percent of the number of employed residents of the rural county.

A county meeting the above commuting standards must also meet the other standards established by EOMB for inclusion in an MSA as an outlying county. In order to meet these requirements, the rural county must have a degree of "metropolitan character." "Metropolitan character" is established by meeting one of the following EOMB standards, which were published in the **Federal Register** on January 3, 1980 (45 FR 956):

• At least 50 percent of the employed workers residing in the county commute to the central county or counties and the population density is at least 25 persons per square mile.

• From 40 percent to 50 percent of the employed workers residing in the county commute to the central county or counties and the population density is at least 35 persons per square mile.

• From 25 percent to 40 percent of the employed workers residing in the county commute to the central county or counties and the population density is at least 35 persons per square mile. In addition, the county meets at least one of the following conditions:

—The county has a population density of at least 50 persons per square mile.

—At least 35 percent of the population in the county is classified as urban by the Bureau of the Census.

—At least 10 percent of the population or at least 5,000 persons live within the urbanized area of the central county.

• From 15 percent to 25 percent of the employed workers residing in the county commute to the central county or counties and the county has a population density of at least 50 persons per square mile. In addition, the county meets at least two of the following conditions:

—The county has a population density of at least 60 persons per square mile.

—At least 35 percent of the population in the county is classified as urban by the Bureau of the Census.

—Between 1970 and 1980, the population must have increased by at least 20 percent.

—At least 10 percent of the population or at least 5,000 persons live within the urbanized area of the central county.

• The sum of the employed workers commuting from the outlying county to the central county or counties and the employed workers commuting from the central county or counties to the outlying county is at least 20 percent of the employed workers living in the outlying county, and the outlying county has a population density of at least 50 persons per square mile. In addition, the county meets at least two of the following conditions:

—The county has a population density of at least 60 persons per square mile.

—At least 35 percent of the population in the county is classified as urban by the Bureau of the Census.

—Between 1970 and 1980, the population must have increased by at least 20 percent.

—At least 10 percent of the population or at least 5,000 persons live within the urbanized area of the central county.

The determination as to whether a county qualifies for inclusion in an MSA is made based on data from the Bureau of the Census.

In determining the total commuting percentage for a county, we rounded the number to two decimal places to determine which commuting category would apply to the county. For example, a county with total commuting to adjacent MSAs of 39.99 percent would fall into the 25 percent to 40 percent commuting category. This number (39.99 percent) would not be rounded up to 40 percent. This is consistent with the rounding policy used by EOMB in making its MSA determinations. The rural counties that would be considered as part of MSAs solely for the purpose of treating hospitals in those counties as being located in an adjacent urban area are shown in the table below.

For purposes of payment under the prospective payment system, a hospital located in a rural county that qualifies under this provision would be deemed to be located in the MSA to which the greatest number of workers in the rural county commute. The area wage indexes would be recomputed to reflect the reclassification of these counties as urban and, consequently, part of the urban wage area.

Section 1886(d)(8)(B)(i) of the Act as added by section 4005(a) of Pub. L. 100–203 applies to a rural county adjacent to one or more urban areas that "would otherwise be considered part of an urban area but for the fact that the rural county does not meet the standard relating to the rate of commutation * * *." Section 1886(d)(8)(B)(ii) of the Act as added by section 4005(a) of Pub. L. 100–203 provides an alternative commuting standard under which total commuting to all adjacent urban areas may be counted in determining whether a rural county meets the commutation standard.

We note that in determining whether a county meets the criteria for being designated an outlying county of an MSA that were published in the January 3, 1980 **Federal Register** notice (and summarized in this document, above), EOMB first determines the county's commuting rate to the central county or counties of individual MSAs and then determines, based on that rate, which additional criteria the county must meet for MSA status. Thus, for example, if a county's commuting rate is less than 15 percent to the central county or counties or the sum of the employed workers commuting from the outlying county to the central county or counties and the employed workers commuting from the central county or counties to the outlying county is at least 20 percent of the employed workers living in the outlying county, the county cannot qualify for MSA status under any criteria. If the commutation rate is from 15 percent to 25 percent, the county must meet at least two out of the following four additional criteria: A population density of at least 60 persons per square mile; at least 35 percent of the population is classified as urban; 1970–1980 population growth of at least 20 percent; and a significant portion of the population lives within the urbanized area of the central county.

Since the purpose of amended section 1886(d)(8) of the Act is to recognize all other criteria for MSA designations except for the alternative commuting standard, we followed the EOMB and Bureau of the Census procedures for evaluating urban status. That is, we first determined which rural counties adjacent to one or more urban areas would meet the alternative standard specified in section 1886(d)(B)(ii) of the Act, and then evaluated whether each of the counties that meet the alternative standard also meet the required additional criteria applicable to the rural county's level of commuting.

On the basis of our evaluation of census data, we have determined that hospitals located in a rural county in the first column of the following table are considered to be located in the

corresponding urban area in the second column.

Rural County	MSA
Marshall, AL	Huntsville, AL
Charlotte, FL	Sarasota, FL
Indian River, FL	Fort Pierce, FL
Christian, IL	Springfield, IL
Macoupin, IL	St. Louis, MO-IL
Mason, IL	Peoria, IL
Clinton, IN	Lafayette, IN
Henry, IN	Anderson, IN
Owen, IN	Bloomington, IN
Jefferson, KS	Topeka, KS
Allegan, MI	Grand Rapids, MI
Barry, MI	Battle Creek, MI
Cass, MI	Benton Harbor, MI
Ionia, MI	Lansing-East Lansing, MI
Lenawee, MI	Ann Arbor, MI
Shiawassee, MI	Flint, MI
Tuscola, MI	Saginaw-Bay City-Midland, MI
Van Buren, MI	Kalamazoo, MI
Clinton, MO	Kansas City, KS-MO
Cass, NE	Omaha, NE
Caswell, NC	Danville, VA
Currituck, NC	Norfolk-Virginia Beach-Newport News, VA
Harnett, NC	Fayetteville, NC
Genesee, NY	Rochester, NY
Columbiana, OH	Beaver County, PA
Morrow, OH	Mansfield, OH
Preble, OH	Dayton-Springfield, OH
Van Wert, OH	Lima, OH
Lawrence, PA	Beaver County, PA
Cherokee, SC	Greenville-Spartanburg, SC
Bedford, VA	Roanoke, VA
Isle of Wight, VA	Norfolk-Virginia Beach-Newport News, VA
Spotsylvania, VA	Washington, DC-MD-VA
Jefferson, WI	Milwaukee, WI
Walworth, WI	Milwaukee, WI
Jefferson, WV	Washington, DC-MD-VA
Lincoln, WV	Charleston, WV

Section 1886(d)(8)(C) of the Act requires that the effect of this provision be budget neutral; that is, a proportional adjustment to the standardized amount for urban hospitals would be made to ensure that total aggregate payments systemwide would be neither greater nor less than aggregate payments to the same hospitals absent this provision. In addition, section 1886(d)(8)(C) of the Act requires that aggregate payments to those rural hospitals not affected by this provision would remain constant. Thus, appropriate adjustments to the standardized amounts set forth in Tables 1a, 1b, and 1c in section IV of the addendum to this proposed rule have been made to reflect the budget neutrality requirement. For a discussion of this adjustment, see section II.A.5.b. of the addendum to this proposed rule.

In the conference report that accompanied Pub. L. 100–203, Congress specified "that the effect of this provision shall be limited to the treatment, for payment purposes, of the hospitals located in qualifying rural counties; the boundaries and population size of the adjacent urban areas shall not be altered." (H.R. Rep. No. 495, 100th Cong., 1st Sess. 532 (1987).) Accordingly, even though a hospital located in a qualifying rural county would be deemed a part of an adjacent MSA for payment purposes, the population of that county would not be included in the MSA for purposes of determining whether the MSA is a large urban area (that is, an MSA with a population of at least 1,000,000 or an NECMA with a population of at least 970,000).

As noted above, other than those exceptions required by law, we have made only one exception to the strict use of MSA and NECMA definitions in identifying urban areas. Under current § 412.63(b)(3), a hospital classified as rural is deemed to be urban and receives the urban Federal payment amount if the county in which it is located meets the following criteria:

- At least 95 percent of the perimeter of the rural county is contiguous with urban counties.
- The county was reclassified from an urban area to a rural area after April 20, 1983.
- At least 15 percent of employed workers in the county commute to the central county of one of the adjacent MSAs or NECMAs.

This provision was added to the regulations by the September 3, 1986 final rule (51 FR 31469) under the Secretary's authority pursuant to section 1886(d)(5)(C)(iii) of the Act "* * * to provide by regulation for such other exceptions and adjustments * * * as the Secretary deems appropriate * * *."

Since implementation of this exception, only one hospital in one county (Shiawassee, MI) has qualified under this provision. Because this hospital would be deemed to be in an urban area under the new statutory requirements in section 1886(d)(8)(B) of the Act, we believe there is no reason to retain our special exception as set forth in current § 412.63(b)(3). Therefore, we would eliminate that provision under the Secretary's authority in section 1886(d)(5)(C)(iii) of the Act "* * * to provide by regulation for such other exceptions and adjustments * * * as the Secretary deems appropriate* * * *." That is, this special rule, which was authorized by the Secretary, would no longer be deemed appropriate because it has been effectively included in a statutory requirement.

3. Multicampus Hospitals

Some hospitals receiving payment under the prospective payment system are multicampus hospitals; that is, they consist of two or more separately located inpatient hospital facilities. We have received inquiries concerning how we determine the prospective payment rate for these hospitals when the various individual hospital facilities are located in areas with different prospective payment rates or wage indexes.

Section 1886(c)(3)(D) of the Act as amended by section 4002(c)(1)(D) of Pub. L. 100–203 provides that prospective payment rates are established "for hospitals located * * * in a large urban area or other urban area * * * " and "for hospitals located in a rural area * * * ." That is, the prospective payment rate is based on the geographic location of the hospital at which the discharge occurs rather than on any other location, such as, for example, the location of the headquarters of the multicampus facility that owns and operates the various individual hospital facilities, or the location of the main hospital facility. Therefore, we would amend § 412.63 to provide that a multicampus hospital that qualifies as a single provider must be paid prospective payment rates that are determined by the geographic location of each individual hospital facility within the multicampus hospital.

D. Establishment of a Regional Floor (Section 412.70)

Section 4002(d) of Pub. L. 100–203 amended section 1886(d)(1)(A)(iii) of the Act to establish a "regional floor" for the prospective payment rate applicable to a hospital. In accordance with this section, hospitals' payments are based on the greater of the national average standardized amount or the sum of 85 percent of the national average standardized amount and 15 percent of the average standardized amount for the Census region in which they are located. This provision is effective for discharges occurring on or after April 1, 1988 and before October 1, 1990 and was described in the April 5, 1988 notice at 53 FR 11134.

In implementing this provision and determining which regions qualify for the regional floor, we compared the total of the labor-related and non-labor-related portions of each standardized amount in each region with the total of the labor-related and non-labor-related portions of the national standardized amount. In structuring the comparison in this way, we are following the explication of this provision contained in the Conference Committee Report accompanying Pub. L. 100–203 (H.R. Rep. No. 495, 100th Cong., 1st Sess. 525 (1987)).

Based on the updated payment rates published in the April 5, 1988 notice, we determined that for discharges occurring on or after April 1, 1988 and before October 1, 1988, rural hospitals in

Census regions I, II, III, and IV and hospitals in large urban areas and other urban areas in Census regions I and IV will receive greater payments using the national/regional blend than the national average standardized amount. Therefore, for discharges occurring on or after April 1, 1988 and before October 1, 1988, the Federal portion of the payment for these hospitals is comprised of 85 percent of the national average standardized amount and 15 percent of the applicable regional average standardized amount rather than 100 percent of the national average standardized amount.

Based on the updated payment rates proposed in this notice, we have determined that there is no change to the areas for which the regional floor is applicable. That is, for discharges occurring on or after October 1, 1988 and before October 1, 1989, rural hospitals in regions I, II, III, and IV and hospitals in large urban areas and other urban areas in regions I and IV would receive greater payments using the national/regional blend than the national average standardized amount. Therefore, for discharges occurring on or after October 1, 1988 and before October 1, 1989, the Federal portion of the payment for these hospitals would be comprised of 85 percent of the national average standardized amount and 15 percent of the applicable regional average standardized amount rather than 100 percent of the national average standardized amount.

As part of this proposed rule, we would amend § 412.70 to implement the provisions of section 1886(d)(1)(A)(iii) of the Act.

E. Payment for Outlier Cases (Sections 412.82 and 412.84)

Section 1886(d)(5)(A) of the Act requires that, in addition to the basic prospective payment rates, payments must be made to hospitals for atypical cases known as "outliers". These are cases that have either an extremely long length of stay or extraordinarily high costs when compared to the other discharges classified in the same DRG.

Section 1886(d)(5)(A)(iii) of the Act specifies that the outlier payments should approximate the marginal cost of care beyond the outlier threshold. In the September 1, 1983 interim final rule, we established the ratio of marginal cost to average cost at 60 percent (48 FR 39776). Therefore, the regulations (§§ 412.82 and 412.84) currently provide that the payment for outlier cases is based on a 60 percent marginal cost factor.

For day outliers, an additional per diem payment is made for each covered day of care beyond the length of stay threshold. The per diem payment is equal to 60 percent of the average per diem Federal rate for the DRG, which is calculated by dividing the wage-adjusted Federal rate for the DRG by the geometric mean length of stay for the DRG. This amount is multiplied by the applicable Federal blend percentage. After the end of the transition period, the Federal portion is 100 percent of the payment rate except for sole community hospitals, which continue to receive payment equal to 75 percent of the hospital-specific portion and 25 percent of the Federal regional portion.

For cost outliers, the additional payment is equal to 60 percent of the difference between the hospital's charges for the discharge, adjusted to cost, and the cost threshold. We currently determine the cost of the discharge to be equal to 66 percent of the billed charges for covered services based on the average ratio of operating costs to charges for Medicare discharges nationwide. The resulting cost estimate is further adjusted to exclude an estimate of indirect medical education costs and payments to hospitals that serve a disproportionate share of low-income patients. As with day outliers, the resulting amount is then multiplied by the applicable Federal blend percentage.

Our analysis indicates that while our payment policy for outliers effectively reduces the risk faced by hospitals in treating cases that are outside the normal range of cases in terms of duration or costliness, additional compensation would be justified for the most expensive cases, particularly those long-stay cases with extremely high costs. On the other hand, some cases that currently qualify for additional payment as day outliers are not extraordinarily costly.

In the June 10, 1987 proposed rule (at 52 FR 22089), we proposed to make two changes to the outlier regulations in order to more adequately compensate hospitals for outlier cases. First, we proposed that a marginal cost factor of 80 percent be applied to the most expensive outlier cases (that is, all outlier cases exceeding the cost threshold). Thus, outlier payment for these cases would be equal to 80 percent of the difference between the adjusted charges for the case and the cost threshold. Second, we proposed that outlier payment for cases with lengths of stay exceeding the day threshold and adjusted charges exceeding the cost threshold also be equal to 80 percent of the difference between the adjusted charges for the case and the cost threshold.

In the September 1, 1987 final rule (52 FR 33048), we discussed the public comments received in response to the proposed changes in the payment policy for outlier cases and our decision to delay implementation of any changes to that policy. While most commenters supported an outlier policy that pays a higher fraction of outlier payments for extremely costly cases, many were concerned about the impact of the proposed changes and recommended that changes in the outlier policy be delayed until further study could be completed. The areas of particular concern were the continued use of a national average cost-to-charge ratio to pay cost outliers and the negative impact of the proposed outlier policy on certain groups of hospitals, such as teaching and small rural hospitals.

Given the concerns expressed by commenters, we decided to delay implementation of any changes to the outlier payment policy. We continued our research on the impact of using a national cost-to-charge ratio in computing cost outlier payments. In addition, in our ongoing analyses of outlier payments, we have investigated numerous options for changing the way that outlier cases are defined and outlier payment is determined. We have developed a proposed outlier policy that we believe would reduce the risks to hospitals for the most expensive cases. Given the number of changes we are proposing and their intended effects, we are particularly interested in soliciting comments on our proposed outlier policy and the degree to which specific features of it are likely to reduce financial risk associated with extremely atypical cases. We are proposing the following changes to the outlier policy to be effective for discharges on or after October 1, 1988. We would amend §§ 412.82 and 412.84 and add a new § 412.86 to implement these changes.

1. Marginal Cost Factor for Cost Outliers

We are proposing to pay cost outlier cases at a marginal cost factor of 80 percent of adjusted charges beyond the cost outlier threshold (except for burn outlier cases, which are being paid using a marginal cost factor of 90 percent for discharges occurring on or after April 1, 1988 and before October 1, 1989, as explained below).

We previously proposed this change in the June 10, 1987 proposed rule (52 FR 22090) as part of our earlier proposal to revise outlier payment policy. As indicated at that time, our research has shown that a higher marginal cost factor for cost outliers would result in more appropriate outlier payments for

atypically expensive cases. In particular, we have found that the estimated loss per case is higher for cost outliers than for day outliers. This finding leads us to conclude that the current marginal cost factor of 60 percent is too low for cost outliers. Further, we have found that increasing the marginal cost factor for cost outlier effectively targets a higher proportion of outlier payments to the most costly cases, thus reducing the financial risk faced by hospitals under the prospective payment system. Since the reduction of this risk is one of the major objectives of outlier payment, a higher marginal cost factor for cost outliers is strongly supported by these findings.

Accordingly, for discharges occurring on or after October 1, 1988, we are proposing to set the marginal cost factor for cost outlier cases at 80 percent of adjusted charges beyond the cost outlier threshold. Based on our research to date, we believe that this revised marginal cost factor would result in more accurate payment for the marginal cost of cost outliers and more adequate compensation to hospitals treating the most costly outlier cases.

2. Higher of Day or Cost Outlier Payment

In addition, for those day outlier cases that have adjusted charges exceeding the cost threshold, we propose to make outlier payment equal to the greater of 60 percent of the per diem Federal rate for each day beyond the length of stay threshold or 80 percent of the difference between adjusted charges and the cost threshold.

We currently pay even the most expensive day outliers at a per diem amount that is based on the average payment for all discharges assigned to that DRG. For some of the cases that currently qualify as day outliers, the per diem rate paid does not adequately compensate the hospital for its marginal costs. This is especially true for day outlier cases with extremely high costs, for which the daily costs may vastly exceed the day outlier per diem and for which that daily difference is multiplied by a long length of stay. Indeed, when day outliers are separated into two categories—those exceeding the length of stay threshold but not the cost threshold, and those exceeding both thresholds—the estimated loss per case for the most expensive day outliers (those also exceeding the cost threshold) substantially exceeds that for the less expensive day outliers (those that do not exceed the cost threshold).

In order to rectify this situation, we are proposing that for the most expensive day outlier cases (that is, those that also meet the cost outlier criterion) we would pay the case an amount equal to 80 percent of adjusted charges beyond the cost outlier threshold, if that amount exceeds the amount that would be paid using the day outlier methodology, on the grounds that the marginal cost for these cases appears to exceed the per diem Federal rate that they are currently paid.

We had previously recommended using the cost outlier payment methodology for all cases that exceeded both the length of stay and the cost thresholds. However, this could result in reduced outlier payments for cases that barely "cross" the cost threshold after exceeding the length of stay threshold by a large margin. We believe that adjusted charges are a more accurate indicator of exceptional cost than is length of stay; however, in light of the response to our proposal last year, we believe, pending conclusive results and evidence on the behavioral response to the other changes that we have proposed, that it would be more appropriate to shift gradually toward reliance on adjusted charges as the measure of atypicality. Consequently, so as not to reduce payments to day outlier cases as they cross the cost threshold, we are proposing to pay for any case that qualifies as both a day and a cost outlier according to the methodology that results in the higher outlier payment for the case.

3. Hospital-Specific Cost-to-Charge Ratios

We are proposing to use hospital-specific cost-to-charge ratios to adjust charges for the purpose of computing cost outlier payments. The use of hospital-specific cost-to-charge ratios should greatly enhance the accuracy with which outlier cases are identified and outlier payments are computed, since there is wide variation among hospitals in these cost-to-charge ratios. Also, as indicated in the September 1, 1987 final rule (52 FR 33048), our preliminary studies concerning the use of a national cost-to-charge ratio for computing cost outlier payments suggest that, in general, the types of hospitals that have high profits per case under the basic rates have lower cost-to-charge ratios than do the types of hospitals that have lower profits per case under the basic rates. This means that use of the national cost-to-charge ratio to compute cost outlier payments results in a transfer of payments to hospitals that are doing well from hospitals that are doing less well. The magnitude of this effect has been limited to date because cost outliers have accounted for only 15 to 20 percent of all outlier payments and because outlier payments have only been made on the Federal portion of payments. However, as noted by many of the commenters on last year's proposal, the increased emphasis on cost in computing outlier payments heightens the need to use reasonably reliable factors to estimate costs from charges. Therefore, we believe the use of hospital-specific cost-to-charge ratios is essential to ensure that outlier payments are made for cases that have extraordinarily high costs, and not merely high charges.

Because of a number of administrative and data problems, we were not able to implement hospital-specific cost-to-charge ratios for FY 1988. However, we have resolved these problems and believe we currently have the capability to accurately compute hospital-specific cost-to-charge ratios both for payment purposes and for estimating outlier payments in order to establish thresholds.

A cost-to-charge ratio would be computed for each hospital by the intermediary using cost data from the hospital's latest settled cost report and charge data for the same period from the billing file maintained by the intermediary. The intermediary would compute the hospital-specific cost-to-charge ratios based on the ratio that follows:

$$\frac{\text{Medicare Operating Cost (from cost report)}}{\text{Medicare Covered Charge (from billing file)}}$$

For hospitals that have not yet filed their first Medicare cost report with their fiscal intermediary or for which the intermediary is unable to compute a reasonable cost-to-charge ratio, we computed statewide average cost-to-charge ratios for urban hospitals and for rural hospitals, which appear in Table 8 of section IV of the addendum to this proposed rule. These average ratios would be used to calculate cost outlier payments for those hospitals for which the intermediary computes cost-to-charge ratios lower than 0.36 or greater than 1.24. This range represents 3.0 standard deviations (plus or minus) from the mean of the log distribution of cost-to-charge ratios for all hospitals (0.67). We believe that ratios falling outside this range are unreasonable, in that they are probably due to faulty data reporting or entry, and should not be used to identify and pay for cost outliers.

Hospital-specific cost-to-charge ratios would be computed annually before the beginning of each Federal fiscal year, based on each hospital's latest settled cost report. The intermediary would enter the appropriate ratio for each hospital into the PRICER program used

by the intermediary to calculate payments and would be used for discharges occurring during that Federal fiscal year. We intend to issue to intermediaries more specific instructions for computing and applying hospital-specific cost-to-charge ratios.

We would continue our policy that cost outlier payments would be final and not subject to recalculation based on later data that would affect the hospital-specific cost-to-charge ratios, indirect medical education adjustment factors, or disproportionate share adjustment factors. This policy was first set forth in the September 1, 1983 final rule (48 FR 39779) and at that time codified at § 405.454(m)(5). This section was subsequently redesignated as § 413.64(k)(1)(ii) in a final rule with comment period published on September 30, 1986 (51 FR 34790). However, in a final rule with comment period published on January 21, 1988 (53 FR 1621), when this section was further redesignated as § 412.116(e), we inadvertently deleted from that section the sentence that specified that outlier payments are based on submitted bills and represent final payment. As a part of this proposed rule, we are correcting that paragraph to include the deleted sentence.

4. Outlier Thresholds and Size of the Outlier Pool

As explained above, section 1886(d)(5)(A) of the Act requires that, in addition to the basic prospective payment rates, payments must be made for discharges involving day outliers and may be made for cost outliers. Section 1886(d)(3)(B) of the Act correspondingly requires that the standardized amounts be reduced by the proportion of estimated total DRG payments attributable to estimated outlier payments. Furthermore, section 1886(d)(5)(A)(iv) of the Act directs that outlier payments may not be less than five percent nor more than six percent of total payments projected to be made based on the prospective payment rates in any year.

In the September 1, 1987 final rule, we set the outlier thresholds so as to result in estimated outlier payments equal to five percent of total prospective payments (that is, estimated outlier payments plus regular prospective payments per discharge, excluding indirect medical education payments and disproportionate share hospital payments) for FY 1988 (52 FR 33065). These same thresholds were estimated to result in outlier payments of 5.1 percent of total DRG payments based on the rates as updated for discharges occurring on or after April 1, 1988 and adjusted to reflect the use of a 90 percent marginal cost factor for burn-related outliers. The urban and rural outlier offsets averaged out to produce this 5.1 percent outlier "pool".

Section 1886(d)(3)(B) of the Act requires that, effective with discharges occurring on or after October 1, 1986, each national and regional standardized amount be reduced for hospitals located in urban areas and for hospitals located in rural areas based on the estimated proportion of total DRG payments attributable to outlier payments for hospitals in urban areas and for hospitals in rural areas, respectively. Consequently, instead of the uniform five percent reduction factor applying equally to all the standardized amounts, there are now two separate reduction factors, one applicable to the urban national and regional standardized amounts and the other applicable to the rural national and regional standardized amounts. Rates for urban hospitals, which are projected to receive outlier payments in excess of five percent of total DRG payments, are reduced by that larger percentage (instead of by five percent). Rates for rural hospitals, which are projected to receive outlier payments of less than five percent of total DRG payments, are reduced by the lower percentage (instead of by five percent).

Under section 1886(d)(5)(A)(iv) of the Act, we are proposing to continue to set the outlier thresholds so as to result in estimated outlier payments equal to five percent of total prospective payments. This requires, for FY 1989, that the day outlier threshold be set at the lesser of 24 days or 3.0 standard deviations and the cost outlier threshold at the greater of 2.0 times the prospective payment rate for the DRG or $27,000. These thresholds would result in estimated outlier payments equaling five percent of total prospective payments.

While similar to ProPAC's recommendation that thresholds be adjusted so that 40 to 50 percent of outlier payments would be paid as cost outliers, the proposed thresholds would result in a somewhat greater emphasis on the cost outlier methodology, accounting for 60 percent of outlier payments. (The previous payment split was approximately 85 percent day outliers and 15 percent cost outliers.) This shift is consistent, however, with ProPAC's recommendation that there be greater emphasis on cost rather than length of stay as a criterion for paying for outliers, and is also reflective of an 80 percent marginal cost factor for cost outliers, rather than the 60 percent factor used by ProPAC. Also, in view of the fact that, compared to current thresholds, the increase in the proposed cost threshold is already triple the increase in the proposed day threshold, we decided not to raise the cost threshold further as would have been necessary to hold to 50 percent the proportion of outlier payments made on the basis of the cost methodology.

Our overriding goal in modifying outlier payment policy is to afford hospitals better financial protection against the risks of extremely costly cases. Based on our research findings that adjusted charges are a better measure of costliness than length of stay, paying all outlier cases exceeding the cost threshold using the cost outlier methodology would be the simplest way to achieve that goal.

In light of the reaction to our proposal to implement such a policy last year, however, we decided a more gradual shift toward use of the cost outlier methodology was in order, so as to avoid the occurrence of cases in which there are sharp reductions in payments for day outlier cases as their costs barely exceed the cost threshold. This "notch effect," which also occurs under the current policy when extremely expensive cases cross the length of stay threshold, is perceived as unfair and may create undersirable incentives for hospitals treating these cases. Hence, we are proposing to pay day outliers exceeding the cost threshold on the basis of the methodology that generates the higher payment. However, this policy would result in higher payment for many outlier cases (those for which payments using the cost outlier methodology are lower than payments using the day outlier methodology), and thus requires that the thresholds be increased beyond those that would have been set under either a continuation of the current policy or a policy of paying expensive day outliers (those whose costs exceed the cost outlier threshold) using the cost outlier methodology, as proposed last year.

The substantial increases in both the day and the cost outlier thresholds stem not only from the combined effects of all the proposed changes to outlier payment policy set forth above, but also from continued slight increases in the Medicare length of stay and hospital charge increases in excess of the hospital market basket increase. Based on the most recent billing data available (FY 1987 MEDPAR), we now estimate that the current outlier thresholds may result in outlier payments equal to almost 5.5 percent of total DRG payments. This result suggests that the current outlier thresholds are too low.

We note, consequently, that even if we were proposing not to modify outlier payment policy but only to update the day and cost thresholds based on the FY 1987 MEDPAR data and on updated national cost-to-charge ratio of 0.63, the revised thresholds for FY 1989 would be the lesser of 21 days (an increase of three days) or 2.0 standard deviations for day outliers and, for cost outliers, the greater of $19,000 (an increase of $5,000) or 2.0 times the Federal prospective payment rate. These thresholds would be necessary to ensure that estimated outlier payments are neither more nor less than the five percent of total Federal DRG payments (including outlier payments) as reflected in the rates and, accordingly, should be used as the basis for comparison of the proposed thresholds and policy.

By comparison, if the only change in outlier policy were to pay the greater of day or cost outlier payments using a marginal cost factor of 60 percent or both, as ProPAC recommended, the thresholds for FY 1989 would have had to be increased to the lesser of 22 days or 3.0 standard deviations for day outliers and the greater of $23,000 or 2.0 times the Federal prospective payment rate for cost outliers.

Alternatively, using the cost outlier methodology, with an 80 percent marginal cost factor, to pay for all expensive day outliers (those that also meet the cost outlier criteria), as we proposed last year, would require thresholds of 24 days or 3.0 standard deviations for day outliers and $23,000 or 2.0 times the Federal rate for cost outliers.

Finally, the combination of an 80 percent marginal cost factor in the cost outlier methodology and payment of expensive day outliers using the methodology that yields the higher outlier payment pushes the thresholds to the lesser of 24 days or 3.0 standard deviations for day outliers and the greater of $27,000 or 2.0 times the Federal prospective payment rate for cost outliers. We note that the shift from 2.0 to 3.0 standard deviations for the day outlier threshold was motivated by a desire to keep the fixed number of days as low as possible. In addition, this change had virtually uniform distributive effects across all groups of hospitals, either by type or by geographic location. Had we continued to use 2.0 standard deviations in our proposed policy, the fixed number of days would have had to increase to 30 days.

The proposed outlier adjustment factors for FY 1989 are as follows:

Outlier Reduction Factors

Urban	Rural
.9446	.9781

These proposed outlier thresholds and reduction factors apply to hospitals located in the fifty states and the District of Columbia as well as to hospitals located in Puerto Rico.

ProPAC agrees with us that the outlier payment policy should be refined to better protect hospitals from the risk of extremely costly cases (Recommendation 18). Our proposed changes are also consistent with ProPAC's recommendations to pay day outliers exceeding the cost threshold on the basis of the greater of the day or the cost outlier amounts and to utilize hospital-specific cost-to-charge ratios for identifying and paying cost outliers.

We are not, however, adopting ProPAC's recommendation to increase the outlier pool from five percent to the maximum six percent allowed under the law. In light of the numerous outlier policy changes that we are already proposing, we believe that it is desirable to maintain a five-percent outlier reserve at this time, because it allows proportionately greater payment for typical cases. Increasing the aggregate outlier reduction to six percent would result in less payment to all hospitals for the vast majority of cases, which involve neither exceptionally long nor costly stays. While benefiting facilities with a greater incidence of outliers, it penalizes those hospitals with relatively few outlier cases. Furthermore, our research shows only a marginal reduction in risk associated with moving to a six-percent outlier reserve. We would be interested in comments on the appropriate size of the outlier pool.

We note that ProPAC has also recommended that a corrective adjustment be made if outlier payments in a year are different from the amount financed by the offsets to the urban and rural rates. In light of our estimate that outlier payments in FY 1988 will be about 5.5 percent of total prospective payments, as compared to a 5.1 percent outlier pool, adopting this recommendation would result in a 0.4 percent reduction to the standardized amounts. Since the update factor applied to the standardized amounts is prescribed by law, we have no authority to make such an adjustment. Moreover, as we have explained in previous prospective payment rules (50 FR 35708, 51 FR 31523, and 52 FR 33047), we believe that we have consistently met our statutory obligation under sections 1886(d)(3)(B) and 1886(d)(5)(A)(iv) of the Act to ensure that the rate offsets used to finance outlier payments were equal to the estimated proportion of total prospective payments that were expected to be additional payments for outliers, and that the thresholds be set so as to yield outlier payments of five to six percent of estimated total DRG-based payments. We have consistently used the most recent Medicare discharge data available to estimate total prospective payments and outlier payments as a percentage thereof. Any discrepancy between the estimated outlier payment proportion (which is, in turn, equal to a weighted average of the urban and rural outlier offsets) and the actual outlier payment proportion is attributable entirely to behavioral and other changes that we are unable to predict and that affect length of stay and hospital charges between the year from which data is used to estimate outlier payments and total prospective payments and the year for which the payment rates and outlier thresholds are applicable.

5. Differential Urban and Rural Thresholds

Under current policy, the same outlier thresholds are applicable to urban and rural hospitals. Since rural hospitals generally have less complex and costly cases, they have fewer outlier cases. Presently, only 2.5 percent of payments to rural hospitals are additional payments for outlier cases. Although rural hospitals have a smaller outlier pool (and higher payments for typical cases), this means that, as a proportion of total prospective payments, they receive less outlier protection than do urban hospitals. At the same time, rural hospitals have fewer inpatient cases and, as a result, are more vulnerable to large losses on individual cases. Moreover, an expensive outlier case has a greater financial effect on a small rural hospital than on the average urban hospital.

In order to provide additional outlier protection to rural hospitals, we considered establishing lower thresholds for rural hospitals than for urban hospitals. Although we decided not to propose this change, we would like to invite comments on the appropriateness of replacing the current combination of uniform thresholds and differential urban and rural outlier offsets with a policy of uniform offsets and differential thresholds for hospitals paid the urban rate and hospitals paid the rural rate. Such a policy would, in order to comport with statutory constraints, require an increase in the

proportion of payments to rural hospitals attributable to outlier payments, a corresponding reduction in the rural standardized amounts, and lower thresholds for hospitals paid the rural rate so as to identify and pay for more outlier cases in rural hospitals.

6. Burn Outliers

In the April 5, 1988 notice (53 FR 11137), we discussed the provisions of section 4008(d)(1)(A) of Pub. L. 100–203, which changed the marginal cost factor from 60 percent to 90 percent for both day and cost outliers in DRGs related to burn cases. These provisions are effective for discharges occurring on or after April 1, 1988 and before October 1, 1989 for outlier cases classified in the six DRGs relating specifically to burn cases:

DRG	Name
456	Burns, transferred to another acute care facility.
457	Extensive burns w/o O.R. procedure.
458	Non-extensive burns with skin graft.
459	Non-extensive burns with wound debridement or other O.R. procedure.
460	Non-extensive burns with w/o O.R. procedure.
472	Extensive burns with O.R. procedure.

As part of the proposed rule, we would amend §§ 412.82 and 412.84 to implement the provisions of section 4008(d)(1) of Pub. L. 100–203.

ProPAC supports the intent of section 4008(d) of Pub. L. 100–203, which temporarily increases outlier payments for burn DRGs. However, ProPAC's preliminary analysis indicates that the increase in outlier payments is appropriate only for those cases treated in specialized burn centers and units. ProPAC will examine this topic further and submit additional recommendations to the Congress and the Secretary as required by section 4008(d)(2)(B) of Pub. L. 100–203.

While we recognize ProPAC's concern that outlier cases result in a more serious impact to specialized burn centers and units than to general hospitals treating burn cases, we generally do not believe it appropriate to create a new class of hospital (that is, burn hospitals and burn units) simply for the purpose of targeting outlier payments.

However, since ProPAC indicated it will carry out further analysis and make additional recommendations, we will comment in more detail once that analysis and subsequent recommendations are completed. We also believe that our proposed changes in outlier policies would serve to improve payments for burn outliers. Within the context of the prospective payment system, we generally believe that solutions to problems should be found on a systematic basis, rather than through making special adjustments for individual cases or small group of cases.

F. Payments to Sole Community Hospitals (Section 412.92)

Section 4005(c) of Pub. L. 100–203 amended section 1886(d)(5)(C)(ii) of the Act to extend through cost reporting periods beginning before October 1, 1990, the time period allowed for a sole community hospital (SCH) to qualify for a payment adjustment for a cost reporting period during which the hosptial experiences, due to circumstances beyond its control, a significant (that is, more than a five percent) decrease in its total inpatient discharges as compared to its immediately preceding cost reporting period. We are proposing to revise § 412.92(e) to reflect this change.

In addition, section 4005(c) of Pub. L. 100–203 also amended section 1886(d)(5)(C)(ii) of the Act to extend the payment adjustment discussed above to those hospitals that meet the criteria to qualify as SCHs but do not receive payment under the prospective payment system as an SCH (that is, payment equal to 75 percent of the hospital-specific portion and 25 percent of the Federal regional portion). That is, if a hospital meets the criteria to qualify as an SCH, it may file for the volume decline adjustment regardless of whether it is being paid as an SCH. Of course, in order to receive the volume adjustment, the hospital must meet all the criteria necessary to qualify for a volume adjustment. This provision is effective for cost reporting periods beginning on or after October 1, 1987.

If a hospital wishes to take advantage of this payment adjustment, it would have to submit a request for SCH status to a HCFA regional office. The hospital's application must clearly state that it is seeking SCH status solely to qualify for the volume adjustment and that it does not wish to be paid under the prospective payment system as an SCH. For this purpose, the hospital must meet all criteria for classification of an SCH that are set forth in § 412.92(a).

Once HCFA's regional office has determined that a hospital meets the criteria to qualify as an SCH for the payment adjustment only, it would notify the hospital and the hospital's intermediary. The hospital would then submit to the intermediary documentation demonstrating the size of the decrease in discharges, explaining the circumstances giving rise to the decline in discharges and how they were beyond the hospital's control. The hospital's submission to the intermediary must be made within 180 days from the date on the notice from the HCFA regional office. The hospital must also furnish evidence of the actions it took to control costs in the face of the circumstances cited and the resulting decline in discharges.

HCFA determines the volume adjustment under the provisions of § 412.92. We would clarify that section to conform with our current practice that HCFA makes its determination within 180 days from the date HCFA receives the hospital's request and all other necessary information from the intermediary. In addition, we would state that this volume adjustment determination is subject to review under Subpart R of Part 405.

Thus, we would revise § 412.92(e) to extend the time period for the payment adjustment and add a new § 412.92(f) to provide for the payment adjustment for a hospital that qualifies as an SCH although it chooses not to be paid on the basis of a hospital-specific/Federal regional blend.

Section 4005(c)(2)(B) of Pub. L. 100–203 requires the Secretary to take appropriate steps to ensure that no more than $5 million is paid for FY 1988 and no more than $10 million is paid for FY 1989 to hospitals that qualify for SCH payment adjustments under this special provision. Accordingly, we will monitor expenditures under this provision to ensure that they do not exceed the amounts specifically authorized.

We also note that ProPAC has recommended that we issue guidelines, before FY 1989 begins, for interpreting the criteria used by our regional offices to designate sole community hospitals, so as to promote greater uniformity in their application (Recommendation 11). ProPAC also recommends that we evaluate whether the criteria can be improved to better identify sole providers of care to isolated populations.

We agree with ProPAC that it is desirable to have as much uniformity as possible in interpreting the criteria for determining sole community hospital status. Our analysis of the sole community hospital criteria is an ongoing process and we will continue to evaluate these criteria in order to achieve as much uniformity as possible in their application. However, the Secretary's current criteria, as set forth in the regulations at § 412.92, and the process for making sole community hospital determinations are the result of long experience with various criteria as well as with centralized and

decentralized procedures for determining sole community status.

The Medicare program's experience with sole community hospitals began with the implementation in 1974 of the hospital cost limits under section 223 of the 1972 Social Security Amendments (Pub. L. 92–603). Under section 223 of Pub. L. 92–603, Congress exempted a hospital from the hospital cost limits if it was the sole source of care that was reasonably available to Medicare beneficiaries. Accordingly, the Secretary developed a procedure by which a hospital wishing to obtain a sole community hospital exemption would submit a request to its Medicare fiscal intermediary. After review and development by the intermediary, the request was sent to the Medicare central office for a final determination.

This centralized system was the focus of much criticism from small rural hospitals. These hospitals felt that central office personnel could not possibly be familiar with the many varied conditions that determine the availability of care in the geographic area served by each hospital seeking sole community hospital status. That is, the hospitals believed that HCFA personnel in Baltimore were unaware of, and could not accurately evaluate, local weather conditions, topography, mileage, and other criteria.

After study, HCFA agreed with these arguments. Thus, the authority to make sole community hospital determinations was delegated to the HCFA regional offices in the 1978 in order to build more flexibility into sole community hospital decisions and to better enable the Medicare program to take account of local conditions. To assist and guide the regional offices in their determination, general guidelines were published. However, the regional offices decided how to apply the general criteria in light of the local conditions pertaining in each case.

We have been generally satisfied with this decentralized process and, therefore, retained it even when the criteria were modified at the inception of the prospective payment system. However, decentralization has not meant abdication of responsibility by the HCFA central office. When there are complaints about the sole community hospital criteria or their application by the regional offices, we investigate these complaints.

In addition, in the interest of promoting uniformity of determinations regarding sole community hospital status, in the September 1, 1983 interim final rule implementing the prospective payment system (48 FR 39752), we included detailed regulatory criteria that a hospital must satisfy in order to obtain sole community hospital status. These criteria, which were subject to public comment, were the result of our long experience with the sole community hospital issue. After analysis of all comments received on the interim final rule, we published a final rule on January 3, 1984 that set forth our final criteria along with our responses to all the public comments.

Based on our experience with sole community hospital criteria and the decision making process, we believe the criteria and process for making sole community hospital determinations are appropriate and provide the proper balance between uniform standards and recognition of local conditions. We have received very little criticism of the current system from hospitals. Nevertheless, we will continue to study ProPAC's recommendations and the analyses performed by their contractor to assure that our criteria are appropriate for determining which hospitals are the sole source of care for Medicare beneficiaries. Moreover, in light of ProPAC's concern about the lack of interpretive guidelines, we are proposing to incorporate into the regulations our definition of a service area and also an explanation of what a hospital must provide to the intermediary to document that no more than 25 percent of the residents of its service area were admitted to other like hospitals for care. This policy was first discussed in the preamble of the September 1, 1983 final rule (48 FR 39781).

First, a hospital that seeks to qualify as a sole community hospital under § 412.92(a)(2)(i) or (a)(2)(ii), under which no more than 25 percent of the residents of the hospital's service area are admitted to other like hospitals for care, must submit to its intermediary admissions data documenting the boundaries of its service area. The term "service area" means the area from which a hospital draws at least 75 percent of its inpatients.

A hospital may delineate its service area by identifying the zip codes of all its inpatients for the cost reporting period ending before the date it applies for SCH status. The lowest number of zip codes accounting for at least 75 percent of its inpatients would then constitute its service area. Alternatively, the boundaries of a hospital's service area as established by a statewide health planning agency may be used as long as the hospital can demonstrate that 75 percent of its inpatients are drawn from that area for the cost reporting period ending before it applies for SCH status.

In order to document that no more than 25 percent of the residents of its service area were admitted to other like hospitals for care, a hospital would also be required to gather and submit applicable admissions data by patient origin from all other hospitals located within its service area or, if larger, within 50 miles of the requesting hospital. That a hospital can develop its data using inpatients from the total population or from the Medicare population was previously discussed in the January 3, 1984 final rule (49 FR 272) and is already reflected in § 412.92(a)(2)(i) of the regulations. We are not proposing to modify this provision. We expect that intermediaries can assist hospitals applying for SCH status by making available Medicare discharge data by patient origin for neighboring hospitals.

Similarly, we are not proposing any revision to the stated policy that, if a hospital has fewer than 50 beds, it can be deemed to meet this criterion (that no more than 25 percent of the residents of its service area were admitted to other like hospitals for care) if its intermediary certifies that the hospital would have met this criterion were it not for the fact that some Medicare beneficiaries or residents of the hospital's service area were forced to seek care outside the service area due to the unavailability of certain specialty services at the hospital with fewer than 50 beds.

The term "service area" and its definition would be added to § 412.92(c). Information that the hospital must provide to the intermediary would be added to § 412.92(b).

In addition, we are proposing to clarify certain terms used in the regulations text. In § 412.92(a)(2)(i), we are proposing to add "who become hospital inpatients" after the word "residents" and after the word "beneficiaries." In § 412.92(c)(1), we are proposing to replace the first sentence with the following: "The term "*miles*" means the shortest distance measured in miles over improved roads." The rest of that definition remains unchanged.

Although we believe that the intent of our existing regulations is clear, we have received some questions and suggestions that the language be more specific. These changes that we are proposing are not changes in policy, but are merely clarification of existing policy.

G. Rural Referral Centers (Section 412.96)

Under the authority of section 1886(d)(5)(C)(i) of the Act, § 412.96 sets

forth the criteria a hospital must meet in order to receive special treatment under the prospective payment system as a referral center. Prior to the enactment of Pub. L. 100–203, one of the criteria under which a rural hospital could qualify as a referral center was to have 500 or more beds available for use. Section 4005(d) of Pub. L. 100–203 amended section 1886(d)(5)(C)(i)(I) of the Act to reduce the bed size criterion from 500 or more beds to 275 or more beds, effective with discharges on or after April 1, 1988.

In the April 5, 1988 notice, at (53 FR 11136), we discussed our policy concerning which beds in a hospital should be counted in evaluating whether a rural hospital meets the new bed size criterion. We stated that, in determining whether a hospital has 275 or more beds, we count only beds available for use within the subsection (d) hospital (that is, we do not count beds located in an excluded psychiatric unit, rehabilitation unit, or newborn nursery).

As further clarification of our policy in implementing the provisions of Pub. L. 100–203 concerning rural referral centers, we are proposing that the definition for determining the number of beds for indirect medical education purposes be used for counting available beds for rural referral center purposes. That is, the definition at § 412.118(b) would be used to determine if a hospital has 275 or more available beds to qualify it as a rural referral center. For rural referral center purposes, we would look at the hospital's most recently completed cost reporting period in making this determination. For example, for cost reporting periods beginning on or after October 1, 1988 and before October 1, 1989, we would apply the definition at § 412.118(b) for determining the number of beds for indirect medical education payment purposes to the hospital's cost reporting period that began on or after October 1, 1986 and before October 1, 1987. This is consistent with the time period used to count a hospital's number of discharges to qualify as a rural referral center under § 412.96(c)(2).

In the April 5, 1988 notice, we also stated that rural referral centers should be paid the standardized amounts for hospitals located in other urban areas rather than the standardized amounts for hospitals located in large urban areas. As a part of this proposed rule, we would amend § 412.96 to implement the provisions of section 1886(d)(5)(C)(i)(I) of the Act.

A rural hospital that does not meet the bed size criterion can qualify as a rural referral center if the hospital meets two mandatory criteria (number of discharges and case-mix index) and at least one of three optional criteria (medical staff, source of inpatients, or volume of referrals). With respect to the two mandatory criteria, currently a hospital is classified as a rural referral center if its—

- Case mix index is equal to the lower of the median case mix index for urban hospitals in each census region, excluding hospitals with approved teaching programs, or the median case-mix index for all urban hospitals nationally; and
- Number of discharges is at least 5,000 discharges per year or, if less, the median number of discharges for urban hospitals in the census region in which the hospital is located. (We note that the number of discharges criterion for an osteopathic hospital is at least 3,000 discharges per year.)

1. Case-Mix Index

Section 412.96(c)(1) provides that HCFA will establish updated national and regional case-mix index values in each year's annual notice of prospective payment rates for purposes of determining referral center status. In determining the proposed national and regional case-mix index values, we would follow the same methodology we used in the November 24, 1986 final rule, as set forth in regulations at § 412.96(c)(1)(ii). Therefore, the proposed national case-mix index value would include all urban hospitals nationwide and the proposed regional values are the median values of urban hospitals within each census region, excluding those with approved teaching programs (that is, those hospitals receiving indirect medical education payments as provided in § 412.118).

These values are based on discharges occurring during FY 1987 (October 1, 1986 through September 30, 1987) and include bills posted to HCFA's records through December 1987. Therefore, in addition to meeting other criteria, we are proposing that to qualify for or to retain rural referral center status for cost reporting periods beginning on or after October 1, 1988, a hospital's case-mix index value for FY 1987 would have to be at least—

- 1.1764; or
- Equal to the median case-mix index value for urban hospitals (excluding hospitals with approved teaching programs as identified in § 412.118) calculated by HCFA for the census region in which the hospital is located as indicated in the table below.

Region	Case-mix index value
1. New England (CT, ME, MA, NH, RI, VT)	1.1370
2. Middle Atlantic (PA, NJ, NY)	1.1124
3. South Atlantic (DE, DC, FL, GA, MD, NC, SC, VA, WV)	1.1624
4. East North Central (IL, IN, MI, OH, WI)	1.1307
5. East South Central (AL, KY, MS, TN)	1.1186
6. West North Central (IA, KS, MN, MO, NB, ND, SD)	1.1501
7. West South Central (AR, LA, OK, TX)	1.1795
8. Mountain (AZ, CO, ID, MT, NV, NM, UT, WY)	1.1950
9. Pacific (AK, CA, HI, OR, WA)	1.1929

The above numbers will be revised in the final rule to the extent that additional bills are received for discharges through September 30, 1987.

For the benefit of hospitals seeking to qualify as referral centers or those wishing to know how their case-mix index value compares to the criteria, we are publishing the FY 1987 case-mix index values in Table 3c in section VI of the addendum to this proposed rule. In keeping with our policy on discharges, these case-mix index values are computed based on all Medicare patient discharges subject to DRG-based payment.

2. Discharges

Section 412.96(c)(2)(i) provides that HCFA will set forth the national and regional numbers of discharges in each year's annual notice of prospective payment rates for purposes of determining referral center status. As specified in section 1886(d)(5)(C)(i)(II) of the Act, the national standard is set at 5,000 discharges. However, we are proposing to update the regional standards, which are based on discharges for urban hospitals during the third year of the prospective payment system (that is, October 1, 1985 through September 30, 1986), which is the latest year for which we have complete discharge data available.

Therefore, in addition to meeting other criteria, we are proposing that to qualify for or to retain rural referral center status for cost reporting periods beginning on or after October 1, 1988, a hospital's number of discharges for its cost reporting period that began during FY 1987 would have to be at least—

- 5,000; or
- Equal to the median number of discharges for urban hospitals in the census region in which the hospital is located as indicated in the table below.

We again note that to qualify for or to retain rural referral center status for

cost reporting periods beginning on or after October 1, 1988, an osteopathic hospital's number of discharges for its cost reporting period that began during FY 1987 would have to be at least 3,000.

Region	Number of discharges
1. New England (CT, ME, MA, NH, RI, VT)	6,730
2. Middle Atlantic (PA, NJ, NY)	8,063
3. South Atlantic (DE, DC, FL, GA, MD, NC, SC, VA, WV)	6,125
4. East North Central (IL, IN, MI, OH, WI)	7,381
5. East South Central (AL, KY, MS, TN)	5,782
6. West North Central (IA, KS, MN, MO, NB, ND, SD)	5,102
7. West South Central (AR, LA, OK, TX)	4,393
8. Mountain (AZ, CO, ID, MT, NV, NM, UT, WY)	6,142
9. Pacific (AK, CA, HI, OR, WA)	4,797

H. Disproportionate Share Adjustment (Section 412.106)

Section 4003 (b), (c), and (d) of Pub. L. 100–203 amended section 1886(d) of the Act to provide for several changes to the rules that govern the disproportionate share adjustment. Section 412.106 would be revised to implement these provisions, which are all effective beginning with discharges on or after October 1, 1988.

First, section 4003(b)(1) of Pub. L. 100–203 amended section 1886(d)(5)(F)(iii) of the Act to increase from 15 percent to 25 percent the disproportionate share payment adjustment factor for a hospital that qualifies as a disproportionate share hospital under § 412.106(b)(1)(ii), that is, the hospital has 100 or more beds; is located in an urban area; and receives more than 30 percent of net inpatient revenues from State and local government sources for the care of indigent patients not eligible for Medicare or Medicaid.

Second, section 4003(b)(2) of Pub. L. 100–203 amended section 1886(d)(5)(F)(iv)(I) of the Act to eliminate the 15 percent cap on the payment adjustment factor for a hospital that qualifies as a disproportionate share hospital under either § 412.106(b)(1)(i)(A) or (b)(2): That is, the hospital has a disproportionate patient percentage of at least 15 percent, has 100 or more beds, and is located in an urban area; or the hospital has a disproportionate patient percentage of at least 15 percent, has 500 or more beds, and is located in a rural area.

Third, section 4003(c) of Pub. L. 100–203 amended sections 1886(d)(2)(C)(iv) and 1886(d)(5)(F)(i) of the Act to extend payment of the disproportionate share adjustment through discharges that occur before October 1, 1990. Prior to enactment of Pub. L. 100–203, the payment adjustment for disproportionate share hospitals was to be made only through discharges occurring before October 1, 1989.

In addition, section 1886(d)(5)(F) of the Act as amended by section 4009(j)(3)(A) of Pub. L. 100–203 clarifies that "net" inpatient revenues is the denominator when determining whether a hospital meets the requirement that 30 percent of its inpatient revenues are from State and local government sources for the care of indigent patients. Because regulations at § 412.106(b)(1)(ii) refers to total inpatient care revenues, we would revise this section to clarify that we would use net inpatient revenues rather than gross inpatient revenues in determining whether a hospital qualifies for a disproportionate share adjustment under this provision.

Net inpatient revenues are defined as gross inpatient revenues minus allowances. Allowances represent reductions in revenue for amounts not expected to be realized as revenues. These include allowances for bad debts, charity care, and courtesy discounts and third party contractual allowances.

I. Classification of Capital-Related Costs and Direct Medical Education Costs (Section 412.113)

The prospective payment system was enacted by section 601 of the Social Security Amendments of 1983 (Pub. L. 98–21) with the intention of curtailing the high rate of increase in hospital inpatient operating expenditures. The term "operating costs of inpatient hospital services" was defined to include all inpatient routine and ancillary costs except for capital-related costs. Payment for capital-related costs continues to be determined on a reasonable cost basis. Payment for the cost of approved medical educational activities also continues to be made on a reasonable cost basis except with respect to activities defined in § 413.85(d).

In order to ensure that reclassification of costs included or excluded from the prospective payment system was minimized, we added the "consistency rule" to the regulations governing the prospective payment system. It is currently set forth at § 412.113(a)(1) and (b). The consistency rule required that the classification of these capital-related and direct medical education costs remain constant for each hospital during the prospective payment transition period. This rule was necessary since a portion of the prospectively determined payment during the transition to fully Federal standardized rates was based upon a hospital's own cost experience (that is, the hospital-specific rate). Continued use of the same classifications was instituted to avoid paying for the same costs under both payment methodologies; that is, once in the hospital-specific rate where they are included in base-year costs and once in pass-through costs if the classification of cost changed during the transition.

We believe that the "consistency rule" for capital-related and direct medical education cost classifications has been effective during the transition period. The rule has been particularly important in indentifying situations where there were gross and monetarily substantial misclassifications of those costs in the period before implementation of the prospective payment system. This was especially true for medical education cost misclassifications. As a result of application of the consistency rule, both hospitals and HCFA have sought revisions on a case-by-case basis to ensure that the same costs are not paid for under both payment methodologies (that is, on a reasonable cost basis as a pass-through item and under the prospective payment system as part of the hospital-specific rate) and to ensure appropriate payments for such costs are consistent with the modification of base year costs rules at § 412.72.

With the expiration of the transition period, prospectively determined payment is now based on national and regional standardized rates that do not depend upon an individual hospital's cost experience. Thus, restrictions on the classification of capital-related and direct medical education costs are no longer necessary. Therefore, we would eliminate this requirement so that it would not be confusing to hospitals in future cost reporting periods.

J. Elimination of Interim Payments for Indirect Medical Education Cost (Section 412.116)

Currently, under § 412.116, payments for indirect medical education costs are on the basis of 26 equal biweekly payments, subject to a year-end adjustment. Because the PRICER program used by intermediaries to calculate payments already computes the indirect medical education interim payments on a bill-by-bill basis, we propose to pay for indirect medical education costs on a bill-by-bill basis, effective with discharges on or after October 1, 1988. This would be consistent with the way in which payments are made for the disproportionate share adjustment.

Thus, we would desire § 412.116(d) from the regulations.

K. Indirect Medical Education Costs (Section 412.118)

Section 1886(d)(5)(B) of the Act provides that prospective payment hospitals that operate medical education programs receive an additional payment for the indirect costs of medical education. The regulations governing the calculation of this additional payment are set forth at § 412.118. Each hospital's additional indirect medical education payment is determined by multiplying the hospital's total DRG revenue by the applicable education adjustment factor.

Section 4003(a) of Pub. L. 100–203 revised section 1886(d)(5)(B)(ii) of the Act to reduce the education adjustment factor used to determine the indirect medical education payment from approximately 8.1 percent to approximately 7.7 percent for discharges occurring on or after October 1, 1988 and before October 1, 1990. The education adjustment factor is an approximation because the adjustment factor is applied on a curvilinear or variable basis. An adjustment made on a curvilinear basis reflects a nonlinear cost relationship; that is, each absolute increment in a hospital's ratio of interns and residents to beds does not result in an equal proportional increase in costs.

For discharges occurring on or after October 1, 1988 and before October 1, 1990, the indirect medical education factor equals the following:

$$1.89 \times \left\{ \left(\frac{1 + \text{interns and residents}}{\text{beds}} \right)^{.405} - 1 \right\}$$

For discharges occurring on or after October 1, 1990, the indiret medical education factor equals the following:

$$1.43 \times \left\{ \left(\frac{1 + \text{interns and residents}}{\text{beds}} \right)^{.5795} - 1 \right\}$$

We would amend § 412.118 (c) and (d) to implement the provisions of section 1886(d)(5)(B)(ii) of the Act.

L. Ceiling on Rate of Hospital Cost Increases (Section 413.40)

Payment to hospitals and hospital units that are excluded from the prospective payment system is on a reasonable cost basis, subject to the rate-of-increase limits provisions of section 1886(b) of the Act. These excluded hospitals and hospital units receive payment for the inpatient hospital services they furnish on the basis of reasonable cost up to a ceiling. The ceiling is determined by a per discharge rate based upon each hospital's or excluded hospital unit's average cost per case in a particular year (that is, the base year) that is updated annually by an applicable percentage. The per discharge rate is referred to as the target amount, and the percentage update is referred to as the target rate or rate-of-increase limit. By using each hospital's or hospital unit's historical cost to establish a target amount for future periods, the choice of an appropriate and representative base period becomes an important factor that must be carefully defined and uniquely maintained for each excluded hospital or hospital unit for all future cost reporting periods.

Section 1886(b)(3) of the Act provides for the use of a particular 12-month cost reporting period as the base period that is to serve as the basis of future period's cost per case (that is, the target amount) after updating by the applicable percentage increase. That particular 12-month period is the hospital's or hospital unit's cost reporting period beginning on or after October 1, 1981. Section 1886(b)(5) of the Act gives the Secretary the authority to determine the applicable 12-month period to use as the base period for hospitals or hospital units that have a cost reporting period that is other than 12 months' duration. This policy is set forth in regulations at § 413.40(b).

We have experienced increasingly frequent requests from hospitals to change their original base year to a later period of time when the hospital does not have consecutive 12-month cost reporting periods after October 1, 1982. In addition, we have received requests for the selection of a new base year for an excluded hospital or excluded hospital unit when it has experienced a break in providing patient services, certification, or Medicare program involvement. We have also been asked to explain the difference in treatment for exclusion of new hospitals as compared to the treatment of new excluded hospital units.

Hospitals have used the provisions of § 413.40(b)(2) to argue for use of later 12-month cost reporting periods for base years when the first 12-month cost reporting period is not followed immediately by another 12-month period. We recognize that the statute requires the target amount to be applied to 12-month cost reporting periods, or in the case of any hospital having a cost reporting period of other than a 12-month period, a 12-month period determined by the Secretary. Rather than either prohibiting cost reporting periods of other than 12-months' duration due to financial or administrative reasons or requiring that hospitals combine data from multiple cost reporting periods in order that the target rate-of-increase limits be applied on a 12-month basis, we believe it is more appropriate to continue to apply the rate-of-increase ceiling to all cost reporting periods, of whatever duration, beginning during each Federal fiscal year. Therefore, we would revise section 413.40(b)(2) to clarify that ceilings would apply to any cost reporting period following a base period established under § 413.40(b)(1) that began on or after October 1, 1982, or, if later, after the hospital's exemption from the target amount expires unless the exception provided in § 413.40(b)(3) applies to such periods that are shorter than 12 months duration.

An excluded hospital or hospital unit may leave the Medicare program due to temporary closure or decertification reasons. Questions have arisen regarding whether there is a need to establish a new base period or whether a "new provider" exemption period is

available in those cases. In other to avoid such confusion, we would revise § 413.40(b)(1) by deleting the word "initial" in the first sentence. We would include a provision that the ceiling, once established, remains applicable to an excluded hospital unit or hospital regardless of intervening cost reporting periods during which the excluded hospital or hospital unit may not be subject to its target amount as a result of other provisions of the law or regulations, or nonparticipation in the Medicare program. This clarification is needed due to the number of excluded hospitals and particularly distinct part units that may be excluded one year, subject to the prospective payment system in a subsequent year (owing, for example, to failure to continue to meet all the criteria for exclusion), and then excluded again in the next year. Such fluctuation from excluded status to prospective payment system status and back again is not considered sufficient reason to establish a new base period.

The authority to establish distinct part units of hospitals is provided for under section 1886(d)(1)(B)(iv) of the Act. Regulations specifically setting forth criteria for establishing distinct part units are contained in §§ 412.25 through 412.29 and 412.32. Distinct part units are excluded from the prospective payment system and are subject to the ceiling on the rate of hospital cost increases. Due to the fact that a majority of the distinct part units was created as a result of the prospective payment system, many hospitals have requested exemptions for newly created distinct part units as new hospitals under § 413.40(f)(1). In that section, a new hospital is defined as a "* * * a provider of inpatient hospital services that has operated as the type of hospital for which HCFA granted it approval to participate in the Medicare program, under present or previous ownership, or both, for less than three full years."

A distinct part unit is not equivalent to a hospital within the meaning of the regulations. A distinct part unit is basically a subprovider within a hospital for which the hospital has decided to separately report costs. Unless the hospital as a whole is new within the meaning of § 413.40(f)(1), a distinct part unit within a hospital would not qualify for an exemption under § 413.30(f).

The base period established under § 413.40(b)(1) for a newly established distinct part unit is the first 12-month cost reporting period for which costs of the unit were reported separately to Medicare. As a result of the confusion created by the establishment of distinct part units, we would modify § 413.40(f) to specifically state that a distinct part unit does not qualify for an exemption under the rate of increase ceiling provision as a new hospital.

V. Other ProPAC Recommendations

As required by law, we have reviewed the March 1, 1988 report submitted by ProPAC and have given its recommendations careful consideration in conjunction with the proposals set forth in this document. Recommendations 1 through 5 concerning the update factors are discussed in Appendix C. Recommendation 11 concerning sole community hospital criteria is discussed in section IV.F. of this preamble. Recommendation 15 concerning recalibration of the DRG weights is discussed in section II.C. of this preamble, Recommendation 16 concerning improvement to DRG 468 is discussed in section II.B. of this preamble, and Recommendations 17 and 18 concerning payment for outlier cases are discussed in section IV.E. of this preamble. The remainder of the recommendations are discussed below.

A. Updating Prospective Payment System Payments

Timely and Accurate Medicare Cost Data (Recommendation 6)

Recommendation: ProPAC believes that the availability of reliable and timely data is a critical priority for decision making. While significant improvements have been made in Medicare cost data timeliness, ProPAC is concerned about the quality of these data for use in policy development. Therefore, the Secretary should consider improvements to the data to better reflect the costs of treating Medicare beneficiaries and to ensure comparability of data over time.

Response: We agree with ProPAC that it is desirable to have timely and accurate hospital cost data. We will continue to improve our data to the extent feasible. We have concerns as to the feasibility of additional improvements in timeliness and accuracy of cost data because of the need to audit cost reports. That is, greater accuracy can be achieved only at the expense of longer time frames to obtain these data.

However, in accordance with section 4007 of Pub. L. 100–203, we are in the process of improving and making more timely our data base for inpatient hospital operating costs.

B. Adjustments to the Prospective Payment System Payment Formula

1. Capital Institutional Neutrality (Recommendation 7)

Recommendation: Until capital costs are incorporated into an all-inclusive prospective payment rate, the Secretary should provide supplemental payments to hospitals that have contracts with other facilities (for example, other hospitals and clinics) for capital costs incurred at those other facilities. Currently, Medicare does not pay for these costs.

Response: We do not accept this recommendation. As we indicated in response to this recommendation last year (52 FR 18854, May 19, 1987), the prospective payment rates represent the full rebundled costs to hospitals of providing services. Under the prospective payment system, hospitals are responsible for the full costs of providing inpatient services, whether they are furnished inhouse or by arrangement.

In developing the prospective payment rates, we incorporated all operating costs of providing services. We also included both the costs of purchased services performed outside the hospital and formerly billed separately by the supplier of services and the costs of services furnished "under arrangements," that is, where the services were furnished by an outside supplier, but billed by the hospital as Part A services. No attempt was made to distinguish operating and capital components of these services furnished by entities other than the hospital. A hospital's own direct costs are appropriately disaggregated into capital and operating costs. While there is a capital component to many items and services purchased by the hospital for use in patient care or provided under arrangements, the charges made for such services do not distinguish the capital from the operating component of such services. It was charges for purchased services that were used to establish the rebundling adjustment to the Federal rates and that were used by the intermediary as the basis for modifying base-year costs to incorporate the effect of the rebundling requirement in the hospital-specific rate. (No similar adjustment was necessary for services furnished "under arrangements" since the allowable costs of these services was already reflected in hospital cost reports used in determining the prospective payment rates.) Therefore, we believe the prospective payment rates already reflect the full costs of services, and that

any additional amount to cover the capital costs of services provided outside the hospital would constitute a duplicate payment.

2. Indirect Teaching and Disproportionate Share Adjustments (Recommendation 8)

Recommendation: The indirect costs of teaching and the costs of serving a disproportionate share of low-income patients should be recognized through the use of data-based adjustments to hospital payments under the prospective payment system. In addition, the Secretary should support further research efforts to improve measurement of the sources of hospital cost variation. Results of this research could be employed to improve the overall structure of payments under the prospective payment system.

Response: We support further research efforts to improve the measurement of the sources of hospital cost variation, including the indirect costs of graduate medical education and treating a disproportionate share of low-income patients. The indirect medical education and disproportionate share adjustment factors are set by law, however, and we do not have the discretion to change them. While we believe the research that ProPAC recommends would be of use in refining future policy, we also believe it is of lower priority at the present time than other studies, including several mandated by Congress.

3. Labor Market Area Definitions (Recommendation 9)

Recommendation: ProPAC states that it continues to believe that the current hospital labor market area definitions are seriously flawed and that they can be improved substantially with currently available data. ProPAC recommends that the Secretary should adopt improved definitions of hospital labor market areas. For urban areas, the Secretary should modify the current MSAs to distinguish between central and outlying areas. The central areas should be defined using urbanized areas as designated by the Census Bureau. For rural areas, the Secretary should distinguish between urbanized rural counties and other rural counties within each State. Urbanized rural counties should be defined as counties with a city or town having a population of 25,000 or greater. The implementation of improved definitions should not result in any change in aggregate hospital payments. Furthermore, these definitions should not affect the assignment of hospitals to urban or rural areas for purposes of determining standardized amounts.

Response: We appreciate the effort and analysis that ProPAC has devoted to trying to better define labor market areas for purposes of applying the wage index. However, we continue to believe that defining labor market areas on the basis of urbanized and nonurbanized areas within areas classified as urban and rural would create administrative problems. In our response to this same recommendation in the April 1, 1987 ProPAC report for FY 1988 (52 FR 22093, June 10, 1987), we raised a number of concerns that still trouble us.

First, we continue to be concerned with the Census Bureau's definition of urbanized areas. Because the boundaries are based on population density and defined to the census tract level, urbanized areas follow boundaries that do not coincide with street address, zip codes, or other identities with which hospitals, intermediaries or we are routinely familiar. In addition, the actual boundaries of urbanized areas are volatile and subject to dramatic change where extensive development occurs. However, the Census Bureau routinely draws the boundaries for urban areas only once each decade following the decennial census. Hence, we would anticipate numerous cases in which hospitals would argue that their location has changed from a nonurbanized area to an urbanized area because of development since the last census. This boundary issue, along with the increase in boundaries resulting from classifying hospitals according to four labor market area classifications, would multiply the number of cases in which hospitals perceive that they are being disadvantaged.

Second, we continue to have concern regarding the accuracy with which hospitals would be assigned to urbanized areas. As we noted in the September 1, 1987 final rule (52 FR 33055), the census tract is not a part of the data we routinely receive from hospitals, nor is it data with which hospitals or intermediaries are familiar. To assign hospitals to classifications below the county level would require this information.

Third, while ProPAC's suggested refinements to labor market areas would most likely recognize greater wage variations than are currently indicated, we note that these wage differentials are highly correlated with and thus are already taken into account in some degree through the indirect medical education and disproportionate share adjustments for hospitals, and the special treatment for rural referral centers. In addition, constructing the wage index for labor market areas as redefined by ProPAC would dictate recalculation of the indirect medical education and disproportionate share adjustments in order to ensure that we would not be aggravating payment disparities among groups of hospitals. Such recalculation would require legislation.

It is not clear that the labor market areas recommended by ProPAC are any more reflective of the markets in which hospitals compete for labor than the current system. We agree that use of more labor market areas would result in a wage index with greater explanatory power with regard to hospital wage levels. In fact, maximum explanatory power would be achieved by using a hospital-specific wage index. However, under the prospective payment system, we are concerned with hospital level cost differences rather than wage level differences. It is anticipated under the prospective payment system that hospitals with high wages substitute nonlabor inputs for labor inputs in order to keep overall costs down.

We recognize that the current system of MSAs used for defining labor market areas has shortcomings. We look forward to continuing to work with ProPAC to develop a classification methodology that better reflects labor market areas and that overcomes the administrative problems discussed above.

4. Evaluation of Sole Community Hospital Policies (Recommendation 10)

Recommendation: Using the most recent data available, the Secretary should immediately initiate an evaluation of the adequacy of current sole community hospital policies for the protection of isolated rural hospitals. Based on this evaluation, the Secretary should develop policies to ensure that prospective payment system policy does not jeopardize Medicare beneficiaries' access to inpatient hospital care in isolated rural areas.

Response: We share ProPAC's concern regarding sole community hospitals and we are committed to maintaining access to the health care system in rural areas. We realize that the financial position of some sole community hospitals remains serious. Accordingly, we have already begun evaluating the current SCH payment provisions.

In addition, Pub. L. 100–203 contained two provisions that should be of considerable value to isolated rural hospitals. First, Congress extended for two additional years the provisions for

payment adjustments for sole community hospitals that experience a yearly decline in discharges of greater than five percent. More significant, Congress extended the adjustment for volume decline to those hospitals that could qualify as sole community hospitals but choose not to or that later choose to give up that designation. This new provision will allow a sole community hospital or a hospital that could qualify as a sole community hospital to choose the payment rate that is most advantageous (either the sole community hospital blended rate or the regular prospective payment rate) while at the same time retaining the protection afforded by the adjustment for declines in volume. (See our discussion of these provisions in section IV.F. of this preamble.)

We are supportive of sole community hospitals and the role they play in ensuring access to care in remote rural areas. However, we also believe that the problems of sole community hospitals are not exclusively related to the Medicare program. While the Medicare program should be a part of any solutions to these problems, sole community hospitals and the communities they serve are encouraged to explore alternative ways in which the hospital can maintain financial stability while continuing to provide essential services in the communities.

C. Quality of Care

Evaluation of Peer Review Organization (PRO) Review and Quality of Care (Recommendation 12)

Recommendation: The Secretary should review and synthesize the findings of the PROs over the past four years. A major comprehensive evaluation of PROs and their impact on quality of care should follow. The evaluation should focus on issues of access to and use of services, patterns of denials, and instances of poor quality care. Issues related to expenditure control and efficient administration of PRO contract requirements should be secondary to broader quality-of-care evaluative goals. The assessment should also evaluate and compare criteria used to make judgments about when care is appropriate. Finally, this major study should assist the Secretary in developing and implementing mechanisms for expanded PRO review of episodes of care that are patient-oriented rather than institution-oriented.

Response: While we agree conceptually with the purpose of a longitudinal study of PRO review findings, we do not believe that such a study is feasible given the transitional nature of the PRO program during the targeted time period. The PRO program was implemented simultaneously with the prospective payment system in 1984, and, in 1986, its foscus changed from utilization review to quality review.

Major changes have been made to improve the review methodology both through our program policies and as a result of legislative mandates. As a result, we do not have a consistent data base on which to perform longitudinal analysis. In addition, we have not collected data on individual case reviews; we have summary data only. This further limits our data analysis techniques. In the next PRO contract scope of work, we are implementing a new data collection system that will include disaggregated data, which will significantly improve our ability to perform a longitudinal analysis.

We have contracted with the Institute of Medicine (IOM) to assess the current state of the art in quality review. IOM will evaluate the procedures, costs, and adequacy of quality assurance mechanisms and examine the availability of reliable and clinically valid criteria and standards to judge quality of care. A comprehensive report of the IOM study outlining findings, conclusions, and recommendations, will be prepared for Congress.

The second part of the ProPAC recommendation concerns the evaluation of PRO criteria. ProPAC believes that the Secretary should review the development, use, and application of criteria related to medical necessity and appropriateness.

All PROs are required to submit their criteria to HCFA 45 days before implementation and to submit any changes to these criteria 30 days before implementation. All criteria are then reviewed by HCFA central office and regional office medical personnel. After this review, the strengths and weaknesses of the criteria are discussed with the PROs, and the PROs are then required to make appropriate revisions to these criteria. In addition, both the HCFA regional offices and an independent contractor, SysteMetrics, Inc. (the so-called "SuperPRO") review a sample of PRO cases using the PRO's approved criteria to assure that the criteria are applied appropriately and that the medical determinations are accurate. In addition, over the next year, the "SuperPRO" will analyze the PRO criteria and made recommendations for changes.

We also agree that the PRO program should focus on outcomes of care. To that end, we are developing uniform, accurate screening procedures using clinical data abstracted from the individual medical records. Under this process, we will review an array of diagnostic information, including objective positive physician findings and information on the course of hospitalization. This will permit assessment of the severity of illness at admission and the care a person receives while a patient, as well as monitoring the outcome. The data generated from this process will be used to systematically identify for indepth review physicians and providers with aberrant practice patterns.

We are in agreement with ProPAC's recommendation that the appropriate mix of cases in all areas should be examined along with the number of reviews and type of tools needed to identify quality problems. A number of activities have taken place in the past year in this regard. A zero based analysis of PRO reviews was performed prior to the development of the new PRO contract scope of work (which is effective for contracts entered into or renewed on or after October 1, 1988) to refine the mix of reviews in order to assure that activities are focused appropriately. In addition, we convened a task force composed of PRO and HCFA representatives that further refined and improved the HCFA inpatient hospital generic quality screens. We believe that the improved quality screens will improve the identification of quality problems. We also convened a task force to develop a model quality intervention plan to ensure that the PROs will take more consistent actions to improve quality of care when problems are identified.

In the new PRO contract scope of work, PROs will review a sample of posthospital care furnished before a readmission that occurred within 31 days of discharge from a hospital. To make that review more meaningful, work groups were convened in early 1987 to develop generic quality screens to help in the identification of quality problems in skilled nursing facilities, home health care, and outpatient surgery areas.

Also, we are in the process of providing some PROs with added funds to conduct pilot studies. These studies will test varying review methodologies in an attempt to identify the most efficient and effective way to identify cases for review. Examples of the areas that will be studied are review of short stays, deaths within 20 days of hospital discharge, and services furnished by skilled nursing facilities and home health agencies.

D. Patient Classification and Case-Mix Measurement

1. Improvements to Case Mix Measurement (Recommendation 13)

Recommendation: ProPAC continues to believe that the DRG system is the best available measure of hospital case mix for the prospective payment system. However, the Secretary should continue to refine the DRGs to improve the equity of hospital payments and to update the DRGs to account for changing technology. The Secretary should focus on generic improvements through the use of patient data currently available from the discharge abstract. The Secretary should also consider the use of temporary, technology-specific DRGs if assignment to an existing DRG is not appropriate.

Response: We agree with ProPAC that the DRG system is the best currently available system for reflecting relative resource intensity in inpatient hospital services and that the system could be further refined. We believe that many of the DRG refinements that have been made have constituted significant improvements to the classification of cases. ProPAC itself has been a contributor to these improvements through its recommendations and analysis.

We believe our commitment to further DRG refinement is also evidenced by the fact that we have proposed DRG classification changes every year since FY 1985 regardless of the fact that we were not obligated by law to reclassify and recalibrate annually until FY 1988. In addition, we continue to support research with respect to DRG refinements. For example, we are sponsoring research by Yale University to investigate ways in which the use of complications and comorbidities in the DRG system could be revised so as to capture severity of illness. We anticipate that this work will inform the DRG classification changes that we may propose in the future.

With respect to the use of technology-specific DRGs, we continue to oppose this approach for reasons discussed in previous **Federal Register** documents. Also, as we noted in the May 19, 1987 proposed notice on changes to the DRG classification system (52 FR 18880), it is not necessary to create new DRGs to trace costs associated with particular technologies, since unique ICD–9–CM codes are available for this purpose.

2. Coding Improvements (Recommendation 14)

Recommendation: The Secretary should formalize a more timely, systematic, and consultative approach to consider ICD–9–CM codes for new diagnoses, procedures, devices, and other treatments. When new codes are considered and created, both coding specialists and clinical specialists should be involved. ProPAC continues to believe that the Secretary's guidelines prohibiting the use of Chapter 16 codes as principal diagnoses should be reviewed because the prohibition has, in some cases, impeded appropriate DRG assignment of important diagnoses. (Chapter 16 of the ICD–9–CM system is a compendium of symptoms, signs, ill-defined conditions, and abnormal findings of laboratory and investigative procedures. Chapter 16 rules contradict the usual guidelines of the ICD–9–CM coding system concerning the sequence of principal and secondary diagnoses.)

Response: We disagree with ProPAC's assertion that the current system for coding changes is not timely, systematic, and consultative. Each fiscal year, we publish the process for coding changes and we request public comment concerning problems and recommendations. We also publish notices in the **Federal Register** to announce the time, place and proposed agenda for regularly scheduled public meetings concerning coding changes. During calendar year 1987, we held meetings in April, July, and December.

Prior to all public meetings, the ICD–9–CM Coordination and Maintenance Committee (the Committee) thoroughly researches the topics on the agenda. This committee is composed of individuals trained in the coding of medical records in addition to physicians, nurses, and others familiar with the Medicare prospective payment system. In addition to the thorough review by this committee, outside organizations are also contacted for consultation. At the public meetings, presentations may be given by qualified experts on particular topics of interest.

While this may appear to be a lengthy time process, we have received many public comments that the timeframes are not sufficient for hospitals to implement or adopt coding changes.

One of the reasons for length of time between meetings is to permit the public to provide additional comments on the proposals presented at the public meetings. In addition to those who regularly attend the public meetings, we also send summaries of the Committee meetings to an additional 200 organizations and individuals. Included among this group are coding specialists as well as physicians. As a result of this distribution, we receive additional comments from those unable to attend the meetings. While the last public meeting is held in December, written comments are accepted until January 31.

The time we allot to this process is necessary to permit us time to consider the volume of input from outside groups before we make a final decision on changing a code. To accurately edit, index, and print the errata for the three volumes of ICD–9–CM, we must have some lead time. In addition, final coding changes may necessitate changes in DRG classification that would require revisions in the GROUPER program.

By statute, the prospective payment rates and update factors that are to be effective for a given Federal fiscal year (that is, on or after October 1) must be published in the **Federal Register** by the preceding May 1 with 60 days allowed for public comment. Since coding changes affect the DRGs that are used in computing final payment for inpatient services, we must finalize coding changes before the May 1 publication date. In order to finalize changes by May 1, we begin formulation of the final proposed code revisions on February 1. By February 15, final clearance begins within HCFA and the National Center for Health Statistics (NCHS). Approval must be obtained by all relevant staff before submission to the HCFA Administrator and NCHS Director. By March 1, revisions have received final approval, and work is completed in April on the tabular and indexing of the Addendum that will contain the new and revised codes. Publication of the Addendum occurs sometime in August. The Addenda for FY 1986 and FY 1987 contained 50 new and revised codes and 100 new and revised codes, respectively.

A great deal of background work goes into a proposal before it is presented at a public meeting. The ICD–9–CM Coordination and Maintenance Committee thoroughly researches the topics on the agenda. This committee is composed of people trained in the coding of medical records in addition to physicians, nurses and others familiar with the prospective payment system. In addition to the review by this committee, technical advice is solicited from clinical specialists. Examples of groups who have provided technical advice include the American Society for Gastrointestinal Endoscopy, North American Society for Pacing and Electrophysiology, the National Association of Children's Hospitals and Related Institutions, and the National Association for Sleep Disorders. Physician specialists regularly attend the public meetings and make presentations on medical procedure and technology. The results are better revisions to the ICD–9–CM.

In its recommendation ProPAC noted what it considered to be two areas of continuing coding problems, acute myocardial infarctions (AMIs) and partial joint replacements.

We agree, with ProPAC, that problems still exist with the coding of AMIs. The diagnosis codes are contained in volumes 1 and 2 of the ICD–9–CM and therefore are the primary responsibility of NCHS. NCHS has been reviewing the problems with the codes throughout the year. Several proposals have been presented by the public and NCHS at the public meetings. However, the proposals have not adequately distinguished between patients admitted with an AMI and patients not admitted for treatment of an AMI but whose diagnosis is an AMI because of the "eight week rule." Under the eight week rule, a diagnosis of AMI must be coded under some circumstances if the patient has had an infarction within eight weeks of the admission.

HCFA will continue to work with NCHS to improve the guidelines and code definitions. Any comments from the public on improving Chapter 16 and any other coding questions concerning volumes 1 and 2 of ICD–9–CM should be sent to: Ms. Sue Meads, Co-Chairperson, ICD–9–CM Coordination and Maintenance Committee, National Center for Health Statistics, Room 2–19 Center Building, 3700 East-West Highway, Hyattsville, MD 20782.

We will also continue to examine the necessity of codes for partial joint replacements. Since this is an issue related to procedure codes within volume 3 of ICD–9–CM, HCFA has the lead responsibility for making any changes. This topic is already scheduled on the agenda for the July meeting and will be addressed during the next year. Any concerns with the coding of procedures in volume 3 of the ICD–9–CM should be sent to: Ms. Patricia Brooks, Health Care Financing Administration, Office of Coverage Policy, Room 309, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207.

VI. Other Required Information

A. Paperwork Reduction Act

This proposed rule does not impose information collection requirements. Consequently, it need not be reviewed by the Executive Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3511).

B. Public Requests for Data

In order to respond promptly to public requests for data related to the prospective payment system, we have set up a process under which commenters can gain access to the raw data on an expedited basis. Generally, the data are available in computer tape format and are listed below with the cost of each tape. Anyone wishing to purchase data tapes should submit a written request along with a check to cover the cost of the tapes to the following address: HCFA Office of Statistics and Data Management, Bureau of Data Management and Strategy, Room 1–F–2 Oak Meadows Building, 6325 Security Boulevard, Baltimore, MD 21207.

1. MEDPAR Public Use File

This file contains billing and medical data for Medicare beneficiaries using short-stay hospital inpatient services for a 20 percent sample determined by the terminal digits in the beneficiary's Health Insurance Claim Number. The file is stripped of most data elements that would have identified either the beneficiary or the hospital.

Periods Available: Calendar Year (CY) 1980 through CY 1987

Price: $800.00 for each calendar year

2. Expanded Modified MEDPAR File

The file contains records for 100 percent of Medicare beneficiaries using short-stay hospital inpatient services. The file is stripped of most data elements that would have identified beneficiaries. The hospitals are identified. The file is available to persons qualifying under the terms of the Notice of Proposed New Routine Use for an Existing System of Records published in the **Federal Register** on December 24, 1984 (49 FR 49941), which was amended by the July 2, 1985 Notice of Proposed New Routine Use for an Existing System of Records (50 FR 27361). Under the requirements of these notices, a data use agreement must be signed by the purchaser before release of these data.

Periods Available: FY 1984 through FY 1987

Price: $2650.00 for each fiscal year

3. HCFA Hospital Wage Index Survey

Wage indexes for acute care hospitals are used to adjust payments in the prospective payment system. Both the 1982 and 1984 wage index files include the following data items for each hospital: provider number, intermediary number, beginning and ending dates of the cost reporting period, total gross hospital salaries, total paid hours, and state and county codes. In addition, the 1982 wage index file includes the date the hospital became subject to the prospective payment system. These files are generated upon special request.

Periods Available: Cost reporting periods ending in calendar year 1982 and cost reporting periods ending September 30, 1984 through September 29, 1985

Price: $370.00 for each of the two periods

4. H180 Extract, Cost Reporting Periods Ending January 1, 1981 through December 31, 1981

This file contains selected data items from cost reports. These data were used in computing the initial Federal prospective payment rate.

Price: $530.00

5. H180 Extract, Cost Reporting Periods Ending January 1, 1982 through September 29, 1983

This file contains the target amount computations that provide the basis for the determination of the final prospective payment system hospital-specific rates and rate-of-increase limits hospital-specific target amounts per case.

Price: $530.00

6. TEFRA Minimum Data Set, Cost Reporting Periods Ending September 30, 1983 through September 29, 1984

The TEFRA Minimum Data Set contains cost, statistical, financial, and other information from the Medicare hospital cost report (Form HCFA 2552–83). There is a single record for each of 6,679 Medicare certified hospitals. This data set includes capital-related cost (fixed and moveable) information used in the early analyses of prospective capital payment. Most of these files are taken from cost reports that have been settled by the intermediaries.

Price: $530.00

7. PPS–I Minimum Data Set, Cost Reporting Periods Ending September 30, 1984 through September 29, 1985

The PPS–I Minimum Data Set contains cost, statistical, financial, and other information from the Medicare hospital cost report (Form HCFA 2552–84). There is a single record for each Medicare certified hospital. The data files include submitted, final settled, and reopened cost reports received from the intermediary.

Price: $530.00

8. PPS–II Minimum Data Set, Cost Reporting Periods Ending September 30, 1985 through September 29, 1986

The PPS–II Minimum Data Set contains cost, statistical, financial, and other information from the Medicare hospital cost report (Form HCFA 2552–85). There is a single record for each Medicare certified hospital. The data set includes submitted, final settled, and reopened cost reports received from the intermediaries.

Period Available: September 30, 1985 through September 29, 1986
Price: $530.00

9. PPS–III Minimum Data Set, Cost Reporting Periods Ending September 30, 1986 through September 29, 1987

The PPS–III Minimum Data Set contains cost, statistical, financial, and other information from the Medicare hospital cost report (Form HCFA 2552–86). There is a single record for each Medicare certified hospital. The data set includes submitted, final settled, and reopened cost reports received from the intermediaries.

Price: $530.00

10. Provider-Specific Variable File

This file is a component of the PRICER program used in an intermediary's system to compute individual DRG payments. The file contains records for all prospective payment system hospitals and short-stay acute care hospitals in waiver States, and data elements used in standardizing hospital charges for recalibration in simulating payments to hospitals.

Periods Available: 1984, 1986, and 1987

Price: $370.00

For further information concerning these data tapes, contact Rose Connerton at (301) 966–8067.

In addition, certain other data, such as area wage data and data used to construct the Puerto Rico standardized amounts, are available in hard copy format. Commenters interested in examining hard copy data should contact Paul Olenick at (301) 966–4534.

We realize that commenters may be interested in obtaining data other than those we have discussed above. These commenters should direct their requests to Paul Olenick at the number provided above.

Finally, in lieu of obtaining data through the mail, certain data may also be available for inspection at the central office of the Health Care Financing Administration in Baltimore, Maryland. Commenters interested in obtaining more information about this alternative for reviewing data should also contact Paul Olenick.

C. Public Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, in preparing the final rule, we will consider all comments concerning the provisions of this proposed rule that we receive by the date and time specified in the "Dates" section of this preamble and respond to those comments in the preamble to that rule. We emphasize that, given the statutory requirement under section 1886(e)(5) of the Act that our final rule for FY 1989 be published by September 1, 1988, we will consider only those comments that deal specifically with the matters discussed in this proposed rule.

List of Subjects

42 CFR Part 412

Health facilities, Medicare.

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Chapter IV would be amended as follows:

CHAPTER IV—HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

SUBCHAPTER B—MEDICARE PROGRAMS

I. Part 412 is amended as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEM FOR INPATIENT HOSPITAL SERVICES

A. The authority citation for Part 412 continues to read as follows:

Authority: Secs. 1102, 1122, 1815(e), 1871, and 1886 of the Social Security Act (42 U.S.C. 1302, 1320a–1, 1395g(e), 1395hh, and 1395ww).

B. In Subpart C, § 412.46, paragraph (a) is revised, paragraphs (b), (c), and (d) are redesignated as paragraphs (c), (d), and (e), respectively, a new paragraph (b) is added, and newly redesignated paragraph (c) is revised to read as follows:

Subpart C—Conditions for Payment Under the Prospective Payment System

§ 412.46 Medical review requirements: DRG validation.

(a) *Physician attestation.* The attending physician must, shortly before, at, or shortly after discharge (but before a claim is submitted), attest to the principal diagnosis, secondary diagnoses, and names of major procedures performed. The information must be in writing in the medical record, and, except as provided in paragraph (b) of this section, the physician must sign the statement. Below the diagnostic and procedural information, and on the same page, the following statement must immediately precede the physician's dated signature:

"I certify that the narrative descriptions of the principal and secondary diagnoses and the major procedures performed are accurate and complete to the best of my knowledge."

(b) *Alternative signature requirement.* The attending physician's signature, along with the other information required in paragraph (a), may be provided by electronic means through a hospital data system if the intermediary determines that the hospital data system meets the guidelines established by HCFA.

(c) *Physician acknowledgement.* In addition, when the claim is submitted, the hospital must have on file a current signed and dated acknowledgement from the attending physician that the physician has received the following notice:

"Notice to Physicians: Medicare payment to hospitals is based in part on each patient's principal and secondary diagnoses and the major procedures performed on the patient, as attested to by the patient's attending physician by virtue of his or her signature in the medical record. Anyone who misrepresents, falsifies, or conceals essential information required for payment of Federal funds, may be subject to fine, imprisonment, or civil penalty under applicable Federal laws."

The acknowledgement must have been completed within the year prior to the submission of the claim.

* * * * *

C. Subpart D is amended as follows:

Subpart D—Basic Methodology for Determining Federal Prospective Payment Rates

1. Section 412.62(k) is revised to read as follows:

§ 412.62 Federal rates for fiscal year 1984.

* * * * *

(k) *Adjusting for different area wage levels.* HCFA adjusts the proportion (as estimated by HCFA from time to time) of Federal rates computed under paragraph (j) of this section that are attributable to wages and labor-related costs, for area differences in hospital wage levels by a factor (established by HCFA) reflecting the relative hospital wage level in the geographic area (that is, urban or rural area as determined under the provisions of paragraph (f) of

this section) of the hospital compared to the national average hospital wage level.

2. Section 412.63, is amended by revising paragraph (b)(3) and by adding new paragraph (b)(4); revising paragraph (c)(4) and adding a new paragraph (c)(6); paragraphs (f) and (g) are revised; paragraphs (h), (i), and (j) are redesignated as paragraphs (i), (j), and (k), respectively; a new paragraph (h) is added; the introductory texts of newly redesignated paragraphs (j) and (j)(1), and paragraph (j)(1)(i) are revised; and newly redesignated paragraph (k) is revised to read as follows:

§ 412.63 Federal rates for fiscal years after Federal fiscal year 1984.

* * * * *

(b) *Geographic classifications.* * * *

(3) For discharges occurring on or after October 1, 1988, a hospital located in a rural county adjacent to one or more urban areas is deemed to be located in an urban area and receives the Federal payment amount for the urban area to which the greatest number of workers in the county commute if the county in which the hospital is located meets the following criteria:

(i) The rural county meets one of the following commuting standards:

(A) At least 15 percent of the residents of the rural county who are employed commute to the central county or counties of all adjacent urban areas.

(B) The sum of the number of employed residents of the rural county who commute to the central county or counties of all adjacent urban areas and the number of employed residents of all adjacent urban areas who commute to the rural county equals at least 20 percent of the number of employed residents of the rural county.

(ii) The rural county meets all other applicable Executive Office of Management and Budget (EOMB) standards for the level of commuting determined under paragraph (b)(4)(i) of this section for designation as an outlying county of an MSA. These EOMB standards are set forth in the notice of final standards for classification of MSAs published in the **Federal Register** on January 3, 1980 (45 FR 956), and available from HCFA, East High Rise Building, Room 132, 6325 Security Boulevard, Baltimore, Maryland 21207.

(4) For hospitals that consist of two or more separately located inpatient hospital facilities, the national adjusted prospective payment rate is based on the geographic location of the hospital facility at which the discharge occurs.

(c) *Updating previous standardized amounts.* * * *

(4) For fiscal years 1987 through 1990 HCFA standardizes the average standardized amounts by excluding an estimate of the payments for hospitals that serve a disproportionate share of low-income patients.

* * * * *

(6) For fiscal year 1988 and thereafter, HCFA computes average standardized amounts for hospitals located in large urban areas, other urban areas, and rural areas. The term "large urban area" means an MSA with a population of more than 1,000,000 or an NECMA with a population of more than 970,000 based on the most recent available population data published by the Bureau of the Census.

* * * * *

(f) *Applicable percentage change for fiscal year 1988.* (1) The applicable percentage change for fiscal year 1988 is—

(i) For discharges occurring on or after October 1, 1987 and before November 21, 1987, zero percent;

(ii) For discharges occurring on or after November 21, 1987 and before April 1, 1988, 2.7 percent; and

(iii) For discharges occurring on or after April 1, 1988 and before October 1, 1988—

(A) 3.0 percent for hospitals located in rural areas;

(B) 1.5 percent for hospitals located in large urban areas; and

(C) 1.0 percent for hospitals located in other urban areas.

(2) For purposes of determining the standardized amounts for discharges occurring on or after October 1, 1988 (for Federal fiscal year 1989), the applicable percentage change for fiscal year 1988 is deemed to have been—

(A) 3.0 percent for hospitals located in rural areas;

(B) 1.5 percent for hospitals located in large urban areas; and

(C) 1.0 percent for hospitals located in other urban areas.

(g) *Applicable percentage change for fiscal year 1989.* The applicable percentage change for fiscal year 1989 is the percentage increase in the market basket index (as described in § 413.40(c)(3)(ii))—

(1) Minus 1.5 percentage points for hospitals located in rural areas;

(2) Minus 2.0 percentage points for hospitals in large urban areas; and

(3) Minus 2.5 percentage points for hospitals in other urban areas.

(h) *Applicable percentage change for fiscal years 1990 and following.* The applicable percentage change for FY 1990 and each subsequent fiscal year for hospitals in all areas is the percentage increase in the market basket index (as described in § 413.40(c)(3)(ii)).

* * * * *

(j) *Computing Federal rates for large urban, other urban, and rural hospitals.* For each discharge classified within a DRG, HCFA will establish for the fiscal year a national prospective payment rate and a regional prospective payment rate, for each region, as follows:

(1) For hospitals located in a large urban or other urban area in the United States or that region respectively, the rate equals the product of—

(i) The adjusted average standardized amount (computed under paragraph (c) of this section) for the fiscal year for hospitals located in a large urban or other urban area in the United States or in that region; and

* * * * *

(k) *Adjusting for different area wage levels.* HCFA adjusts the proportion (as estimated by HCFA from time to time) of Federal rates computed under paragraph (j) of this section that are attributable to wages and labor-related costs for area differences in hospital wage levels by a factor (established by HCFA) reflecting the relative hospital wage level in the geographic area (that is, urban or rural area as determined under the provisions of paragraph (b) of this section) of the hospital compared to the national average hospital wage level.

D. Subpart E is amended as follows:

Subpart E—Determination of Transition Period Payment Rates

1. Section 412.70, is amended by revising paragraph (c)(5); adding a new paragraph (c)(6) immediately preceding the table to paragraph (c) revising paragraph (d)(4); and adding a new paragraph (d)(5) to read as follows:

§ 412.70 General description.

* * * * *

(c) *Amount of blended portions.*

* * * * *

(5) The appropriate Federal prospective payment rate is a combined regional and national rate and changes with the Federal fiscal year. For Federal fiscal year 1984, which begins October 1, 1983, the Federal prospective payment rate is 100 percent regional. For Federal fiscal years 1985 and 1986, which begin October 1, 1984 and October 1, 1985, respectively, the combined rate is 75 percent regional and 25 percent national. For Federal fiscal year 1987, which begins October 1, 1986, the combined rate is 50 percent regional and 50 percent national. Effective with Federal fiscal year 1988, which begins

October 1, 1987, the Federal prospective payment rate is 100 percent national except as provided in paragraph (c)(6) of this section.

(6) For discharges occurring on or after April 1, 1988 and before October 1, 1990, payments to a hospital are based on the greater of the national average standardized amount or the sum of 85 percent of the national average standardized amount and 15 percent of the average standardized amount for the region in which the hospital is located.

* * * * *

(d) *Blended portions for new hospitals.*

* * * * *

(4) For discharges occurring on or after October 1, 1987, the prospective payment rate equals the appropriate Federal national rate except as provided in paragraph (d)(5) of this section.

(5) For discharges occurring on or after April 1, 1988 and before October 1, 1990, payments to a hospital are based on the greater of the national average standardized amount or the sum of 85 percent of the national average standardized amount and 15 percent of the average standardized amount for the region in which the hospital is located.

2. Section 412.73(c) is amended by revising paragraph (c)(5) and adding a new paragraph (c)(6) to read as follows:

§ 412.73 Determination of the hospital-specific rate.

* * * * *

(c) *Updating base-year costs*

* * * * *

(5) *For Federal fiscal year 1988.* (i) For purposes of determining the prospective payment rates for sole community hospitals under § 412.92(d) for cost reporting periods beginning in Federal fiscal year 1988 (that is, on or after October 1, 1987 and before October 1, 1988), the base-year cost per discharge is updated as follows:

(A) For the first 51 days of the hospital's cost reporting period, by zero percent.

(B) For the next 132 days of the hospital's cost reporting period, by 2.7 percent.

(C) For the remainder of the hospital's cost reporting period, by—

(*1*) 3.0 percent for hospitals located in urban areas;

(*2*) 1.5 percent for hospitals located in large rural areas; and

(*3*) 1.0 percent for hospitals located in other urban areas.

(ii) For purposes of determining the updated base-year costs for cost reporting periods beginning in Federal fiscal year 1989 (that is, beginning on or after October 1, 1988 and before October 1, 1989), the update factor for the cost reporting period beginning during Federal fiscal year 1988 is deemed to have been—

(A) 3.0 percent for hospitals located in rural areas;

(B) 1.5 percent for hospitals located in large urban areas; and

(C) 1.0 percent for hospitals located in other urban areas.

(6) *For Federal fiscal years 1989 and following.* For Federal fiscal years 1989 and following, the update factor is determined using the methodology set forth in § 412.63(g) and (h).

E. Subpart F is amended as follows:

Subpart F—Payment for Outlier Cases

1. In § 412.80, pargraph (a) is amended by revising the introductory texts of paragraph (a)(1) and (a)(1)(ii), and paragraph (a)(2) to read as follows:

§ 412.80 General provisions.

(a) *Basic rule.* (1) Except as provided in paragraph (a)(2) of this section concerning transferring hospitals, HCFA provides for additional payment, approximating a hospital's marginal cost of care beyond thresholds specified by HCFA, to a hospital for covered inpatient hospitals services furnished to a Medicare beneficiary if either of the following conditions is met:

* * * * *

(ii) The beneficiary's length of stay does not exceed criteria established under paragraph (a)(1)(i) of this section, but the hospital's charges for covered services furnished to the beneficiary, adjusted to cost by applying a cost-to-charge ratio as described in § 412.84(h), exceed the greater of the following:

* * * * *

(2) *Outlier cases in transferring hospitals.* HCFA provides cost outlier payments to a transferring hospital that does not receive payment under § 412.2(b) for discharges specified in § 412.4(d)(2), if the hospital's charges for covered services furnished to the beneficiary, adjusted to cost by applying a cost-to-charge ratio as described in § 412.84(h), exceed the greater of the criteria specified in paragraph (a)(1)(ii) of this section.

* * * * *

2. In § 412.82, paragraph (c) is revised; paragraph (d) is redesignated as paragraph (e); and a new paragraph (d) is added to read as follows:

§ 412.82 Payment for extended length-of-stay cases (day outliers).

* * * * *

(c) Except as provided in paragraph (d) of this section or § 412.86, the per diem payment made under paragraph (a) of this section is derived by first taking 60 percent of the average per diem payment for the applicable DRG, as calculated by dividing the Federal prospective payment rate determined under Subpart D of this part by the mean length-of-stay for that DRG. The resulting amount is then multiplied by the applicable Federal portion of the blend as follows:

Cost reporting periods beginning on or after	Federal portion (percent)
October 1, 1983	25
October 1, 1984	50
October 1, 1985	
The first seven months of the cost reporting period	50
The remaining five months of the cost reporting period	55
October 1, 1986	75
October 1, 1987	100

(d) For discharges occuring on or after April 1, 1988 and before October 1, 1989, the per diem payment made under paragraph (a) of this section for the DRGs related to burn cases, which are identified in the most recent annual notice of prospective payment rates published in accordance with § 412.8(b), is derived under the provisions of paragraph (c) of this section except that the calculation is made using 90 percent of the average per diem payment of the applicable DRG.

* * * * *

3. In § 412.84, paragraphs (a) and (g) are revised; paragraphs (h) and (i) are redesignated as paragraphs (i) and (j), respectively; a new paragraph (h) is added; newly redesignated paragraph (j) is revised; and a new paragraph (k) is added to read as follows:

§ 412.84 Payment for extraordinarily high-cost cases (cost outliers).

(a) A hopsital may request its intermediary to make an additional payment for inpatient hospital services that meet the criteria established in accordance with § 412.80(a)(1)(ii).

* * * * *

(g) The intermediary bases the cost of the discharge on the billed charges for covered inpatient services adjusted by a cost-to-charge ratio as described in paragraph (h) of this section. The cost is adjusted further to exclude an estimate of indirect medical education costs, and payments for hospitals that serve a disproportionate share of low-income patients, and to include the reasonable charges for nonphysician services billed by an outside supplier in accordance with § 489.23(c)(3) of this chapter.

(h) The cost-to-charge ratio used to adjust covered charges is computed by the intermediary for each hospital based on the latest available settled cost report for that hospital and charge data for the same time period as that covered by the cost report. Statewide cost-to-charge ratios are used in those instances in which a hospital's cost-to-charge ratio falls outside reasonable parameters. HCFA sets forth these parameters and the Statewide cost-to-charge ratios in each year's annual notice of prospective payment rates published under § 412.8(b).

(j) Except as provided in paragraph (k) of this section, the additional amount is derived by first taking 80 percent of the difference between the hospital's adjusted cost for the discharge (as determined under paragraph (g) of this section) and the threshold criteria established under § 412.80(a)(1)(ii). The resulting amount will then be multiplied by the applicable Federal portion of the blend as indicated in § 412.82(c).

(k) For dicharges occuring on or after April 1, 1988 and before October 1, 1989, the additional payment amount for the DRGs related to burn cases, which are identified in the most recent annual notice of prospective payment rates published in accordance with § 412.8(b), is computed under the provisions of paragraph (i) of this section except that the payment is made using 90 percent of the difference between the hospital's adjusted cost for the discharge and the threshold criteria.

4. A new § 412.86 is added to read as follows:

§ 412.86 Payment for extraordinarily high-cost day outliers.

If a discharge that qualifies for an additional payment under the provisions of § 412.82 has charges adjusted to costs that exceed the cost outlier threshold criteria for an extraordinarily high-cost case as set forth in § 412.80(a)(1)(ii), the additional payment made for the discharge is the greater of—

(a) The applicable per diem payment computed under § 412.82 (c) or (d); or

(b) The payment that would be made under § 412.84 (i) or (j) if the case had not met the day outlier criteria threshold set forth in § 412.80(a)(1)(i).

F. Subpart G is amended as follows:

Subpart G—Special Treatment of Certain Facilities

§ 412.90 [Amended]

1. In § 412.90(h), the phrase "October 1, 1988" is revised to read "October 1, 1990".

2. In § 412.92, the introductory text of paragraphs (a) and (a)(2) is republished and paragraph (a)(2)(i) is revised; paragraphs (b)(1)(ii) and (b)(1)(iii) are redesignated as paragraphs (b)(1)(iii) and (b)(1)(iv), respectively; new paragraph (b)(1)(ii) is added; the introductory text of paragraph (c) is republished, paragraph (c)(1) is revised, and a new paragraph (c)(3) is added; paragraph (d)(2) is revised; the heading of paragraph (e) and paragraph (e)(1) are revised; the introductory texts of paragraphs (e)(2) and (e)(3) is revised; paragraphs (e)(3)(i), (e)(3)(ii), and (e)(3)(iii) are redesignated as paragraphs (e)(3)(i)(A), (e)(3)(i)(B), and (e)(3)(i)(C), respectively; new paragraphs (e)(3)(i) introductory text, (e)(3)(ii) and (e)(3)(iii) are added; paragraph (f) is redesignated as paragraph (g); a new paragraph (f) is added; and newly redesignated paragraph (g)(1) is revised to read as follows:

§ 412.92 Special treatment: Sole community hospitals.

(a) *Criteria for classification as a sole community hospital.* HCFA classifies a hospital as a sole community hospital if it is located in a rural area (as defined in § 412.62(f)), and meets one of the following conditions:

* * * * *

(2) The hospital is located between 25 and 50 miles from other like hospitals and meets one of the following criteria:

(i) No more than 25 percent of the residents who become hospital inpatients or, if data on general resident utilization are not available, no more than 25 percent of the Medicare beneficiaries who become hospital inpatients in the hospital's service area are admitted to other like hospitals for care:

* * * * *

(b) *Classification procedures*—(1) *Request for classification as a sole community hospital.* * * *

(ii) If a hospital is seeking sole community hospital classification under paragraph (a)(2)(i) or (a)(2)(ii) of this section, the hospital must include the following information with its request:

(A) The hospital must provide patient origin data (for example, the number of patients from each zip code from which the hospital draws inpatients) for all inpatient discharges to document the boundaries of its service area.

(B) The hospital must provide patient origin data from all other hospitals located within a 50 mile radius of it or, if larger, within its service area, to document that no more than 25 percent of either all of the population or the Medicare beneficiaries residing in the hospital's service area and hospitalized for inpatient care were admitted to other like hospitals for care.

* * * * *

(c) *Terminology.* As used in this section—

(1) The term *"miles"* means the shortest distance in miles measured over improved roads. An improved road for this purpose is any road which is maintained by a local, State, or Federal government entity and which is available for use by the general public.

* * * * *

(3) The term *"service area"* means the area from which a hospital draws at least 75 percent of its inpatients during the most recent 12-month cost reporting period ending before it applies for classification as a sole community hospital.

(d) *Determining prospective payment rates for sole community hospitals.*

* * * * *

(2) *Adjustments to payments.* A sole community hospital may receive an adjustment to its payments to take into account a significant decrease in number of discharges or a significant increase in inpatient operating costs, as described in paragraphs (e) and (g) of this section respectively.

(e) *Additional payments to sole community hospitals experiencing a significant volume decrease.* (1) For cost reporting periods beginning on or after October 1, 1983 and before October 1, 1990, HCFA provides for a payment adjustment for a sole community hospital for any cost reporting period during which the hospital experiences, due to circumstances as described in paragraph (e)(2) of this section, of more than five percent decrease in its total discharges of inpatients as compared to its immediately preceding cost reporting period. If either the cost reporting period in question or the immediately preceding cost reporting period is other than a 12-month cost reporting period, the intermediary must convert the discharges to a monthly figure and multiply this figure by 12 to estimate the total number of discharges for a 12-month cost reporting period.

(2) To qualify for a payment adjustment on the basis of a decrease in discharges, a sole community hospital must no later than 180 days after the date on the intermediary's notice of program reimbursement—

* * * * *

(3) HCFA determines a lump sum adjustment amount not to exceed the difference between the hospital's Medicare inpatient operating costs and the hospital's total DRG revenue based on DRG-adjusted prospective payment

rates (including outlier payments determined under Subpart F of this part and additional payments made for hospitals that serve a disproportionate share of low-income patients as determined under § 412.106 and for indirect medical education costs as determined under § 412.118).

(i) In determining the adjustment amount, HCFA considers—

* * * * *

(ii) HCFA makes its determination within 180 days from the date HCFA receives from the intermediary the hospital's request and all other necessary information.

(iii) The HCFA determination is subject to review under Subpart R of Part 405 of this chapter.

(f) *Additional payments to other hospitals experiencing a significant volume decrease.* (1) For cost reporting periods beginning on or after October 1, 1987 and before October 1, 1990, HCFA provides for a payment adjustment for a hospital that qualifies as a sole community hospital but is not receiving payment as a sole community hospital under paragraph (d) of this section for any cost reporting period during which the hospital experiences, due to circumstances beyond its hospital's control, a decrease of more than five percent in its total discharges of inpatients as compared to its immediately preceding cost reporting period. If either the cost reporting period in question or the immediately preceding cost reporting period is other than a 12-month cost reporting period, the intermediary must convert the discharges to a monthly figure and multiply that figure by 12 to estimate the total number of discharges for a 12-month cost reporting period. The payment adjustment is determined under the provisions of paragraph (e)(3) of this section.

(2) To qualify for a payment adjustment under paragraph (f)(1) of this section, a hospital must complete the following:

(i) The hospital must submit to the HCFA regional office a request for sole community hospital status for the purpose of the payment adjustment only furnishing the documentation as may be necessary to demonstrate that the hospital meets the criteria in paragraph (a) of this section.

(ii) Within 180 days from the date on the notice from the regional office indicating that sole community hospital status has been granted for purposes of the payment adjustment only, the hospital submits to the intermediary documentation demonstrating the size of the decrease in discharges and the resulting effect on per discharge costs and shows that the decrease is due to circumstances beyond the hospital's control.

(g) *Payment adjustment for new inpatient facilities or services*—(1) *General rule.* If a sole community hospital experiences a significant increase in inpatient operating costs resulting from new inpatient services or facilities that were not available in the hospital during its base period and that are necessary for patient care, HCFA may adjust payments made to the hospital to ensure that it is receiving reasonable compensation, as defined in paragraph (g)(2) of this section, for the operating costs of the new inpatient facilities or services (including special care units).

* * * * *

3. In § 412.96, introductory text is added to paragraph (b), paragraphs (b)(1) and (d) are revised, and paragraph (e) is removed and reserved to read as follows:

§ 412.96 Special treatment: Referral centers.

* * * * *

(b) *Criteria for cost reporting periods beginning on or after October 1, 1983.* The hospital meets either of the following criteria:

(1) The hospital is located in a rural area (as defined in § 412.63(b)) and has the following number of beds, as determined under the provisions of § 412.118(b), available for use:

(i) Effective for discharges occurring before April 1, 1988, the hospital has 500 or more beds.

(ii) Effective for discharges occurring on or after April 1, 1988, the hospital has 275 or more beds during its most recently completed cost reporting period.

* * * * *

(d) *Payment to rural referral centers.* Effective for discharges occurring on or after April 1, 1988, a hospital that is located in a rural area and meets the criteria of paragraphs (b)(1), (b)(2), or (c) of this section is paid prospective payments per discharge based on the applicable other urban payment rates as determined in accordance with § 412.63, as adjusted by the hospital's area wage index.

(e) [Reserved]

* * * * *

4. In § 412.106, the introductory text of paragraph (b)(1), and paragraphs (b)(1)(ii), (b)(2), and (c) are revised to read as follows:

§ 412.106 Special treatment: Hospitals that serve a disproportionate share of low-income patients.

* * * * *

(b) *Criteria for classification*—(1) *General rule.* For discharges occurring on or after May 1, 1986 and before October 1, 1990, a payment adjustment (as described in paragraph (c) of this section) is made for each hospital that meets one of the following criteria:

* * * * *

(ii) The hospital is located in an urban area, has 100 or more beds, and can demonstrate that, during its cost reporting period, more than 30 percent of its net inpatient care revenues are derived from State and local government payments for indigent care furnished to patients who are not covered by Medicare or Medicaid.

(2) *Special rule for certain rural hospitals.* For discharges occurring on or after October 1, 1986 and before October 1, 1990, a payment adjustment (as described in paragraph (c) of this section) is made for each hospital that, during its cost reporting period, has a disproportionate patient percentage that is at least equal to 15 percent, if the hospital is located in a rural area and has 500 or more beds.

(c) *Payment adjustment.* For discharges occurring on or after October 1, 1988, if a hospital meets one of the criteria in paragraph (b) of this section, the hospital's total DRG revenue based on DRG-adjusted prospective payment rates (for transition period payments, the Federal portion of the hospital's payment rates), including outlier payments determined under Subpart F of this part but excluding additional payments made under the provisions of this subpart or § 412.118, is increased by the disproportionate share payment adjustment factor, determined as follows:

(1) If the hospital meets the criteria of paragraph (b)(1)(i)(A) or (b)(2) of this section, the disproportionate share payment adjustment factor is 2.5 percent plus one-half the difference between the hospital's disproportionate patient percentage and 15 percent.

(2) If the hospital meets the criteria of paragraph (b)(1)(i)(B) of this section, the disproportionate share payment adjustment factor is five percent.

(3) If the hospital meets the criteria of paragraph (b)(1)(i)(C) of this section, the disproportionate share payment adjustment factor is four percent.

(4) If the hospital meets the criteria of paragraph (b)(1)(ii) of this section, the disproportionate share payment adjustment factor is 25 percent.

G. Subpart H is amended as follows:

Subpart H—Payments to Hospitals Under the Prospective Payment System

1. In § 412.113, paragraphs (a)(1) and (b) are revised to read as follows:

§ 412.113 Payments determined on a reasonable cost basis.

(a) *Capital related costs.* (1) *Payment.* Subject to the reductions described in paragraph (a)(2) of this section, payment for capital-related costs (as described in § 413.130 of this chapter) is determined on a reasonable cost basis.

* * * * *

(b) *Direct medical education costs.* Payment for the cost of approved medical educational activities as defined in § 413.85 of this chapter is made on a reasonable cost basis (except with respect to activities defined in § 413.85(d) of this chapter). For cost reporting periods beginning on or after July 1, 1985, but before July 1, 1986, payment for these reasonable costs is limited as described in § 413.85(a) of this chapter.

* * * * *

2. In § 412.116, the heading and paragraph (a) are revised, paragraph (d) is removed, paragraphs (e) and (f) are redesignated as paragraphs (d) and (e), respectively, and newly redesignated paragraph (d) is revised to read as follows:

§ 412.116 Method of payment.

(a) *General rule.* Unless the provisions of paragraphs (b) and (c) of this section apply, hospitals are paid for each discharge based on the submission of a discharge bill. Payments for inpatient hospital services furnished by an excluded distinct part psychiatric or a rehabilitation unit of a hospital are made as described in § 413.64 (a), (c), (d), and (e) of this chapter.

* * * * *

(d) *Outlier payments.* Payments for outlier cases (described in Subpart F of this part) are not made on an interim basis. The outlier payments are made based on submitted bills and represent final payment.

* * * * *

3. In § 412.118, the introductory text of paragraph (c) is republished; paragraphs (c)(1) and (c)(2) are revised; paragraph (d)(1) is removed and paragraph (d)(2) is redesignated as paragraph (d)(1); newly redesignated paragraph (d)(1) is amended by revising the introductory text and paragraphs (d)(1)(i) and (d)(1)(iii); and a new paragraph (d)(2) is added to read as follows:

§ 412.118 Determination of indirect medical education adjustment.

* * * * *

(c) *Measurement for teaching activity.* The factor representing the effect of teaching activity on inpatient operating costs is equal to the following:

(1) For discharges occurring on or after May 1, 1986 and before October 1, 1990, the factor equals .405.

(2) For discharges occurring on or after October 1, 1990, the factor equals .5795.

(d) *Determination of education adjustment factor.* (1) For discharges occurring on or after October 1, 1988 and before October 1, 1990, each hospital's education adjustment factor is calculated as follows:

(i) *Step one*—A factor representing the sum of 1.00 plus the hospital's ratio of full-time equivalent interns and residents to beds, as determined under paragraph (a)(1) of this section, is raised to an exponential power equal to the factor set forth in paragraph (c)(1) of this section.

* * * * *

(iii) *Step three*—The factor derived from completing steps one and two is multiplied by 1.89.

(2) For discharges occurring on or after October 1, 1990, each hospital's education adjustment factor is calculated as follows:

(i) *Step one*—A factor representing the sum of 1.00 plus the hospital's ratio of full-time equivalent interns and residents to beds, as determined under paragraph (a)(1) of this section, is raised to an exponential power equal to the factor set forth in paragraph (c)(2) of this section.

(ii) *Step two*—The factor derived from step one is reduced by 1.00.

(iii) *Step three*—The factor derived from completing steps one and two is multiplied by 1.43.

* * * * *

H. Subpart K is amended as follows:

Subpart K—Prospective Payment System for Hospitals Located in Puerto Rico

1. In § 412.208, the introductory test of paragraph (f)(1) is republished, paragraph (f)(1)(ii) is redesignated as paragraph (f)(1)(iii), a new paragraph (f)(1)(ii) is added, and paragraph (i) is revised to read as follows:

§ 412.208 Puerto Rico rates for Federal fiscal year 1988.

* * * * *

(f) *Geographic classifications.* (1) For purposes of this paragraph (e) of this section, the following definitions apply:

* * * * *

(ii) The term "large urban area" means an MSA with a population of more than 1,000,000.

* * * * *

(i) *Adjusting for different area wage levels.* HCFA adjusts the proportion (as estimated by HCFA from time to time) of Puerto Rico rates computed under paragraph (h) of this section that are attributable to wages and labor-related costs, for area differences in hospital wage levels, by a factor (established by HCFA) reflecting the relative hospital wage level in the geographic area of the hospital compared to the national average hospital wage level (that is, urban or rural area as determined under the provisions of paragraph (f) of this section).

2. In § 412.210, paragraph (a)(2) is revised; the text of paragraph (b) is redesignated as paragraph (b)(1) and revised new paragraphs (b)(2) and (b)(3) are added; and the introductory text of paragraph (c), paragraph (c)(1), the introductory texts of paragraphs (d) and (d)(1), paragraph (d)(1)(i), and paragraph (e) are revised to read as follows:

§ 412.210 Puerto Rico rates for fiscal years after fiscal year 1988.

(a) *General rule.* * * *

(2) The rate is determined for hospitals located in large urban, other urban, or rural areas within Puerto Rico, as described in paragraphs (b) through (e) of this section.

(b) *Geographic classifications.* (1) For purposes of this section, the definitions set forth in § 412.208(f)(1) apply.

(2) For discharges occurring on or after October 1, 1988, a hospital located in a rural county adjacent to one or more urban areas is deemed to be located in an urban area and receives the Federal payment amount for the urban area to which the greatest number of workers in the county commute if the county in which the hospital is located meets the following criteria:

(i) The rural county meets one of the following commuting standards:

(A) At least 15 percent of the residents of the rural county who are employed commute to the central county or counties of all adjacent urban areas.

(B) The sum of the number of employed residents of the rural county who commute to the central county or counties of all adjacent urban areas and the number of employed residents of all adjacent urban areas who commute to the rural county equals at least 20 percent of the number of employed residents of the rural county.

(ii) The rural county meets all other applicable Executive Office of Management and Budget (EOMB)

standards for the level of commuting determined under paragraph (f)(3)(i) of this section for designation as an outlying county of an MSA. Those EOMB standards are set forth in a notice of final standards for classification of MSAs published in the **Federal Register** on January 3, 1980 (45 FR 956), and available from HCFA, East High Rise Building, Room 132, 6325 Security Boulevard, Baltimore, Maryland 21207.

(3) For hospitals that consist of two or more separately located inpatient hospital facilities, the national adjusted prospective payment rate is based on the geographic location of the hospital at which the discharge occurs.

(c) *Updating previous standardized amounts.* HCFA computes separate average standardized amounts for hospitals in large urban, other urban, and rural areas within Puerto Rico equal to the respective average standardized amount computed for fiscal year 1988 under § 412.208(e)—

(1) Increased by the applicable percentage changes determined under § 412.63 (g) and (h); and

* * * * *

(d) *Computing Puerto Rico rates for large urban, other urban, and rural hospitals.* For each discharge classified within a DRG, HCFA establishes for the fiscal year a Puerto Rico prospective payment rate as follows:

(1) For hospitals located in a large urban or other urban area in Puerto Rico, the rate equals the product of—

(i) The average standardized amount (computed under paragraph (c) of this section) for the fiscal year for hospitals located in a large urban or other urban area; and

* * * * *

(e) *Adjusting for different area wage levels.* HCFA adjusts the proportion (as estimated by HCFA from time to time) of Puerto Rico rates computed under paragraph (d) of this section that is attributable to wages and labor-related costs for area differences in hospital wage levels by a factor (established by HCFA) reflecting the relative hospital wage level in the geographic area (that is, urban or rural area as determined under the provisions of paragraph (b) of this section) of the hospital compared to the national average hospital wage level.

§ 412.212 [Amended]

3. In § 412.212, the reference to "§ 412.63(i)(1)(i)" in paragraph (b)(1) is revised to read "§ 412.63(j)(1)(i)" and the reference to "§ 412.63(i)(2)(i)" in paragraph (b)(2) is revised to read "§ 412.63(j)(2)(i)".

II. Part 413 is amended as follows:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES

A. The authority citation for Part 413 continues to read as follows:

Authority: Secs. 1102, 1122, 1814(b), 1815, 1833(a), 1861(v), 1871, 1881, and 1886 of the Social Security Act as amended (42 U.S.C. 1302, 1320a–1, 1395f(b), 1395g, 1395l(a), 1395x(v), 1395hh, 1395rr, and 1395ww).

B. In Subpart C, § 413.40, paragraphs (a)(2), (b)(1), and (b)(2) are revised; the introductory text of paragraph (c)(3)(i) is republished; paragraphs (c)(3)(i)(C) and (c)(3)(i)(D) are revised; paragraph (f)(1) is redesignated as paragraph (f)(1)(i); and a new paragraph (f)(1)(ii) is added to read as follows:

§ 413.40 Ceiling on rate of hospital cost increases.

(a) *Introduction.* * * *

(2) *Applicability.* (i) This section is not applicable to—

(A) Hospitals reimbursed in accordance with section 1814(b)(3) of the Act or under State reimbursement control systems that have been approved under section 1886(c) of the Act and Subpart C of Part 403 of this chapter; or

(B) Hospitals that are paid under the prospective payment system for inpatient hospital services in accordance with section 1886(d) of the Act and Part 412 of this chapter.

(ii) For cost reporting periods beginning on or after October 1, 1983, this section is applicable to hospitals excluded from the prospective payment system in accordance with § 412.23 of this chapter, subprovider psychiatric and rehabilitation units (distinct parts) excluded from the prospective payment system in accordance with §§ 412.25 through 412.32 of this chapter, and those hospitals eligible for special treatment under the prospective payment system as described in § 412.94(b) of this chapter.

(b) *Cost reporting periods subject to the rate of increase ceiling.*—(1) *Base period.* Each hospital's ceiling is based on allowable inpatient operating costs per case incurred in the 12-month cost reporting period immediately preceding the first cost reporting period subject to ceilings established under this section, except that, when the immediately preceding cost reporting period is a short reporting period (fewer than 12 months) the first 12-month period subsequent to that short period is the base period. The ceiling established under this procedure remains applicable for a hospital or excluded distinct part hospital unit, as described in §§ 412.25 through 412.32 of this chapter, in spite of intervening cost reporting periods during which the hospital or excluded distinct part hospital unit is not subject to the target amount as a result of other provisions of the law or regulations, or nonparticipation of the Medicare program, unless the hospital or excluded distinct part hospital unit qualifies as a new hospital or excluded distinct part hospital unit under paragraph (f) of this section.

(2) *Periods subject to the ceiling.* Ceilings established under this section are applied to all cost reporting periods that—

(i) Begin on or after October 1, 1982; and

(ii) Immediately follow the base period established under paragraph (b)(1) of this section unless the exception in paragraph (b)(3) of this section is applicable.

* * * * *

(c) *Procedure for establishing the ceiling (target amount).* * * *

(3) *Target rate percentage.* * * *

(i) The applicable target rate percentage is determined as follows: * * *

(C) *Federal fiscal year 1988.* The applicable target rate percentage for cost reporting periods beginning on or after October 1, 1987 and before October 1, 1988 is 2.3238 percent. For purposes of updating the target rates for cost reporting periods beginning on or after October 1, 1988, the target rate percentage for cost reporting periods beginning during FY 1988 is deemed to have been 2.7 percent.

(D) *Federal fiscal year 1989 and following:* The applicable target rate percentage for cost reporting periods beginning during FY 1989 and in all fiscal years thereafter is the percentage increase in the hospital market basket (as described in paragraph (c)(3)(ii)) of this section.

* * * * *

(f) *Exemptions*—(1)(i) *New hospitals.* New hospitals that request and receive an exemption from HCFA are not subject to the rate of increase ceiling imposed under this section. For purposes of this section, a new hospital is a provider of inpatient hospital services that has operated as the type of hospital for which HCFA granted it approval to participate in the Medicare program, under present or previous ownership, or both, for less than three full years. This exemption expires at the end of the first cost reporting period

beginning at least two years after the hospital accepts its first patient. The first cost reporting period beginning at least two years after the hospital accepts its first patient is the base period in accordance with paragraph (b) of this section.

(ii) A newly-established distinct part unit that is excluded from the prospective payment system under the provisions of §§ 412.25 through 412.32 of this chapter does not qualify for the exemption afforded to a new hospital under paragraph (f)(1)(i) of this section unless the distinct part unit is located in a hospital that, if it were subject to the provisions of this section, would qualify as a new hospital under paragraph (f)(1)(i) of this section. The first 12-month cost reporting period under which a newly-established excluded distinct part unit exists is the base period used to establish a target amount.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 13.773, Medicare—Hospital Insurance)

Dated: May 13, 1988.

William L. Roper,

Administrator, Health Care Financing Administration.

Approved: May 20, 1988.

Otis R. Bowen,

Secretary

[**Editorial Note:** The following addendum and appendixes will not appear in the Code of Federal Regulations.]

Addendum—Proposed Schedule of Standardized Amounts Effective with Discharges On or After October 1, 1988, and Update Factors and Target Rate Percentages Effective With Cost Reporting Periods Beginning On or After October 1, 1988

I. Summary and Background

In this addendum, we are proposing changes in the methods, amounts, and factors for determining prospective payment rates for Medicare inpatient hospital services. We are also proposing new target rate percentages for determining the rate-of-increase limits (target amounts) for hospitals and hospital units excluded from the prospective payment system.

For hospital cost reporting periods beginning on or after October 1, 1988, except for sole community hospitals and hospitals located in Puerto Rico, each hospital's payment per discharge under the prospective payment system will be comprised of 100 percent of the Federal rate. Except for hospitals affected by the regional floor, the Federal portion of a hospital's prospective payment rate is based on 100 percent of the national rate.

Sole community hospitals are to be paid on the basis of a rate per discharge composed of 75 percent of the hospital-specific rate and 25 percent of the applicable Federal regional rate (section 1886(d)(5)(C)(ii) of the Act). Hospitals in Puerto Rico are paid on the basis of a rate per discharge composed of 75 percent of a Puerto Rico rate and 25 percent of a national rate (section 1886(d)(9)(A) of the Act). Hospitals affected by the regional floor are paid on the basis of 85 percent of the Federal national rate and 15 percent of the Federal regional rate.

As discussed below in section II, we are proposing to make changes in the determination of the prospective payment rates. The changes, to be applied prospectively, would affect the calculation of the Federal rates. Section III sets forth our proposed changes for determining the rate-of-increase limits for hospitals excluded from the prospective payment system. The tables to which we refer in the preamble to the proposed rule are presented at the end of this addendum in section IV.

II. Proposed Changes to Prospective Payment Rates For Hospitals for FY 1989

The basic methodology for determining prospective payment rates is set forth at § 412.63 for hospitals located outside of Puerto Rico. The basic methodology for determining the prospective payment rates for hospitals located in Puerto Rico is set forth at §§ 412.210 and 412.212. Below we discuss the manner in which we are proposing to change some of the factors or methodology used for determining the prospective payment rates. The Federal and Puerto Rico rate changes, once issued as final, would be effective with discharges occurring on or after October 1, 1988. As required by section 1886(d)(4)(C) of the Act, we must adjust the DRG classifications and weighing factors for discharges in FY 1989.

In summary, the standardized amounts set forth in Tables 1a, 1b, and 1c of section IV of this addendum were:

- Restandardized to reflect the revision to the indirect medical education and disproportionate share hospital adjustment factors.
- Except for the amounts in Table 1c, adjusted to generate and preserve program savings from the reduction in indirect medical education payments.
- Adjusted to ensure budget neutrality as provided in section 4005(a)(1)(C) of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100-203).
- Adjusted by the revised urban and rural outlier offsets.
- Updated by—

—The market basket percentage increase minus 1.5 percentage points for hospitals located in rural areas;

—The market basket percentage increase minus 2.0 percentage points for hospitals in large urban areas; and

—The market basket percentage increase minus 2.5 percentage points for hospitals in urban areas other than large urban areas.

A. Calculation of Adjusted Standardized Amounts

1. Standardization and Restandardization of Base-Year Costs or Target Amounts

Section 1886(d)(2)(A) of the Act required the establishment of base-year cost data containing allowable operating costs per discharge of inpatient hospital services for each hospital. The preamble to the interim final rule, published September 1, 1983 (48 FR 39763), contains a detailed explanation of how base-year cost data were established in the initial development of standard amounts for the prospective payment system and how they are used in computing the Federal rates.

Section 1886(d)(9)(B)(i) of the Act required that Medicare target amounts be determined for each hospital located in Puerto Rico for its cost reporting period beginning in FY 1987. The September 1, 1987 final rule contains a detailed explanation of how the target amounts were determined and how they are used in computing the Puerto Rico rates (52 FR 33043, 33066).

The standardized amounts are based on per discharge averages of adjusted hospital costs or, for Puerto Rico, adjusted target amounts, from a base period, updated and otherwise adjusted in accordance with the provisions of section 1886(d) of the Act. Sections 1886(d)(2)(C) and 1886(d)(9)(B)(ii) of the Act required that the updated base-year per discharge costs and, for Puerto Rico, the updated target amounts, respectively, be standardized in order to remove from the cost data the effects of certain sources of variation in cost among hospitals. These include case mix, differences in area wage levels, cost of living adjustments for Alaska and Hawaii, indirect medical education costs, and payments to hospitals serving a disproportionate share of low-income patients. Restandardization for the revised indirect medical education and disproportionate share hospital adjustment factors is performed at the individual hospital level because the original adjustments are performed on a

hospital-specific basis and it is those adjustments that must be replaced.

Since all adjustments for variation in hospital operating costs or target amounts except those for the indirect medical education and disproportionate share hospitals have already been accounted for consistent with the construction of the standardized amounts, no revision was made at the hospital level for those factors. That is, the adjustments for differences in case mix, wages, and cost-of-living reflected in the FY 1989 proposed standardized amounts are identical to those reflected in the current (FY 1988) standardized amounts. Therefore, the discussion below is limited to the changes in standardization for indirect medical education and disproportionate share hospitals necessitated by section 4003 of Pub. L. 100–203.

a. Indirect Medical Education Costs. Section 1886(d)(2)(C)(i) of the Act requires that the updated FY 1984 amounts be standardized for indirect medical education costs. Section 1886(d)(9)(B)(ii)(I) is the parallel requirement for development of the Puerto Rico rates from updated FY 1987 target amounts. Section 1886(d)(5)(B) of the Act provides that prospective payment hospitals receive an additional payment for the indirect costs of medical education.

Section 4003(a) of Pub. L. 100–203 revised section 1886(d)(5)(B)(ii) of the Act to reduce the indirect medical education adjustment factor used to determine the indirect medical education payment from approximately 8.1 percent to approximately 7.7 percent for discharges occurring on or after October 1, 1988 and before October 1, 1990. (These factors are approximations because the adjustment factor is applied on a curvilinear or variable basis. An adjustment made on a curvilinear basis reflects a nonlinear cost relationship, that is, each absolute increment in a hospital's ratio of interns and residents to beds does not result in an equal proportional increase in costs.) For discharges occurring on or after October 1, 1988 and before October 1, 1990, the indirect medical education factor equals the following:

$$1.89 \times \left\{ \left(\frac{1 + \text{interns and residents}}{\text{beds}} \right)^{.405} - 1 \right\}$$

Section 1895(b)(1)(B) of the Tax Reform Act of 1986 (Pub. L. 99–514), enacted October 22, 1986, provides that "If the formula under paragraph (5)(B) [of 1886(d) of the Act] for determining payments for the indirect costs of medical education is changed for any fiscal year, the Secretary shall readjust the standardized amounts previously determined for each hospital to take into account the changes in that formula." Accordingly, since the indirect medical education adjustment factor has been changed by section 4003(a) of Pub. L. 100–203, the base-year costs and target amounts have been readjusted (restandardized) using the new formula.

The restandardization is accomplished by multiplying each affected hospital's base-year cost or target amount per discharge by 1.0 plus the hospital's indirect medical education adjustment factor computed using the formula in effect prior to the enactment of Pub. L. 100–203 and then dividing the product by 1.0 plus the hospital's revised indirect medical education adjustment factor computed using the formula required by section 1886(d)(5)(B)(ii) of the Act as amended by section 4003(a) of Pub. L. 100–203.

b. Costs for Hospitals that Serve a Disproportionate Share of Low-Income Patients. Prior to enactment of Pub. L. 100–203, sections 1886(d)(2)(C)(iv) and 1886(d)(9)(B)(ii)(IV) of the Act provided that, effective with discharges occurring on or after October 1, 1986 and before October 1, 1989, the updated hospital costs and target amounts per case be standardized for the estimated additional payments made to hospitals that serve disproportionate shares of low-income patients. That is, the law requires us to remove the effects of the payments made to disproportionate share hospitals from the costs used to establish the standardized amounts.

Section 4003(b) and (c) of Pub. L. 100–203 amended section 1886(d) of the Act to provide the following changes to the disproportionate share adjustment:

- The adjustment is extended to discharges occurring before October 1, 1990.
- For hospitals that qualify for a disproportionate share adjustment because they receive more than 30 percent of their net inpatient revenues from State and local government sources for the care of indigent patients, the adjustment is raised from 15 percent to 25 percent.
- For hospitals with 100 or more beds that are located in urban areas and for hospitals with 500 or more beds that are located in rural areas, the 15 percent cap on the amount of the payment adjustment is eliminated.

In establishing the standardized amounts for FY 1987 and FY 1988, we adjusted each disproportionate share hospital's inpatient operating cost or target amount per discharge by adding 1.0 to the applicable disproportionate share payment factor and dividing the hospital's cost or target amount per discharge by that number. In this way, we removed the effect of payment adjustments for disproportionate share hospitals from the standardized amounts as required under section 1886(d)(2)(C)(iv) of the Act.

The changes to the disproportionate share adjustment will result in higher adjustment factors than are taken into account in standardizing the costs used to establish the standardized amounts. Thus, it is now necessary to restandardize the base-year costs and target amounts to remove the effects of disproportionate share payments computed in accordance with the revised formula. In order to accomplish the restandardization, we first multiplied each affected hospital's base-year cost or target amount per discharge by 1.0 plus the applicable disproportionate share payment factor computed under the law as in effect prior to enactment of Pub. L. 100–203 and used to standardize the costs for FY 1988. This eliminated the effects of prior standardization for disproportionate share payments. We then divided the product of this calculation by the disproportionate share payment adjustment factor computed using the most recent data available to reflect the elimination of the 15 percent cap on disproportionate share adjustments and other changes required by section 4003(c) of Pub. L. 100–203.

2. Wage Index Values for Puerto Rico

As discussed in section III of the preamble to this proposed rule, we are proposing to update the HCFA wage index by basing it entirely on 1984 wage data. However, since the current wage index values for areas in Puerto Rico are based solely on 1984 data (and are not a blend of indexes based on 1982 and 1984 data), any changes in Puerto Rico wage index values would be attributable only

to the provisions of section 4005(a) of Pub. L. 100–203 and any corrections we have made to the 1984 wage data based on our continuing analysis of the data. Since the Puerto Rico standardized amounts are based on target amount data from relatively few hospitals, it is necessary to restandardize the target amount data to reflect changes in the wage values for Puerto Rico in order for the standardized amounts to be accurately adjusted for differences in area relative wage levels.

3. Computing Urban and Rural Averages Within Geographic Areas

In determining the prospective payment rates for FY 1984, section 1886(d)(2)(D) of the Act required that the average standardized amounts be determined for hospitals located in urban and rural areas of the nine census divisions and the nation. Under section 1886(d)(9)(B)(iii) of the Act, the average standardized amount per discharge for FY 1988 must be determined for hospitals located in urban and rural areas in Puerto Rico.

For FY 1989, except for hospitals in Puerto Rico and those hospitals that are affected by the regional floor, the Federal rates will be comprised of 100 percent of the national rate (section 1886(d)(1)(A)(iii) of the Act). The Federal rate for hospitals affected by the regional floor is based on 85 percent of the national rate and 15 percent of the regional rate. Section 1886(d)(5)(C)(ii) of the Act specifies that a sole community hospital's Federal rate is based on 100 percent of the regional rate. Hospitals in Puerto Rico are paid a blend of 75 percent of the applicable Puerto Rico standardized amount and 25 percent of a national standardized payment amount.

Table 1a contains the three national standardized amounts that would be applicable to most hospitals. Table 1b sets forth the 27 regional standardized amounts that would be applicable to sole community hospitals and to hospitals subject to the regional floor. Under section 1886(d)(9)(A)(ii) of the Act as amended by section 4002(c) of Pub. L. 100–203, effective October 1, 1987, the national standardized payment amount applicable to hospitals in Puerto Rico consists of the discharge-weighted average of the national rural standardized amount, the national large urban standardized amount and the national other urban standardized amount (as set forth in Table 1a). The national average standardized amount for Puerto Rico is set forth in Table 1c. This table also includes the three standardized amounts that would be applicable to most hospitals in Puerto Rico.

The methodology for computing the national average standardized amounts is identical to the methodology for determining the regional amounts, except that we now apply separate update factors for the purposes of determining large urban and other urban rates.

The Executive Office of Management and Budget (EOMB) may announce revised listings of the Metropolitan Statistical Area (MSA) and New England County Metropolitan Area (NECMA) designations that are used in calculating the standardized amounts. If EOMB makes the announcement before we issue the final rule, we will list the revised MSA/NECMA designations in the addendum to the final rule. Consistent with Medicare policy, the changes in designation will be effective for discharges occurring on or after October 1, 1988.

4. Updating the Average Standardized Amounts

In accordance with section 1886(d)(3)(A) of the Act, as amended by section 4002(c) of Pub. L. 100–203, we are proposing to update the large urban, other urban, and rural average standardized amounts using the applicable percentage increases specified in section 1886(b)(3)(B)(i) of the Act, as amended by section 4002(a) of Pub. L. 100–203. The percentage increase to be applied is mandated under that section of the law as the estimated percentage increase in the hospital market basket minus—

- 1.5 percentage points for hospitals located in rural areas;
- 2.0 percentage points for hospitals located in large urban areas; and
- 2.5 percentage points for hospitals located in other urban areas.

The percentage change in the market basket reflects the average change in the price of goods and services purchased by hospitals to furnish inpatient care.

The most recent forecasted hospital market basket increase for FY 1989 is 4.8 percent. Therefore, the applicable percentage increases are—

- 3.3 percent for hospitals located in rural areas;
- 2.8 percent for hospitals located in large urban areas; and
- 2.3 percent for hospitals in other urban areas.

In accordance with section 1886(b)(3)(B)(i) of the Act, we are also proposing that the hospital-specific rate (which after the first 51 days of cost reporting periods beginning on or after October 1, 1987 applies only to sole community hospitals) be updated by the applicable percentage increase for hospitals located in a large urban, other urban, or rural area based on the location of the sole community hospital.

Although the update factors for FY 1989 are set by law, we were required by section 1886(e)(3)(B) of the Act to report to Congress no later than March 1, 1988 on our initial recommendation of update factors for FY 1989 for both prospective payment hospitals and hospitals excluded from the prospective payment system. For general information purposes, we have included this report as Appendix B of this proposed rule. Our proposed recommendation on the update factors (which is required by sections 1886(e)(4) and (e)(5)(A) of the Act), as well as our responses to ProPAC's recommendations concerning the update factors, are set forth as Appendix C to this proposed rule.

5. Other Adjustments to the Average Standardized Amounts

a. Indirect Medical Education. Section 1886(d)(3)(C)(ii) of the Act provides that, effective for discharges occurring on or after October 1, 1986, the average standarized amounts be further reduced, taking into consideration the effects of the standardization for indirect medical education costs as described in section II.A.1.a. of this addendum. The required adjustment is to ensure that the program savings that would be achieved through standardizing for indirect medical education on one basis and computing indirect medical education payments on another basis are preserved. The first such adjustment was implemented for the standardized amounts effective October 1, 1986. (See the September 3, 1986 final rule (51 FR 31521).) Section 1886(d)(3)(C)(ii) of the Act, as amended by section 4003(a)(2) of Pub. L. 100–203, now requires a revision of the adjustment due to the revision of the adjustment factor for computing indirect medical education payments effective October 1, 1988.

Specifically, for each geographic area (regional and national, large urban, other urban, and rural), total payments including indirect medical education and disproportionate share hospital adjustments, based on payment rates for FY 1989, standardized for a 7.7 percent curvilinear indirect medical education factor and for disproportionate share, shall be neither more nor less than the estimated total of payments, including indirect medical education adjustment payments that would have been made based on rates standardized for an 11.59 percent linear indirect medical education factor and paid out at

approximately 8.3 percent on a curvilinear basis. The adjustment is performed on a regional basis in order to reflect congressional intent that the necessary calculations will not redistribute payments among the regions.

Through this adjustment, Congress is ensuring that total prospective payments, on a regional basis, taking into consideration the restandardization of rates for disproportionate share payments and for a revised indirect medical education payment factor of approximately 7.7 percent on a curvilinear basis, will equal payments that would have resulted with rates standardized for an 11.59 percent indirect medical education adjustment factor, and payments computed using an indirect medical education factor of approximately 8.3 percent applied on a curvilinear basis. Since the first such adjustment already ensures system savings equal to those that would have been achieved by a reduction in indirect medical education payments from 11.59 percent on a linear basis to about 8.7 percent on a curvilinear basis, the only further adjustment necessary is to achieve the incremental savings that would result from a further reduction in indirect medical education payments from 8.7 percent to about 8.3 percent, both on a curvilinear basis. Therefore, under section 1886(d)(3)(C)(ii) of the Act, for FY 1989, we are proposing to adjust the large urban, other urban, and rural regional and national standardized amounts to account for indirect medical education.

Because there is no specific reference in the Act to making this adjustment for hospitals in Puerto Rico, this adjustment was not made to the Puerto Rico standardized amounts. It is reflected, however, in the discharge-weighted national average standardized amount applicable to Puerto Rico.

The factors applied to the standardized amounts are shown in the table below:

	Large urban and other urban	Rural
1. New England (CT, ME, MA, NH, RI, VT)	0.99692	0.99826
2. Middle Atlantic (PA, NJ, NY)	0.99755	0.99804
3. South Atlantic (DE, DC, FL, GA, MD, NC, SC, VA, WV)	0.99823	0.99927
4. East North Central (IL, IN, MI, OH, WI)	0.99809	0.99965
5. East South Central (AL, KY, MS, TN)	0.99796	0.99994
6. West North Central (IA, KS, MN, MO, NB, ND, SD)	0.99757	0.99983
7. West South Central (AR, LA, OK, TX)	1.00064	0.99981
8. Mountain (AZ, CO, ID, MT, NV, NM, UT, WY)	0.99813	0.99990
9. Pacific (AK, CA, HI, OR, WA)	0.99928	1.00000
10. National	0.99823	0.99949

b. Rural Hospitals Deemed to be Urban. Section 1886(d)(8)(B) of the Act, as added by section 4005(a) of Pub. L. 100–203, provides that certain rural hospitals will be deemed urban effective with discharges occurring on or after October 1, 1988. Section 1886(d)(8)(C) of the Act specifies two payment conditions that must be met. First, the FY 1989 urban standardized amounts are to be adjusted so as to ensure that total aggregate payments under the prospective payment system after implementation of this provision are equal to the aggregate prospective payments that would have been made absent the provision. Second, the rural standardized amounts are to be adjusted to ensure that aggregate payments to rural hospitals not affected by this provision neither increase nor decrease as a result of implementation of this provision. The following adjustment factors, necessary to achieve the requisite budget neutrality constraints, were applied to the standardized amounts: Urban: .99924; rural: 1.00075.

c. Outliers. Section 1886(d)(5)(A) of the Act requires that, in addition to the basic prospective payment rates, payments must be made for discharges involving day outliers and may be made for cost outliers. Section 1886(d)(3)(B) of the Act correspondingly requires that the urban and rural standardized amounts, respectively, be separately reduced by the proportion of estimated total DRG payments attributable to estimated outlier payments for hospitals located in urban areas and those located in rural areas. Section 1886(d)(9)(B)(iv) of the Act requires that the urban and rural standardized amounts be reduced by the proportion of estimated total payments made to hospitals in Puerto Rico attributable to estimated outlier payments.

Consequently, instead of the uniform reduction factor applying equally to all the standardized amounts, there are now two separate reduction factors, one applicable to the urban national and regional standardized amounts and the other applicable to the rural national and regional standardized amounts. Furthermore, sections 1886(d)(5)(A)(iv) and 1886(d)(9)(i) of the Act direct that outlier payments may not be less than five percent nor more than six percent of total payments projected to be made based on the prospective payment rates in any year.

In the September 1, 1987 final rule, we set the outlier thresholds so as to result in estimated outlier payments equal to five percent of total prospective payments. We also set the same outlier thresholds and offsets for the Puerto Rico prospective payment standardized amounts as we had for hospitals located outside Puerto Rico. Therefore, for FY 1988, we set the day outlier threshold at the lesser of 18 days or 2.0 standard deviations and the cost outlier threshold at the greater of $14,000 or 2.0 times the prospective payment rate for the DRG. The outlier adjustments for FY 1988 were .94441 for the urban rates and .97485 for the rural rates.

These adjustments were modified effective for discharges occurring on or after April 1, 1988 to .9441 for urban rates and .9746 for rural rates, with a budget neutrality factor of .997697, for the increase to 90 percent in the marginal cost factor for burn outliers in accordance with section 4008(d)(1)(A) of Pub. L. 100–203. (See the April 5, 1988 notice (53 FR 11137).) These thresholds and offsets were estimated to yield outlier payments of 5.1 percent of total prospective payments.

We are proposing to continue to set the outlier thresholds so as to result in estimated outlier payments equal to five percent of total prospective payments. Therefore, for FY 1989, we would set the day outlier threshold at the lesser of 24 days or 3.0 standard deviations and the cost outlier threshold at the greater of $27,000 or 2.0 times the prospective payment rate for the DRG. See section IV.E of the preamble to this proposed rule for a detailed discussion of proposed outlier policy changes and the proposed outlier thresholds for FY 1989.

The proposed outlier adjustment factor for FY 1989 are as follows:

OUTLIER REDUCTION FACTORS

Urban	Rural
.9446	.9781

B. Adjustments for Area Wage Levels and Cost-of-Living

This section contains an explanation of the application of two types of adjustments to the adjusted standardized amounts that will be made by the intermediaries in determining the prospective payment rates as described in section D below. For discussion

purposes, it is necessary to present the adjusted standardized amounts divided into labor and nonlabor portions. Tables 1a, 1b, and 1c, as we propose in this addendum, contain the actual labor-related and nonlabor-related shares that would be used to calculate the prospective payment rates for hospitals located in the 50 States, the District of Columbia, and Puerto Rico.

1. Adjustment for Area Wage Levels

Sections 1886(d)(2)(H) and 1886(d)(9)(C)(iv) of the Act require that an adjustment be made to the labor-related portion of the prospective payment rates to account for area differences in hospital wage levels. This adjustment is made by the intermediaries by multiplying the labor-related portion of the adjusted standardized amounts by the appropriate wage index for the area in which the hospital is located. In section III of the preamble to this proposed rule, we discuss certain revisions we are making to the wage index. This index is set forth in Tables 4a and 4b of this addendum.

2. Adjustment for Cost of Living in Alaska and Hawaii

Section 1886(d)(5)(C)(iv) of the Act authorizes an adjustment to take into account the unique circumstances of hospitals in Alaska and Hawaii. Higher labor-related costs for these two States are taken account of in the adjustment for area wages above. For FY 1989, the adjustment necessary for nonlabor-related costs for hospitals in Alaska and Hawaii would be made by the intermediaries by multiplying the nonlabor portion of the standardized amounts by the appropriate adjustment factor contained in the table below.

TABLE OF COST-OF-LIVING ADJUSTMENT FACTORS, ALASKA AND HAWAII HOSPITALS

Alaska—All areas	1.25
Hawaii:	
Oahu	1.225
Kauai	1.175
Maui	1.20
Molokai	1.20
Lanai	1.20
Hawaii	1.15

(The above factors are based on data obtained from the U.S. Office of Personnel Management.)

C. DRG Weighting Factors

As discussed in section II of the preamble to this proposed rule, we have developed a classification system for all hospital discharges, sorting them into DRGs, and have developed weighting factors for each DRG that are intended to reflect the resource utilization of cases in each DRG relative to that of the average Medicare case.

Table 5 of section IV of this addendum contains the weighting factors that we propose to use for discharges occurring in FY 1989. These factors have been recalibrated as explained in section II of the preamble.

D. Calculation of Prospective Payment Rates for FY 1989

General Formula for Calculation of Prospective Payment Rates for FY 1989:

Prospective Payment Rate for all hospitals located outside Puerto Rico except sole community hospitals = Federal Portion

Prospective Payment Rate for Sole Community Hospitals = 75 percent of the hospital-specific portion + 25 percent of the Federal portion

Prospective Payment Rate for Puerto Rico Hospitals = 75 percent of the Puerto Rico rate + 25 percent of a discharge-weighted average of the large urban, other urban, and rural national rates

1. Federal Portion

For discharges on or after October 1, 1988 and before October 1, 1989, except for sole community hospitals and hospitals located in Puerto Rico, the hospital's rate is comprised exclusively of the Federal rate. The Federal rate is comprised of 100 percent of the Federal national rate except for those hospitals located in regions affected by the regional floor, whose Federal rate equals 85 percent of the Federal national rate and 15 percent of the Federal regional rate. For sole community hospitals, the 25 percent Federal portion is based entirely on the Federal regional rate. The Federal rates are determined as follows:

Step 1—Select the appropriate regional or national adjusted standardized amount considering the type of hospital and designation of the hospital as large urban, other urban, or rural (see Tables 1a and 1b, section IV of this addendum).

Step 2—Multiply the labor-related portion of the standardized amount by the applicable wage index for the geographic area in which the hospital is located (see Tables 4a and 4b, section IV of this addendum).

Step 3—For hospitals in Alaska and Hawaii, multiply the nonlabor-related portion of the standardized amount by the appropriate cost-of-living adjustment factor.

Step 4—Sum the amount from step 2 and the nonlabor portion of the standardized amount (adjusted if appropriate under step 3).

Step 5—Multiply the final amount from step 4 by the weighting factor corresponding to the appropriate DRG (see Table 5, section IV of this addendum).

Step 6—For sole community hospitals, multiply the result in step 5 by 25 percent. The result is the Federal portion of the FY 1989 prospective payment for a given discharge for a sole community hospital.

2. Hospital-Specific Portion (Applicable Only to Sole Community Hospitals)

The hospital-specific portion of the prospective payment rate is based on a hospital's historical cost experience. For the first cost reporting period under prospective payment, a hospital-specific rate was calculated for each hospital, derived generally from the following formula:

$$\frac{\text{Base year costs per discharge}}{\text{1981 case-mix index}} \times \text{update factor} = \text{Hospital-specific rate}$$

For sole community hospitals, the hospital-specific portion equals 75 percent of the hospital-specific rate for all cost reporting periods beginning on or after October 1, 1983. For each subsequent cost reporting period, the hospital-specific portion is derived as follows: Hospital-Specific Rate × Update Factor × Blending Percentage × DRG Weight.

For a more detailed discussion of the hospital-specific portion, we refer the reader to the September 1, 1983 interim final rule (48 FR 39772).

a. Updating the Hospital-Specific Rates for FY 1989 Cost Reporting Periods. For cost reporting periods beginning on or after October 1, 1988, we are proposing to increase the hospital-specific rates by—

- 3.3 percent (market basket percentage increase minus 1.5 percentage points) for hospitals located in rural areas;
- 2.8 percent (market basket percentage increase minus 2.0 percentage points) for hospitals located in large urban areas; and
- 2.3 percent (market basket percentage increase minus 2.5 percentage points) for hospitals located in other urban areas.

As required by section 1886(b)(3)(B) of the Act (as amended by section 4002 of Pub. L. 100–203), these are the same percentage increases by which we are proposing to change the Federal rates for FY 1989.

b. Calculation of Hospital-Specific Portion. For sole community hospital cost reporting periods beginning on or after October 1, 1988, the hospital-specific portion of a hospital's payment for a given discharge would be calculated by—

Step 1—Multiplying the hospital's hospital-specific rate for the preceding cost reporting period by the applicable update factor (that is, 3.3 percent for hospitals located in rural areas, 2.8 percent for hospitals located in large urban areas, and 2.3 percent for hospitals located in other urban areas);

Step 2—Multiplying the amount resulting from Step 1 by the specific DRG weighting factor applicable to the discharge; and

Step 3—Multiplying the result in step 2 by 75 percent. (The result is the hospital-specific portion of the FY 1989 prospective payment for a given discharge for a sole community hospital.)

3. General Formula for Calculation of Prospective Payment Rates for Hospitals Located in Puerto Rico beginning on or after October 1, 1988 and before October 1, 1989

a. Puerto Rico Rate. The Puerto Rico prospective payment rate is determined as follows:

Step 1—Select the appropriate adjusted average standardized amount considering the large urban, other urban, or rural designation of the hospital (see Table 1c, section IV of the addendum).

Step 2—Multiply the labor-related portion of the standardized amount by the appropriate wage index (see Tables 4a and 4b, section IV of the addendum).

Step 3—Sum the amount from step 2 and the nonlabor portion of the standardized amount.

Step 4—Multiply the result in step 3 by 75 percent.

Step 5—Multiply the amount from step 3 by the weighting factor corresponding to the appropriate DRG weight (see Table 5, section IV of the addendum).

b. *National Rate.* The national prospective payment rate is determined as follows:

Step 1—Multiply the labor-related portion of the national average standardized amount (see Table 1c, section IV of the addendum) by the appropriate wage index.

Step 2—Sum the amount from step 1 and the nonlabor portion of the national average standardized amount.

Step 3—Multiply the result in step 2 by 25 percent.

Step 4—Multiply the amount from step 3 by the weighting factor corresponding to the appropriate DRG weight (see Table 5, section IV of the addendum).

The sum of the Puerto Rico rate and the national rate computed above equals the prospective payment for a given discharge for a hospital located in Puerto Rico.

III. Proposed Target Rate Percentages for Hospitals and Hospital Units Excluded From the Prospective Payment System

A. Background

The inpatient operating costs of hospitals and hospital units excluded from the prospective payment system are subject to rate-of-increase limits established under the authority of section 1886(b) of the Act, which is implemented in § 413.40 of the regulations. Under these limits, an annual target amount (expressed in terms of the inpatient cost per discharge) is set for each hospital, based on the hospital's own historical cost experience, trended forward by the applicable update factors. This target amount is applied as a ceiling on the allowable costs per discharge for the hospital's next cost reporting period.

A hospital that has inpatient operating costs per discharge in excess of its target amount would be paid no more than that amount. However, a hospital that has inpatient operating costs less than its target amount would be paid its costs plus the lower of (1) 50 percent of the difference between the inpatient operating cost per discharge and the target amount, or (2) five percent of the target amount.

Each hospital's target amount is adjusted annually, before the beginning of its cost reporting period, by an applicable target rate percentage. For cost reporting periods beginning on or after October 1, 1988, section 1886(b)(3)(B)(ii) of the Act, as amended by section 4002(e) of Pub. L. 100–203, provides that the applicable percentage increase is the market basket percentage increase. Also, under section 4002(g)(3)(C) of Pub. L. 100–203, the hospital's target amount for the cost reporting period beginning in FY 1988 is deemed to have been increased by 2.7 percent (rather than 315/366 multiplied by 2.7, which was the actual target rate of increase applicable for this period). Therefore, in order to determine a hospital's target amount for its cost reporting period beginning in FY 1989, the following steps apply:

- Increase the hospital's target amount for its reporting period which began in FY 1987 by 2.7 percent;
- Increase the result of step one by the market basket percentage increase for FY 1989.

The most recent forecasted hospital market basket increase for FY 1989 is 4.8 percent. Therefore, the applicable percentage increase is also 4.8.

IV. Tables

This section contains the tables referred to throughout the preamble to

this proposed rule and in this addendum. For purposes of this proposed rule, and to avoid confusion, we have retained the designations of Tables 1 through 5 that were first used in the September 1, 1983 initial prospective payment final rule (48 FR 39844). Tables 1a, 1b, 1c, 3c, 4a, 4b, 5, 6a, 6b, 6c, 6d, 6e, 7a, 7b, and 8 are presented below. The tables are as follows:

Table 1a—National Adjusted Standardized Amounts, Labor/Nonlabor

Table 1b—Regional Adjusted Standardized Amounts, Labor/Nonlabor

Table 1c—Adjusted Standardized Amounts for Puerto Rico, Labor/Nonlabor

Table 3c—Hospital Case-Mix Indexes for Discharges Occurring in FY 1987

Table 4a—Wage Index for Urban Areas

Table 4b—Wage Index for Rural Areas

Table 5—Diagnosis-Related Groups

Table 6a—New Diagnosis Codes

Table 6b—New or Revised Procedure Codes

Table 6c—Elective, Diagnostic and Other Nonextensive Procedures Unrelated to Principal Procedures that Group to DRG 477

Table 6d—Additions to the CC Exclusions List

Table 6e—Deletions from the CC Exclusions List

Table 7a—Length-of-Stay Percentiles Using FY 1988 DRG Classification

Table 7b—Length-of-Stay Percentiles Using Proposed FY 1989 DRG Classification

Table 8—Statewide Average Cost-to-Charge Ratios for Urban and Rural Hospitals

This section contains the tables referred to in this preamble.

TABLE 1A.—NATIONAL ADJUSTED STANDARDIZED AMOUNTS, LABOR/NONLABOR

Large urban		Other Urban		Rural	
Labor-related	Nonlabor-related	Labor-related	Nonlabor-related	Labor-related	Nonlabor-related
2360.10	836.21	2337.05	828.04	2202.06	609.83

TABLE 1B.—REGIONAL ADJUSTED STANDARDIZED AMOUNTS, LABOR/NONLABOR

	Large urban		Other urban	Nonlabor-related	Rural	
	Labor-related	Nonlabor related	Labor-related		Labor-related	Nonlabor-related
1. New England (CT, ME, MA, NH, RI, VT)	2474.45	871.46	2450.28	862.96	2437.28	722.68
2. Middle Atlantic (PA, NJ, NY)	2232.58	830.79	2210.78	822.68	2337.38	681.87
3. South Atlantic (DE, DC, FL, GA, MD, NC, SC, VA, WV)	2374.95	762.58	2351.76	755.13	2233.09	592.86
4. East North Central (IL, IN, MI, OH, WI)	2502.75	901.41	2478.31	892.61	2263.60	658.92
5. East South Central (AL, KY, MS, TN)	2278.71	691.84	2256.45	685.09	2217.53	553.75
6. West North Central (IA, KS, MN, MO, NB, ND, SD)	2373.83	821.55	2350.64	813.54	2150.95	590.88
7. West South Central (AR, LA, OK, TX)	2373.27	758.86	2350.10	751.46	2063.68	543.34
8. Mountain (AZ, CO, ID, MT, NV, NM, UT, WY)	2276.26	811.49	2254.02	803.56	2098.26	629.09
9. Pacific (AK, CA, HI, OR, WA)	2216.62	926.88	2194.97	917.82	2029.99	704.12

TABLE 1C.—ADJUSTED STANDARDIZED AMOUNTS FOR PUERTO RICO, LABOR/NONLABOR

	Large Urban		Other urban		Rural	
	Labor related	Nonlabor related	Labor related	Nonlabor related	Labor related	Nonlabor related
Puerto Rico	2085.97	375.45	2065.60	371.79	1466.66	273.11
National	2311.73	775.96				

BILLING CODE 4120-01-M

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 1 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
010001	01.2309	010059	00.9709	010120	00.9554	030002	01.4526	030071	00.8923
010004	00.9806	010060	00.9983	010121	01.0624	030003	01.2018	030072	00.9266
010005	01.1431	010061	00.9712	010122	00.9988	030004	00.9100	030073	01.0242
010006	01.1342	010062	00.9506	010123	01.1723	030006	01.3359	030074	00.9614
010007	00.9540	010064	01.4223	010124	01.1835	030007	01.1912	030075	00.8646
010008	00.9892	010065	01.0590	010125	00.9980	030008	01.2991	030076	00.8973
010009	01.0889	010066	00.8549	010126	01.0095	030009	01.2355	030077	00.8693
010010	00.9981	010067	00.9060	010127	01.2036	030010	01.3155	030078	01.1215
010011	01.2791	010068	01.1485	010128	01.0233	030011	01.2337	030079	00.8460
010012	01.2311	010069	01.0530	010129	01.0600	030012	01.1013	030080	01.3316
010015	01.1092	010070	01.1797	010130	01.0368	030013	01.1347	030081	00.9319
010016	01.2003	010072	01.1115	010131	01.1329	030014	01.2537	030082	01.0432
010018	00.9905	010073	00.9372	010133	00.8159	030016	01.0980	030083	01.1706
010019	01.1136	010074	00.9219	010134	00.9025	030017	01.1890	030084	01.1870
010020	01.0708	010075	01.0580	010136	01.0204	030018	01.3212	030085	01.0794
010021	01.1667	010078	01.1642	010137	01.2047	030019	01.1132	030086	01.1216
010022	00.9944	010079	01.1044	010138	01.0384	030020	01.2865	030087	01.1545
010023	01.1865	010080	01.0245	010139	01.4259	030022	01.2885	030088	01.2038
010024	01.1722	010081	01.5190	010142	00.9612	030023	01.2127	030089	01.1368
010025	01.1250	010083	01.0566	010143	01.0868	030024	01.4557	030091	00.9371
010026	00.9370	010084	01.2970	010144	01.1174	030025	01.1116	040001	01.0473
010027	01.0821	010085	01.2104	010145	01.1705	030027	01.0286	040002	01.0435
010028	00.9971	010086	00.9790	010146	01.0014	030030	01.4659	040003	00.9742
010029	01.1987	010087	01.2723	010148	01.0363	030033	01.1349	040004	01.2947
010030	00.9337	010089	01.0277	010149	01.2252	030034	01.0981	040005	01.0616
010031	01.1765	010090	01.2458	010150	01.0130	030035	01.1424	040006	00.9930
010032	00.9119	010091	01.0046	010152	01.1650	030036	01.1639	040007	01.3799
010033	01.7186	010092	01.2883	010153	01.0038	030037	01.6285	040008	01.0898
010034	01.0097	010094	01.0845	020001	01.3550	030038	01.4301	040009	00.9725
010035	01.0595	010095	01.0076	020002	01.0447	030040	01.1276	040010	01.1402
010036	01.0704	010096	00.9122	020004	01.1471	030041	00.9402	040011	00.9295
010038	01.0387	010097	01.0119	020005	00.8941	030043	01.0669	040013	01.0830
010039	01.5286	010098	01.0821	020006	01.0562	030044	01.0875	040014	01.1616
010040	01.1455	010099	01.0152	020007	00.8889	030046	00.9581	040015	01.0992
010041	00.8638	010100	01.1533	020008	01.0145	030047	00.9921	040016	01.3445
010043	00.9396	010101	01.0190	020009	00.9004	030049	01.0159	040017	01.1414
010044	00.9057	010102	00.9708	020010	00.8834	030051	01.0415	040018	01.1596
010045	01.0096	010103	01.4121	020011	00.9771	030054	01.0482	040019	01.1612
010046	01.1029	010104	01.4549	020012	01.1988	030055	01.0967	040020	01.3801
010047	00.9729	010108	01.0928	020013	00.9467	030057	01.2439	040021	00.9911
010049	00.9851	010109	01.0575	020014	00.9825	030059	01.1760	040022	01.4298
010050	00.9788	010110	00.9475	020017	01.1258	030060	01.1494	040024	00.9786
010051	00.8921	010111	00.8524	020018	00.9693	030061	01.3306	040025	00.9365
010052	00.9887	010112	01.0372	020019	00.9363	030062	01.1304	040026	01.2181
010053	01.0753	010113	01.3835	020021	00.9065	030063	01.1885	040027	01.1954
010054	01.1015	010114	01.1181	020024	01.1106	030064	01.3376	040028	01.0785
010055	01.2857	010115	00.9932	020025	00.9272	030065	01.3872	040029	01.0569
010056	01.1869	010117	00.9280	020026	01.2300	030067	00.9707	040030	00.9524
010057	01.1086	010118	01.1517	020027	00.8370	030068	01.0743	040031	00.9978
010058	01.0817	010119	01.1383	030001	01.1477	030069	01.2441	040032	00.9515

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
040033	00.8671	040108	00.9334	050052	01.1312	050111	01.2062	050172	01.1759
040035	00.9504	040109	01.1771	050053	01.1979	050112	01.3171	050173	01.2309
040036	01.1618	040114	01.6221	050054	01.1778	050113	01.1531	050174	01.4581
040037	01.0483	040115	00.9902	050055	01.1940	050114	01.3056	050175	01.1845
040039	00.9813	040116	01.1617	050056	01.1699	050115	01.2782	050177	01.3207
040040	00.9833	040118	01.0589	050057	01.2343	050116	01.3437	050179	01.1534
040041	01.1524	040119	01.1947	050058	01.2943	050117	01.1642	050180	01.3442
040042	01.2207	040122	01.0089	050060	01.3157	050118	01.1249	050181	01.1922
040043	00.9604	040123	00.8570	050061	01.2094	050119	00.8513	050183	01.1085
040044	00.9673	040124	01.0655	050063	01.2815	050121	01.1122	050186	01.1827
040045	00.9430	040126	00.9870	050065	01.2995	050122	01.3882	050187	01.1451
040047	01.0035	040128	00.8907	050066	01.1839	050124	01.2366	050188	01.2383
040048	01.1543	040130	01.0748	050067	01.1350	050125	01.1495	050189	00.9896
040050	01.0498	050002	01.1730	050068	01.0751	050126	01.2747	050190	01.2229
040051	00.8987	050004	01.1599	050069	01.3858	050127	01.2513	050191	01.3018
040053	01.0018	050006	01.1662	050070	01.1523	050128	01.3310	050192	01.0049
040054	01.0841	050007	01.3741	050071	01.1587	050129	01.4697	050193	01.2828
040055	01.2508	050008	01.2782	050072	01.2271	050131	01.1822	050194	01.2161
040058	00.9233	050009	01.3244	050073	01.1490	050132	01.2114	050195	01.2081
040060	00.9865	050011	01.1662	050074	00.9573	050133	01.1733	050196	01.1762
040062	01.1477	050013	01.9341	050075	01.2165	050134	01.2693	050197	01.6697
040063	01.2893	050014	01.1721	050076	01.4420	050135	01.4889	050199	01.0905
040064	00.9747	050015	01.2442	050077	01.4568	050136	01.2396	050201	01.0361
040066	00.9551	050016	01.1027	050078	01.1937	050137	01.1781	050202	01.2009
040067	01.0347	050017	01.6366	050079	01.2238	050138	01.4054	050204	01.4099
040069	01.0213	050018	01.1236	050080	01.1223	050139	01.2136	050205	01.1119
040070	00.9580	050019	00.9234	050081	01.4193	050140	01.2049	050207	01.1978
040071	01.1789	050021	01.1292	050082	01.2268	050141	01.1530	050208	01.1808
040072	01.0247	050022	01.3307	050084	01.3667	050143	01.1929	050211	01.2402
040074	01.0447	050024	01.1312	050086	01.1076	050144	01.3109	050212	01.0931
040075	01.1027	050025	01.4549	050087	01.2743	050145	01.2468	050213	01.1920
040076	00.9724	050026	01.3341	050088	01.1204	050146	01.2515	050214	01.3500
040077	00.9060	050028	01.2504	050089	01.1939	050147	00.8694	050215	01.2971
040078	01.2051	050029	01.1903	050090	01.1913	050148	01.1035	050217	01.1624
040080	00.9772	050030	01.1560	050091	01.2015	050149	01.1647	050219	01.2594
040081	00.8800	050032	01.1130	050092	01.0915	050150	01.2096	050220	01.0869
040082	01.1687	050033	01.3073	050093	01.4467	050151	01.2342	050221	01.2016
040084	01.0553	050034	01.1484	050095	01.1095	050152	01.2323	050222	01.1743
040085	01.0155	050036	01.2381	050096	01.1678	050153	01.4709	050224	01.2688
040087	00.9833	050038	01.2418	050097	01.1797	050154	01.1773	050225	01.1643
040088	01.1670	050039	01.4410	050099	01.3105	050155	01.1726	050226	01.4152
040090	00.9487	050040	01.1230	050100	01.6806	050158	01.4425	050228	01.2355
040091	01.0663	050041	01.1110	050101	01.2561	050159	01.1760	050229	01.2195
040093	01.0621	050042	01.1629	050102	01.2595	050161	01.1746	050230	01.2036
040095	00.9791	050043	01.5191	050103	01.3901	050164	01.2597	050231	01.3446
040098	01.1714	050045	01.1116	050104	01.2317	050166	01.0483	050232	01.5472
040100	01.0741	050046	01.0970	050107	01.2405	050167	01.2414	050233	01.1428
040105	01.0085	050047	01.5044	050108	01.3261	050168	01.3350	050234	01.1917
040106	01.0453	050049	01.1482	050109	01.9583	050169	01.3655	050235	01.3076
040107	01.0560	050051	01.0355	050110	01.1229	050170	01.2944	050236	01.1695

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
050238	01.2005	050309	01.2074	050383	01.0842	050455	01.4377	050544	01.1714
050239	01.2645	050310	01.0943	050385	01.2014	050456	01.3181	050545	00.8217
050240	01.2414	050312	01.2549	050387	00.9812	050457	01.4038	050546	00.9531
050241	01.1452	050313	01.1139	050388	00.9504	050458	00.7628	050547	00.9348
050242	01.2786	050315	01.2368	050390	01.2114	050459	01.2609	050549	01.4060
050243	01.2612	050317	01.1749	050391	01.1706	050464	01.5529	050550	01.2575
050245	01.3604	050318	00.9151	050392	01.0200	050467	01.2013	050551	01.2634
050248	01.0881	050319	01.2369	050393	01.2699	050468	01.2752	050552	01.1419
050251	01.0348	050320	01.1144	050394	01.3727	050469	00.9530	050557	01.2192
050253	01.2029	050324	01.5905	050395	01.1476	050470	01.0624	050559	01.2133
050254	01.1486	050325	01.2016	050396	01.4333	050471	01.4889	050560	01.0946
050256	01.5381	050326	01.2565	050397	01.0445	050473	01.2078	050561	01.1082
050257	01.2160	050327	01.5022	050401	01.2148	050476	01.2160	050562	01.1082
050258	01.2743	050328	01.1754	050404	01.0923	050477	01.1362	050564	01.1475
050260	01.1094	050329	01.2136	050406	01.0324	050478	01.1389	050565	01.1501
050261	01.1075	050331	01.2506	050407	01.1702	050481	01.2537	050566	00.9462
050262	01.5082	050333	01.0950	050410	01.0812	050482	01.0186	050567	01.2673
050263	01.1892	050334	01.2081	050411	01.2173	050483	01.2097	050568	01.1815
050264	01.2608	050335	01.0832	050413	01.3087	050485	01.4122	050569	01.2724
050267	01.3743	050336	01.2391	050414	01.0773	050486	01.3075	050570	01.4540
050268	01.2085	050337	01.1096	050417	01.1458	050488	01.2037	050571	01.2510
050269	01.1791	050342	01.1669	050418	01.0672	050489	01.1463	050573	01.4036
050270	01.2228	050343	01.1351	050419	01.1661	050491	01.2437	050575	01.0831
050272	01.2456	050345	01.2756	050420	01.1967	050492	01.1283	050577	01.2750
050273	00.9347	050348	01.3647	050421	01.2203	050494	01.0331	050578	01.0733
050274	00.9393	050349	00.9430	050423	01.0234	050496	01.5870	050579	01.2339
050276	01.0837	050350	01.2770	050424	01.4511	050497	00.8454	050580	01.1116
050277	01.2160	050351	01.3868	050425	01.1985	050498	01.1889	050581	01.2181
050278	01.2681	050352	01.0900	050426	01.1173	050502	01.6274	050583	01.5347
050279	01.1409	050353	01.5231	050427	00.9307	050503	01.2917	050584	01.1319
050280	01.2030	050355	00.9782	050430	00.9066	050506	01.2376	050585	01.2389
050281	01.2712	050357	01.4603	050431	01.0984	050510	01.1349	050586	01.1299
050282	01.2197	050359	01.0935	050432	01.2251	050512	01.1424	050587	01.2412
050283	01.2520	050360	01.1872	050433	00.9787	050515	01.2986	050588	01.2134
050286	01.0637	050361	00.9180	050434	01.0415	050516	01.2563	050589	01.1998
050289	01.5455	050362	01.0499	050435	01.1652	050517	01.1371	050590	01.1973
050290	01.3600	050363	01.1113	050436	01.0466	050522	01.1726	050591	01.1565
050291	01.2140	050366	01.1660	050438	01.3669	050523	01.1439	050592	01.2411
050292	01.1457	050367	01.2290	050440	01.1154	050526	01.1236	050593	01.1065
050293	00.9903	050369	01.1682	050441	01.5775	050527	01.1868	050594	02.0736
050295	01.2560	050371	01.0021	050442	01.1704	050528	01.1442	050597	01.1435
050296	01.1048	050372	01.1174	050443	00.9398	050530	01.2139	050598	01.1900
050298	01.0802	050373	01.1056	050444	01.1357	050531	01.2019	050599	01.3179
050299	01.2500	050376	01.2992	050446	00.9521	050534	01.1801	050601	01.1770
050300	01.2280	050377	01.0413	050447	01.2983	050535	01.2508	050603	01.3737
050301	01.1816	050378	01.0558	050448	00.9930	050537	01.2661	050604	01.1861
050302	01.2715	050379	01.0248	050449	01.1943	050539	01.2692	050605	01.0664
050305	01.3132	050380	01.5067	050450	00.8615	050541	01.3757	050607	01.1651
050307	01.3374	050381	00.9313	050451	00.9760	050542	01.0719	050608	01.1164
050308	01.4196	050382	01.3610	050454	01.6618	050543	01.1681	050609	01.2498

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 4 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
050613	00.9949	060014	01.4069	060072	00.9376	070034	01.2243	100030	01.0677
050615	01.1940	060015	01.3467	060073	00.9073	070035	01.2935	100032	01.2032
050616	01.0927	060016	01.2147	060074	01.1126	070036	01.2594	100033	01.2670
050618	01.0070	060017	01.2261	060075	01.1767	070038	00.9216	100034	01.3616
050619	01.2334	060018	01.1614	060076	01.2455	080001	01.3083	100035	01.2070
050622	01.1297	060019	01.2240	060077	00.9768	080002	01.1210	100036	01.2234
050623	01.1584	060020	01.3228	060083	01.0622	080003	01.1917	100038	01.3902
050624	01.2051	060022	01.4816	060085	00.9426	080004	01.2250	100039	01.2730
050625	01.3721	060023	01.3260	060087	01.1076	080005	01.1168	100040	01.3591
050630	01.0470	060024	01.4084	060088	01.0445	080006	01.0530	100042	01.1327
050633	01.1773	060026	01.3174	060090	00.9878	080007	01.1780	100043	01.2479
050635	01.2250	060027	01.2441	060092	00.9989	090001	01.3012	100044	01.2299
050636	01.2202	060028	01.3870	060093	00.9163	090002	01.0481	100045	01.2483
050637	01.1791	060029	01.0185	060096	01.1423	090003	01.2074	100046	01.1620
050638	00.9271	060030	01.2002	060097	00.6840	090004	01.3570	100047	01.2027
050641	01.1218	060031	01.3946	060098	01.1555	090005	01.2299	100048	00.9717
050643	00.9730	060032	01.3643	060099	00.8740	090006	01.2147	100049	01.1620
050644	01.1384	060033	01.2402	060101	01.6750	090007	01.0733	100050	01.0945
050649	01.0177	060034	01.2184	070001	01.6614	090008	01.1249	100051	01.0783
050650	01.2150	060035	01.1575	070002	01.5212	090009	01.1307	100052	01.2684
050651	01.2037	060036	01.1313	070003	01.2183	090010	01.0906	100053	01.1496
050660	01.2361	060037	00.9818	070004	01.1463	090011	01.5778	100054	01.2454
050661	01.0607	060038	01.0784	070005	01.3072	100001	01.2642	100055	01.1676
050662	01.0199	060039	01.0966	070006	01.1757	100002	01.2918	100056	01.1533
050663	01.1257	060041	00.9862	070007	01.2290	100004	01.1045	100057	01.2057
050666	00.9002	060042	01.0276	070008	01.1362	100005	01.0561	100059	01.4070
050667	01.1326	060043	00.9790	070009	01.1807	100006	01.3920	100060	01.4129
050668	01.3825	060044	01.2183	070010	01.3969	100007	01.6220	100061	01.2257
050669	00.7371	060045	01.0271	070011	01.2057	100008	01.3816	100062	01.2022
050671	01.0357	060046	01.1331	070012	01.1563	100009	01.3543	100063	01.1650
050672	00.6944	060047	01.1120	070013	01.1864	100010	01.2392	100065	01.1001
050674	01.2277	060049	01.0442	070014	01.1731	100011	01.0069	100067	01.2656
050675	01.2890	060050	01.1553	070015	01.1933	100012	01.2599	100068	01.1642
050676	00.8937	060051	01.2673	070016	01.2354	100013	00.9375	100069	01.1940
050677	01.2251	060052	00.8780	070017	01.2639	100014	01.1605	100070	01.2512
050678	01.1633	060053	00.8746	070018	01.1980	100015	01.1468	100071	01.2641
050679	01.0823	060054	01.2351	070019	01.1754	100016	01.0399	100072	01.1511
050680	01.0729	060056	00.9474	070020	01.2556	100017	01.2578	100073	01.4545
060001	01.4128	060057	01.1824	070021	01.2055	100018	01.2550	100074	01.1459
060003	01.1607	060058	01.0046	070022	01.5677	100019	01.2625	100075	01.4431
060004	01.0588	060060	01.0747	070023	01.1933	100020	01.2068	100076	01.0887
060005	01.3970	060062	00.9812	070024	01.1955	100021	01.1898	100077	01.2360
060006	01.2477	060063	01.0579	070025	01.4938	100022	01.4029	100078	01.0826
060007	01.1626	060064	01.2558	070026	01.1319	100023	01.1868	100079	01.2133
060008	01.1699	060065	01.1950	070027	01.2467	100024	01.1371	100080	01.2272
060009	01.2303	060066	01.0075	070028	01.3341	100025	01.4217	100081	01.0288
060010	01.4559	060067	01.0374	070029	01.2087	100026	01.3444	100082	01.2760
060011	01.1814	060068	01.1285	070030	01.1389	100027	01.0140	100083	01.1204
060012	01.3179	060070	01.1396	070031	01.2513	100028	01.1534	100084	01.3029
060013	01.2464	060071	01.2684	070033	01.1907	100029	01.2480	100085	01.1710

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 5 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
100086	01.1947	100151	01.5277	100220	01.4874	110002	01.1903	110059	01.0583
100087	01.5425	100152	01.1813	100221	01.5994	110003	01.1583	110061	00.8783
100088	01.2999	100154	01.3295	100222	01.1319	110004	01.2352	110062	00.9530
100089	01.1642	100156	01.0547	100223	01.2367	110005	01.1437	110063	01.0113
100090	01.1300	100157	01.3353	100224	01.1886	110006	01.1559	110064	01.1882
100092	01.1526	100159	01.0160	100225	01.1616	110007	01.2915	110065	01.0664
100093	01.2595	100160	01.0597	100226	01.1653	110008	01.0032	110066	01.1759
100098	00.9757	100161	01.2666	100227	01.1435	110009	01.0169	110069	01.0552
100099	01.1645	100162	01.2283	100228	01.1559	110010	01.8275	110070	00.9438
100100	01.1408	100164	00.9951	100229	01.2030	110011	01.1067	110071	00.9372
100102	01.0585	100165	00.9301	100230	01.1465	110013	01.0030	110072	00.9316
100103	00.9612	100166	01.2667	100231	01.4832	110014	01.0768	110073	00.9987
100105	01.1754	100167	01.1754	100232	01.0621	110015	01.0467	110074	01.1904
100106	01.0907	100168	01.2297	100234	01.1793	110016	01.2030	110075	01.0774
100107	01.1509	100169	01.4970	100235	01.2050	110017	00.9189	110076	01.2575
100108	01.0180	100170	01.2020	100236	01.2550	110018	01.1207	110077	00.9559
100109	01.1543	100172	01.1626	100237	01.7038	110020	01.1114	110078	01.4144
100110	01.2008	100173	01.1883	100238	01.1959	110023	01.1241	110079	01.0490
100112	00.9711	100174	01.3980	100239	01.3179	110024	01.1904	110080	01.0428
100113	01.6329	100175	01.0736	100240	00.7480	110025	01.1636	110081	01.0173
100114	01.2417	100176	01.6668	100241	01.0372	110026	00.9771	110082	01.6861
100115	01.0965	100177	01.1722	100242	01.1820	110027	01.0297	110083	01.2184
100117	01.1993	100179	01.3467	100243	01.1833	110028	01.3670	110085	01.1320
100118	01.1373	100180	01.2779	100244	01.1736	110029	01.1348	110086	01.1631
100120	01.1819	100181	01.0849	100246	01.1916	110030	01.1362	110087	01.1434
100121	01.0935	100183	01.1564	100248	01.4402	110031	01.1196	110088	00.8579
100122	01.1210	100185	01.0591	100249	01.0897	110032	01.1378	110089	01.1074
100124	01.1528	100186	01.2522	100252	01.1615	110033	01.1225	110091	01.1830
100125	01.1610	100187	01.1523	100253	01.2413	110034	01.2098	110092	01.0547
100126	01.1883	100189	01.2061	100254	01.2411	110035	01.1368	110093	00.9954
100127	01.3211	100191	01.2234	100255	01.1763	110036	01.3984	110094	00.9068
100128	02.0703	100194	01.1913	100256	01.2398	110037	01.1116	110095	01.2259
100129	01.1846	100195	01.1358	100258	01.2538	110038	01.2008	110096	01.0194
100130	01.1945	100196	01.2455	100259	01.1433	110039	01.1420	110097	00.9956
100131	01.1727	100199	01.1697	100260	01.1856	110040	00.9866	110098	00.9223
100132	01.1961	100200	01.2155	100262	01.2258	110041	01.1205	110099	00.9002
100134	00.9190	100203	01.2254	100263	01.1722	110042	01.0049	110100	01.0575
100135	01.4333	100204	01.3793	100264	01.2471	110043	01.3645	110101	00.9796
100137	01.1579	100206	01.1448	100265	01.1602	110044	01.1245	110103	00.9939
100138	00.9978	100207	01.2147	100266	01.1263	110045	01.0170	110104	01.0592
100139	01.1465	100208	01.2056	100267	01.1674	110046	01.1661	110105	01.1463
100140	01.0634	100209	01.2542	100268	01.1464	110047	00.9548	110107	01.4085
100142	01.0607	100210	01.4760	100269	01.2031	110048	01.0785	110108	00.9371
100143	00.9699	100211	01.2135	100270	00.9200	110049	00.9293	110109	00.9553
100144	01.0402	100212	01.1953	100271	01.3229	110050	01.0159	110111	01.0036
100145	01.1743	100213	01.2948	100273	00.9313	110051	00.9303	110112	00.9104
100146	01.0252	100214	01.3202	100275	01.1385	110052	00.8925	110113	00.9945
100147	01.0235	100217	01.0974	100276	01.1359	110054	01.1916	110114	01.0676
100149	01.1565	100218	01.1291	100277	01.1266	110055	00.9523	110115	01.3482
100150	01.2485	100219	01.2099	110001	01.0982	110056	00.9243	110117	00.9312

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
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TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 6 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
110118	00.9642	110181	01.0279	130012	00.9400	140017	01.2285	140080	01.5732
110120	00.9532	110183	01.1343	130013	01.1343	140018	01.2681	140081	01.0982
110121	00.9503	110184	01.0573	130014	01.2152	140019	00.9243	140082	01.1787
110122	01.1644	110185	01.0893	130015	01.0156	140023	01.0892	140083	01.1139
110123	01.0167	110186	01.0533	130016	00.9392	140024	00.9936	140084	01.1623
110124	01.0008	110187	01.0700	130017	01.0619	140025	01.0931	140085	01.2177
110125	01.0888	110188	01.2218	130018	01.2483	140026	01.1195	140086	01.1159
110127	00.9964	110189	00.9858	130019	01.0783	140027	01.1285	140087	01.1632
110128	01.1231	110190	01.1040	130021	00.9237	140029	01.2124	140088	01.4702
110129	01.3083	110191	01.1519	130022	01.0860	140030	01.3105	140089	01.0988
110130	00.9304	110192	01.2119	130024	01.2029	140031	01.0653	140090	01.2797
110131	00.9975	110193	01.0395	130025	01.0024	140032	01.1397	140091	01.3164
110132	00.9827	110194	00.9875	130026	01.0651	140033	01.1153	140093	01.1233
110133	00.9553	110195	00.9759	130027	00.9156	140034	01.0673	140094	01.0997
110134	00.8692	110196	01.6054	130028	01.1862	140035	01.0616	140095	01.2163
110135	00.9971	110198	01.1880	130029	01.1050	140036	01.0734	140097	01.0625
110136	01.0588	110200	01.4246	130030	00.9498	140037	01.0268	140098	01.1555
110140	00.9338	110201	01.1434	130031	01.1294	140038	01.1689	140099	01.1438
110141	00.9353	110202	00.9467	130032	00.8992	140039	00.9723	140100	01.0826
110142	01.1179	110203	00.9386	130034	00.8984	140040	01.1570	140101	01.0643
110143	01.1116	120001	01.4294	130035	01.0522	140041	01.0650	140102	01.0093
110144	01.1448	120002	01.0788	130036	01.1656	140042	00.9536	140103	01.1250
110146	00.8695	120003	01.0916	130037	01.0685	140043	01.1395	140104	01.1103
110149	00.9657	120004	01.2341	130038	00.8909	140045	01.0258	140105	01.1767
110150	01.0873	120005	01.1467	130039	01.1041	140046	01.0877	140107	00.9401
110151	01.0013	120006	01.1358	130040	00.9910	140047	01.0516	140108	01.1680
110152	00.9766	120007	01.4409	130043	01.0198	140048	01.1209	140109	00.9739
110153	01.0138	120008	01.1240	130044	00.9783	140049	01.2590	140110	01.1434
110154	00.9627	120009	00.9694	130045	00.9587	140051	01.1961	140111	01.0406
110155	00.9688	120010	01.4540	130048	00.9978	140052	01.2324	140112	01.1216
110156	00.8606	120011	01.2881	130049	01.2155	140053	01.4878	140113	01.4060
110157	01.1446	120012	01.0964	130051	01.0395	140054	01.2741	140114	01.1166
110158	01.0647	120014	01.1279	130054	00.9275	140055	00.9339	140115	01.0426
110161	01.2236	120015	00.9561	130056	00.9552	140058	01.0648	140116	01.2263
110162	00.8804	120016	00.9721	130057	00.9910	140059	01.0351	140117	01.1930
110163	01.2076	120018	00.8676	140001	01.1443	140061	01.0879	140118	01.3512
110164	01.2150	120019	01.0616	140002	01.2213	140062	01.1655	140119	01.4619
110165	01.1376	120021	00.9709	140003	00.9838	140063	01.1659	140120	01.1117
110166	01.2114	120022	01.4688	140004	01.0500	140064	01.1649	140121	01.1284
110168	01.2705	120024	01.2270	140005	00.8971	140065	01.2106	140122	01.2203
110169	00.7240	130001	01.0460	140007	01.1663	140066	01.0691	140123	01.1228
110170	00.8895	130002	01.2577	140008	01.2484	140067	01.4604	140124	01.0266
110171	01.1612	130003	01.2155	140009	01.0043	140068	01.0816	140125	01.0925
110172	01.0893	130005	01.2365	140010	01.2848	140069	01.0628	140126	01.4056
110174	00.9124	130006	01.5214	140011	01.0662	140070	01.2688	140127	01.1452
110175	01.0156	130007	01.3563	140012	01.1812	140072	01.1060	140128	01.0563
110176	01.1058	130008	00.8905	140013	01.2232	140074	01.0768	140129	01.0161
110177	01.1653	130009	00.9198	140014	01.0651	140075	01.2608	140130	01.1520
110178	00.9663	130010	00.9854	140015	01.1312	140077	00.9536	140131	01.1751
110179	01.1200	130011	01.2367	140016	01.0193	140079	01.1499	140132	01.2962

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: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 7 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
140133	01.2178	140190	01.0024	140253	01.1489	150032	01.5920	150088	01.1013
140134	01.2070	140191	01.1585	140258	01.2564	150033	01.3411	150089	01.1924
140135	01.1315	140192	01.1038	140261	01.1218	150034	01.0742	150090	01.2393
140136	01.0301	140193	00.9773	140271	00.9766	150035	01.1538	150091	01.0882
140137	01.0907	140197	01.2682	140273	00.9756	150036	01.0254	150092	01.0637
140138	01.1575	140199	01.0491	140275	01.0964	150037	01.1216	150094	00.9894
140139	01.0741	140200	01.2445	140276	01.3183	150038	01.1470	150095	01.0604
140140	01.0770	140202	01.1729	140280	01.1223	150039	01.0122	150096	01.0179
140141	01.0162	140203	01.0774	140281	01.3770	150042	01.1436	150097	01.0653
140142	01.1320	140204	01.2199	140285	01.0711	150043	01.0900	150098	01.0922
140143	01.0914	140205	01.0964	140286	01.1514	150044	01.1327	150099	01.1239
140144	01.0506	140206	01.0598	140288	01.3542	150045	01.1432	150100	01.3237
140145	01.1377	140207	01.1730	140289	01.2306	150046	01.3073	150101	01.0493
140146	00.9618	140208	01.3256	140290	01.1747	150047	01.3347	150102	01.0168
140147	01.0593	140209	01.2713	140291	01.1877	150048	01.1644	150103	00.9945
140148	01.3613	140210	01.0263	140292	01.1473	150049	01.0016	150104	01.1014
140150	01.2434	140211	01.1253	140293	01.0132	150050	01.1435	150105	01.0889
140151	01.2308	140212	01.0591	140294	01.0808	150051	01.1888	150106	01.0565
140152	01.0445	140213	01.1384	140295	01.2268	150052	01.0091	150109	01.2202
140154	01.1198	140215	01.0594	140297	01.2131	150053	00.9825	150110	00.9483
140155	01.0952	140216	00.9340	140298	01.2779	150054	01.0335	150111	01.0953
140156	01.2076	140217	01.1771	150001	01.1036	150056	01.4351	150112	01.1442
140157	01.0127	140218	01.0360	150002	01.1521	150057	01.9846	150113	01.0797
140158	01.2107	140219	01.1853	150003	01.3328	150058	01.3990	150114	01.0350
140159	01.1293	140220	01.0860	150004	01.2104	150059	01.0875	150115	01.1935
140160	01.2189	140223	01.3522	150005	01.1376	150060	01.0770	150122	01.0695
140161	01.0234	140224	01.2601	150006	01.2039	150061	01.1088	150123	00.9745
140162	01.1659	140226	00.9779	150007	01.0926	150062	01.0095	150124	01.1389
140164	01.1925	140228	01.4006	150008	01.2052	150063	01.1012	150125	01.2990
140165	00.9981	140229	01.0532	150009	01.1938	150064	01.0629	150126	01.6357
140166	01.1455	140230	00.9582	150010	01.0581	150065	01.1453	150127	01.1053
140167	01.0724	140231	01.1875	150011	01.1630	150066	01.0837	150128	01.1132
140168	01.0608	140232	01.0114	150012	01.2942	150067	01.0097	150129	01.1015
140170	01.0317	140233	01.4406	150013	01.0116	150069	01.1219	150130	01.1838
140171	00.9827	140234	01.1577	150014	01.1527	150070	01.1006	150132	01.3074
140172	01.3285	140235	00.9510	150015	01.1391	150071	01.1364	150133	01.1493
140173	00.9641	140236	00.9650	150017	01.4723	150072	01.2101	150134	01.1452
140174	01.2311	140239	01.3533	150018	01.1688	150073	01.0841	150135	00.7826
140176	01.1204	140240	01.1614	150019	01.1346	150074	01.3075	150136	01.2039
140177	01.1250	140241	00.6893	150020	01.0513	150075	01.1645	160001	01.1569
140179	01.2201	140242	01.2445	150021	01.3383	150076	01.0568	160002	01.3103
140180	01.2366	140243	01.1194	150022	01.0535	150077	01.1412	160003	01.0385
140181	01.1051	140245	01.0056	150023	01.2065	150078	01.0417	160004	01.1572
140182	01.2519	140246	01.0592	150024	01.1046	150079	01.0473	160005	01.2094
140184	01.0914	140247	00.9848	150025	01.3530	150081	01.0273	160007	01.0601
140185	01.1773	140248	01.1535	150026	01.1876	150082	01.2378	160008	01.1466
140186	01.1055	140249	00.8249	150027	01.0581	150083	00.8570	160009	01.1156
140187	01.2366	140250	01.1454	150029	01.1816	150084	01.5520	160012	01.0777
140188	00.9879	140251	01.1940	150030	01.1492	150085	00.9847	160013	01.2796
140189	01.0992	140252	01.2111	150031	01.0075	150086	01.1073	160014	01.0655

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 8 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
160016	01.1978	160070	01.0162	160130	01.1518	170036	00.9758	170095	01.0851
160018	01.0095	160071	01.2069	160131	01.1274	170037	01.1261	170097	00.9992
160020	01.0738	160072	01.0761	160132	01.2152	170038	01.0240	170098	01.0838
160021	01.0806	160073	00.9429	160133	01.1207	170039	01.0522	170099	01.1408
160023	01.1424	160074	01.0058	160134	00.9506	170040	01.3302	170100	00.8390
160024	01.1704	160075	01.0397	160135	00.9327	170041	01.0031	170101	01.0531
160025	01.4779	160076	00.9950	160138	01.0880	170043	01.0760	170102	00.9804
160026	01.1056	160077	01.0164	160140	01.0264	170044	01.0985	170103	01.1821
160027	01.1435	160079	01.2220	160141	00.9501	170045	01.0586	170104	01.2651
160028	01.1680	160080	01.0974	160142	01.1551	170046	00.9754	170105	01.0340
160029	01.2460	160081	01.1238	160143	01.0050	170049	01.1659	170106	00.9744
160030	01.2271	160082	01.4421	160145	01.0889	170050	00.9612	170108	01.0732
160031	01.0878	160083	01.3841	160146	01.2783	170051	01.0020	170109	01.0616
160032	01.0533	160085	01.2102	160147	01.3036	170052	01.0042	170110	00.9300
160033	01.2338	160086	00.9927	160151	01.1083	170053	01.0196	170112	00.9461
160034	01.0292	160088	00.9995	160152	01.0554	170054	01.0736	170113	01.0702
160035	01.0766	160089	01.1373	160153	01.4123	170055	01.0310	170114	01.1110
160036	01.1412	160090	01.0610	170001	01.1382	170056	00.9837	170115	01.0570
160037	01.0938	160091	01.2600	170002	01.1779	170057	01.0014	170116	01.1431
160038	01.1844	160092	01.0212	170003	01.0851	170058	01.0021	170117	01.0238
160039	01.0062	160093	00.9844	170004	01.0654	170060	01.0035	170119	00.9034
160040	01.2284	160094	01.1299	170005	00.9683	170061	01.1073	170120	01.1532
160041	01.1113	160095	01.1105	170006	01.1765	170062	00.9449	170121	00.8208
160043	01.0641	160097	01.1342	170007	01.1331	170063	00.9656	170122	01.5973
160044	01.2262	160098	01.1005	170008	00.9730	170064	01.0463	170123	01.3552
160045	01.3902	160099	01.0503	170009	01.1424	170066	00.9221	170124	01.0073
160046	01.0223	160101	01.1100	170010	01.0968	170067	00.9615	170125	00.9236
160047	01.2250	160102	01.2827	170011	01.1548	170068	01.1602	170126	00.9465
160048	01.0700	160103	00.9353	170012	01.3544	170069	01.0019	170128	01.0349
160049	00.9843	160104	01.0733	170013	01.2767	170070	00.9598	170130	01.4044
160050	01.0888	160106	01.2112	170014	01.0847	170072	00.9376	170131	01.1493
160051	01.1140	160107	01.0840	170015	01.0461	170073	01.1066	170133	01.2273
160052	01.1197	160108	01.1604	170016	01.4458	170074	01.1060	170134	01.0345
160053	01.1324	160109	01.1111	170017	01.1081	170075	00.8876	170137	01.1406
160054	01.0523	160110	01.3428	170018	01.0588	170076	01.0751	170138	01.1488
160055	01.0513	160111	01.1250	170019	01.1944	170077	00.9367	170139	01.0071
160056	01.0051	160112	01.2411	170020	01.1921	170079	00.9180	170140	01.0198
160057	01.1540	160113	01.0280	170021	01.0047	170080	00.9368	170142	01.1831
160058	01.4790	160114	01.0032	170022	01.1614	170081	01.0147	170143	01.1405
160059	01.2116	160115	01.0815	170023	01.2909	170082	00.9023	170144	01.3108
160060	01.0600	160116	01.1214	170024	00.9768	170084	00.9716	170145	01.0993
160061	01.0357	160117	01.2623	170025	01.2032	170085	00.9999	170146	01.2470
160062	01.0382	160118	01.1078	170026	01.0422	170086	01.3975	170147	01.1966
160063	01.2046	160119	00.8833	170027	01.1599	170087	01.2709	170148	01.1973
160064	01.2106	160120	01.0346	170030	00.9730	170088	01.0114	170150	01.0769
160065	01.0863	160122	01.0785	170031	01.0097	170089	00.9512	170151	01.0012
160066	01.1032	160123	01.1187	170032	01.0469	170090	00.9470	170152	00.9321
160067	01.1475	160124	01.1299	170033	01.1481	170092	01.0148	170159	00.9371
160068	01.0798	160126	01.1096	170034	00.9630	170093	00.9750	170160	00.9078
160069	01.3087	160129	01.0225	170035	00.9747	170094	00.9988	170164	01.2253

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
170166	01.0272	180045	01.1312	180122	00.9794	190046	01.2807	190130	00.9413
170168	01.0631	180046	00.9856	180123	01.1377	190047	01.0351	190131	01.0627
170170	01.1318	180047	00.9976	180124	01.2322	190048	01.0523	190132	01.1131
170171	01.0807	180048	01.1070	180125	00.9403	190049	01.0190	190133	01.0674
170172	00.9632	180049	01.1093	180126	01.0870	190050	00.9827	190134	00.8520
170173	00.9657	180050	01.1326	180127	01.1100	190053	01.1507	190135	01.3417
170174	00.9096	180051	01.2097	180128	01.0337	190054	01.2506	190136	00.9735
170175	01.1179	180053	00.9516	180129	00.9329	190058	00.9783	190137	00.9530
170176	01.2517	180054	01.0779	180130	01.1940	190059	01.0217	190138	00.7550
170178	01.0354	180055	01.0198	180132	01.1012	190060	01.1948	190139	01.0651
180001	01.1275	180056	01.1085	180133	01.0872	190064	01.2879	190140	00.9782
180002	00.9994	180058	00.8648	180134	01.1814	190065	01.3648	190141	01.0094
180004	01.1026	180059	00.9282	180136	01.1826	190067	01.0407	190142	00.9575
180005	01.0015	180060	00.9013	180137	01.2418	190071	00.9886	190144	01.1039
180006	00.8979	180062	00.9087	180138	01.1444	190073	00.8558	190145	00.9394
180007	01.2152	180063	00.9392	190001	00.9664	190075	01.1835	190146	01.3413
180009	01.0955	180064	01.0532	190002	01.3795	190077	01.0363	190147	00.8930
180010	01.4362	180065	00.9754	190003	01.1713	190078	01.0381	190148	00.8702
180011	00.9977	180066	01.0100	190004	01.1367	190079	01.0734	190149	01.0628
180012	01.1345	180067	01.3871	190005	01.1231	190081	00.9421	190151	01.1182
180013	01.1787	180069	00.9778	190006	01.0894	190083	00.9198	190152	01.1262
180014	01.3939	180070	00.9758	190007	01.0033	190086	01.1033	190155	00.9724
180015	01.0590	180072	01.1101	190008	01.3308	190088	01.0287	190156	00.9192
180016	01.1698	180075	00.9472	190009	01.0749	190089	01.1229	190157	00.9299
180017	01.1821	180078	00.9441	190010	01.0519	190090	01.0442	190158	01.0664
180018	01.1472	180079	00.9611	190011	01.0618	190092	01.1712	190160	01.0260
180019	01.0988	180080	01.0916	190012	01.0576	190095	00.9306	190161	01.0909
180020	00.9711	180081	01.1912	190013	01.1222	190098	01.2213	190162	01.1593
180021	00.9458	180085	01.2154	190014	00.9799	190099	01.0264	190163	00.9662
180023	00.8496	180087	01.0621	190015	01.1551	190101	00.9902	190164	01.0745
180024	00.9811	180088	01.3557	190017	01.1159	190102	01.2540	190165	01.0029
180025	01.1066	180092	01.0615	190018	01.2162	190103	00.8708	190166	00.9469
180026	01.0292	180093	01.2168	190019	01.2453	190106	00.9784	190167	01.1370
180027	01.0471	180094	00.9621	190020	01.0573	190109	01.0322	190169	00.9763
180028	00.9262	180095	01.0697	190023	00.9203	190110	00.9862	190170	00.9836
180029	01.0918	180099	00.9613	190025	01.1223	190111	01.3070	190173	01.2117
180030	01.0043	180100	01.1470	190026	01.2400	190112	01.1942	190175	01.1471
180031	01.0189	180101	01.1116	190027	01.2289	190113	01.1330	190176	01.3689
180032	00.8956	180102	01.1934	190029	01.0569	190114	01.0002	190177	01.0952
180033	01.0911	180103	01.4192	190033	00.9191	190115	01.2133	190178	00.9533
180034	01.0067	180104	01.2541	190034	01.1377	190116	01.1012	190179	01.0337
180035	01.2284	180105	00.8467	190035	01.2494	190117	01.0317	190180	01.0651
180036	01.0305	180106	00.8388	190036	01.4143	190118	00.9944	190182	01.0292
180037	01.1369	180108	00.8725	190037	01.0234	190119	01.0287	190183	01.0367
180038	01.1167	180115	00.9805	190039	01.3379	190120	00.9130	190184	00.9068
180040	01.5703	180116	01.1878	190040	01.2967	190122	01.1234	190185	01.1603
180041	01.0071	180117	00.9685	190041	01.3148	190124	01.2156	190186	00.9378
180042	01.0196	180118	00.9777	190043	01.0333	190125	01.1847	190187	01.0476
180043	01.0045	180120	00.9307	190044	01.0066	190127	01.0978	190188	00.9801
180044	01.0039	180121	00.9669	190045	01.1656	190128	01.0214	190189	01.1092

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 10 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
190190	01.0932	200044	01.1439	210045	01.0214	220049	01.1535	220110	01.7737
190191	01.1659	200047	01.1539	210046	01.0371	220050	01.0432	220111	01.1280
190193	01.1775	200049	00.9376	210047	01.0389	220051	01.2118	220114	01.0567
190194	01.0507	200050	01.1108	210048	01.1248	220052	01.1780	220115	01.2122
190195	01.0335	200051	01.0466	210049	01.2009	220053	01.1587	220116	01.5893
190196	00.9640	200052	01.0571	210050	00.9394	220055	01.1602	220117	01.0423
190197	01.2023	200055	01.0480	210051	01.1876	220057	01.1594	220118	01.7081
190198	01.0714	200062	01.0597	210054	01.1138	220058	01.0538	220119	01.2064
190199	01.4111	200063	01.2289	210055	01.1490	220060	01.1198	220120	01.0502
190200	01.1315	200066	01.1398	210056	01.2826	220061	01.2052	220121	01.0523
190201	01.1618	210001	01.2444	210057	01.2063	220062	00.8900	220123	01.0105
190202	01.1552	210002	01.5577	210058	01.8141	220063	01.0987	220124	02.9401
190203	01.3314	210003	01.1887	210059	01.1268	220064	01.1843	220126	01.1706
190204	01.1323	210004	01.1968	220001	01.1901	220065	01.1172	220128	01.1380
190205	01.2135	210005	01.2146	220002	01.2977	220066	01.2284	220129	01.1562
190206	01.2712	210006	01.0608	220003	01.0034	220067	01.1938	220131	01.0441
190207	01.1038	210007	01.3981	220004	01.1517	220068	00.6884	220133	00.8410
200001	01.2212	210008	01.1804	220005	01.1241	220070	01.1357	220135	01.1115
200002	01.0380	210009	01.3531	220006	01.1821	220071	01.6001	220153	01.0223
200003	01.0112	210010	01.1198	220008	01.1775	220072	01.1161	220154	01.0168
200005	00.8878	210011	01.1937	220009	01.1174	220073	01.1658	220156	01.1388
200006	01.1431	210012	01.2122	220010	01.1378	220074	01.0921	220162	01.0584
200007	01.0200	210013	01.1986	220011	01.1981	220075	00.7483	220163	01.7818
200008	01.2152	210015	01.1899	220012	01.2145	220076	01.1598	220171	01.3542
200009	01.5572	210016	01.4136	220015	01.1687	220077	01.4461	230001	01.1657
200012	01.0593	210017	01.0533	220016	01.1549	220079	01.1092	230002	01.1522
200013	01.1776	210018	01.2268	220017	01.1883	220080	01.1078	230003	01.1401
200015	01.2242	210019	01.3141	220019	01.1168	220081	01.0386	230004	01.4759
200016	01.0293	210021	01.1613	220020	01.1410	220082	01.1531	230005	01.1287
200017	01.1781	210022	01.2202	220021	01.1430	220083	01.1527	230006	01.0227
200018	01.1237	210023	01.1839	220022	01.0598	220084	01.1856	230007	01.0293
200019	01.2250	210024	01.1955	220023	01.1646	220086	01.4755	230011	01.0335
200020	01.1006	210025	01.1186	220024	01.1555	220087	00.9233	230012	01.0949
200021	01.1310	210026	01.1580	220025	01.1160	220088	01.3699	230013	01.1966
200023	00.9560	210027	01.1628	220026	01.2141	220089	01.1998	230014	01.0686
200024	01.1545	210028	01.0780	220028	01.2078	220090	01.1086	230015	01.1111
200025	01.1953	210029	01.2900	220029	01.1202	220092	01.1663	230017	01.3410
200026	01.0065	210030	01.0161	220030	01.0962	220094	01.1322	230019	01.2142
200027	01.0625	210031	01.5240	220031	01.4815	220095	01.1053	230020	01.2084
200028	01.0551	210032	01.0583	220033	01.1749	220097	01.0975	230021	01.2018
200031	01.1491	210033	01.1224	220034	01.0803	220098	01.1569	230022	01.2157
200032	01.2427	210034	01.1407	220035	01.0833	220099	01.0394	230023	01.0315
200033	01.3727	210035	01.1041	220036	01.3639	220100	01.2386	230024	01.3629
200034	01.1787	210036	01.1848	220038	01.1270	220101	01.2035	230027	01.0802
200037	01.1098	210037	01.1845	220040	01.1205	220102	01.0790	230029	01.2264
200038	01.0196	210038	01.1823	220041	01.1188	220104	01.1038	230030	01.2521
200039	01.2510	210039	01.1330	220042	01.1019	220105	01.1132	230031	01.2430
200040	01.0711	210040	01.2533	220045	01.1742	220106	01.1156	230032	01.6063
200041	01.1100	210043	01.1424	220046	01.2759	220107	01.0510	230034	01.0514
200043	00.8364	210044	01.1854	220048	01.1217	220108	01.0722	230035	01.1452

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 11 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
230036	01.2153	230101	01.0846	230159	01.1855	230235	00.9795	240036	01.2485
230037	01.0465	230102	01.1775	230161	00.8651	230236	01.2306	240037	01.1102
230038	01.5267	230103	01.0679	230162	00.9253	230237	01.1436	240038	01.3806
230039	01.2368	230104	01.3558	230163	00.9844	230239	01.0735	240040	01.1171
230040	01.1962	230105	01.3716	230165	01.4833	230241	01.0735	240041	01.1584
230041	01.1100	230106	01.0862	230167	01.1780	230244	01.1753	240043	01.1871
230042	01.1176	230107	01.0085	230169	01.1517	230253	01.0522	240044	01.1099
230043	00.8334	230108	01.1735	230171	01.1146	230254	01.1765	240045	01.0938
230046	01.5121	230110	01.1458	230172	01.1795	230256	01.0704	240046	01.2894
230047	01.1117	230111	00.9810	230173	01.1195	230257	01.0508	240047	01.2702
230051	00.9537	230113	00.9256	230174	01.1297	230259	01.0923	240048	01.2403
230053	01.3374	230114	00.9397	230175	00.9188	230264	01.1022	240049	01.5199
230054	01.3294	230115	01.0199	230176	01.0999	230265	01.0552	240050	01.1325
230055	01.0485	230116	00.9298	230178	01.0957	230266	01.1209	240051	00.9618
230056	00.9681	230117	01.6416	230179	00.9284	230269	01.1433	240052	01.2041
230057	00.9485	230118	01.2068	230180	01.0842	230270	01.1109	240053	01.3511
230058	01.0533	230119	01.0222	230181	01.1497	230273	01.2113	240055	01.1597
230059	01.3671	230120	01.0599	230184	01.1222	230275	01.0415	240056	01.3171
230060	01.1250	230121	01.1466	230186	01.0922	230276	00.9421	240057	01.5720
230062	00.9962	230122	01.2072	230188	01.0505	230277	01.1387	240058	00.9875
230063	01.1618	230123	00.9492	230189	00.9611	240001	01.3481	240059	01.0529
230065	01.1927	230124	01.0469	230190	01.1321	240002	01.4903	240061	01.4058
230066	01.1661	230125	01.2978	230191	00.9009	240003	01.1052	240062	01.1523
230067	00.8971	230127	01.6182	230193	01.1560	240004	01.3068	240063	01.3064
230068	01.2144	230128	01.2782	230194	01.1049	240005	00.9929	240064	01.1872
230069	01.0767	230129	01.6495	230195	01.2262	240006	01.1506	240065	00.9564
230070	01.2493	230130	01.3192	230197	01.0863	240007	01.0925	240066	01.2365
230071	00.7004	230132	01.1933	230199	01.0703	240008	01.0483	240069	01.0991
230072	01.1316	230133	01.0981	230201	01.0235	240009	01.1254	240071	01.1149
230075	01.2000	230134	01.0958	230203	00.7816	240010	01.8394	240072	01.0353
230076	01.1971	230135	01.1477	230204	01.2349	240011	01.0428	240073	01.0082
230077	01.6079	230137	01.0560	230205	01.1631	240013	01.2636	240074	01.0356
230078	01.0552	230138	00.8858	230207	01.1055	240014	01.0922	240075	01.1612
230080	01.1662	230140	01.0300	230208	01.3398	240016	01.2938	240076	01.1417
230081	01.0485	230141	01.3414	230211	00.9361	240017	01.1782	240077	01.0077
230082	01.1466	230142	01.1289	230212	01.0955	240018	01.1727	240078	01.3244
230084	01.0662	230143	01.2384	230213	01.0105	240019	01.3600	240079	01.0958
230085	01.1245	230144	01.1281	230216	01.2450	240020	01.1467	240080	01.2248
230086	01.0229	230145	01.1432	230217	01.1000	240021	01.0292	240081	01.2755
230087	01.0864	230146	01.1350	230219	00.9231	240022	01.1263	240082	01.2814
230089	01.2053	230147	01.1751	230221	01.2047	240023	01.0632	240083	01.1397
230090	01.3590	230149	01.0958	230222	01.1528	240024	01.1350	240084	01.2696
230092	01.1316	230150	01.4773	230223	01.1930	240025	01.1368	240085	00.9117
230093	01.1536	230151	01.2824	230224	01.0338	240026	01.3077	240086	01.0890
230095	01.0815	230153	01.1302	230225	01.1259	240027	01.0484	240087	01.1765
230096	01.0838	230154	00.9956	230227	01.1816	240028	01.1137	240088	01.3692
230097	01.1905	230155	00.9585	230228	01.1636	240029	01.0893	240089	01.0036
230098	01.1353	230156	01.4549	230230	01.2921	240030	01.3229	240090	01.0209
230099	01.1390	230157	01.1721	230231	00.9580	240031	01.0239	240091	01.0053
230100	01.1200	230158	00.9921	230232	01.0305	240033	00.9552	240093	01.2903

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 12 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
240094	01.0634	240150	00.9880	250016	00.8592	250077	00.9000	250138	00.9957
240096	01.0619	240152	01.0418	250017	00.8834	250078	01.2146	250139	00.9243
240097	01.1072	240153	01.0407	250018	01.0278	250079	00.8504	250140	00.8795
240098	00.9870	240154	00.9808	250019	01.1459	250081	01.1258	260001	01.3949
240099	01.1206	240155	00.9911	250020	00.9712	250082	01.0867	260002	01.1804
240100	01.1902	240156	00.9645	250021	00.9072	250083	00.8711	260003	00.9909
240101	01.0374	240157	01.0513	250023	00.9039	250084	01.1045	260004	01.0625
240102	00.9513	240158	01.1541	250024	00.9343	250085	00.9775	260005	01.1730
240103	01.0380	240160	01.0295	250025	00.9799	250086	01.0071	260006	01.1886
240104	01.1942	240161	01.0207	250026	00.8942	250088	01.0444	260007	01.1536
240105	00.9704	240162	01.0972	250027	00.9468	250089	00.9908	260008	01.1523
240106	01.2351	240163	01.0693	250029	00.8862	250091	00.9345	260009	01.1440
240107	01.0413	240165	00.9919	250030	00.9042	250093	01.1172	260010	01.1470
240108	00.9948	240166	01.1362	250031	01.0569	250094	01.1091	260011	01.2182
240109	01.0440	240167	00.9637	250032	01.1514	250095	01.0284	260012	00.9298
240110	01.1510	240169	00.9215	250033	00.8711	250096	01.0998	260013	01.0761
240111	01.0733	240170	01.0995	250034	01.3115	250097	01.0819	260014	01.3879
240112	01.0439	240171	01.0536	250035	00.9098	250098	00.8965	260015	01.0355
240114	00.9947	240172	01.0337	250036	00.9625	250099	01.0798	260016	01.1681
240115	01.2080	240173	01.0175	250037	00.9473	250100	01.1582	260017	01.2199
240116	00.9967	240175	00.9461	250038	00.9187	250101	00.8903	260018	01.0176
240117	01.1238	240176	01.0254	250039	00.9265	250102	01.3484	260019	00.9993
240118	00.9608	240177	00.9937	250040	01.0651	250104	01.1651	260020	01.3682
240119	00.9033	240179	01.0252	250042	01.0429	250105	00.8783	260021	01.2485
240121	00.9513	240180	01.0592	250043	00.8622	250107	00.9271	260022	01.2925
240122	01.0833	240183	01.0986	250044	00.9863	250109	00.8889	260023	01.2155
240123	01.0514	240184	01.0043	250045	01.0517	250110	00.9351	260024	01.0902
240124	01.0495	240187	01.1858	250046	00.9673	250111	00.8915	260025	01.1937
240125	01.0640	240192	00.9669	250047	00.8865	250112	00.9334	260026	01.0832
240127	01.0767	240193	01.0353	250048	01.2867	250113	00.9412	260027	01.3118
240128	01.1107	240196	01.3540	250049	00.9166	250114	00.8561	260029	01.1345
240129	01.0457	240200	00.9229	250050	01.1575	250117	00.9503	260030	01.1556
240130	01.0129	240201	00.9493	250051	00.8607	250118	01.0503	260031	01.3607
240131	01.2713	240205	00.8520	250057	01.0367	250119	00.9296	260032	01.4286
240132	01.2103	240206	00.8389	250058	01.0769	250120	01.0548	260033	01.1944
240133	01.1146	240207	01.1687	250059	01.0046	250121	00.9142	260034	01.0420
240134	01.0582	240210	01.2468	250060	00.8303	250122	01.0625	260035	00.9601
240135	00.6973	250001	01.3868	250061	00.9949	250123	01.1221	260036	01.0563
240136	01.0556	250002	00.8672	250062	01.0417	250124	00.8959	260037	01.1867
240137	01.0517	250003	00.8808	250063	00.9085	250125	01.0473	260039	01.1152
240138	00.9984	250004	01.2591	250065	01.0204	250126	00.9955	260040	01.3118
240139	01.0710	250005	01.0037	250066	00.9068	250127	00.8605	260041	01.0333
240140	00.9235	250006	00.9525	250067	01.0346	250128	01.0167	260042	01.0943
240141	01.0036	250007	01.0308	250068	00.8632	250129	01.0309	260044	01.0542
240142	01.1371	250008	00.8653	250069	01.1057	250131	01.0001	260047	01.1950
240143	00.9869	250009	01.0920	250071	01.0125	250132	00.9708	260048	01.1316
240144	01.0056	250010	01.0093	250072	01.1241	250133	00.8600	260049	00.9515
240145	00.9353	250012	00.9275	250073	00.9199	250134	01.0714	260050	01.0232
240146	01.0113	250014	01.0011	250075	00.9465	250136	00.9966	260051	01.0988
240148	00.9571	250015	01.0179	250076	00.8962	250137	00.8679	260052	01.1471

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TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 13 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
260053	01.1046	260116	01.1407	270001	00.9282	270068	00.9139	280048	01.0292
260054	01.1897	260118	01.2057	270002	01.0454	270071	00.9651	280049	01.0849
260055	01.0623	260119	01.2261	270003	01.1140	270072	00.8712	280050	01.0022
260056	01.1919	260120	01.1249	270004	01.6176	270073	01.0630	280051	01.0418
260057	01.0525	260121	01.0811	270006	00.8738	270074	00.9209	280052	01.0784
260058	01.1253	260122	01.0505	270007	00.9742	270075	00.9005	280054	01.1502
260059	00.9938	260123	00.9963	270008	00.9279	270076	00.8780	280055	01.0141
260061	01.0746	260127	01.0533	270009	00.9477	270079	00.9639	280056	01.1036
260062	01.1388	260128	01.0536	270011	01.0917	270080	01.1187	280057	01.0670
260063	01.1205	260129	01.1568	270012	01.2657	270081	00.9923	280058	01.1449
260064	01.2261	260131	01.2384	270013	01.1622	270082	00.9210	280060	01.2645
260065	01.3662	260134	01.1091	270014	01.4315	270083	01.0290	280061	01.2757
260066	01.0642	260137	01.1855	270016	00.8888	280001	01.1096	280062	01.1326
260067	01.0341	260138	01.5515	270017	01.2268	280003	01.6159	280064	01.0607
260068	01.7008	260141	01.6612	270018	01.1072	280004	01.1134	280065	01.2159
260070	01.0206	260142	01.2384	270019	00.9281	280005	01.2758	280066	01.1256
260073	01.0061	260143	01.3976	270021	01.1059	280009	01.3131	280068	00.9118
260074	01.1189	260146	00.8949	270023	01.2556	280010	01.3345	280070	01.0495
260077	01.2020	260147	00.9950	270024	01.0169	280011	01.0367	280071	00.9667
260078	01.0594	260148	00.9376	270026	00.8521	280012	01.2258	280073	01.0465
260079	01.0586	260158	01.1908	270027	01.1198	280013	01.4003	280074	01.1125
260080	01.2042	260159	01.0121	270028	01.0215	280014	01.1159	280075	01.1449
260081	01.3635	260160	01.1645	270029	00.9637	280015	01.0483	280076	01.1075
260082	01.1540	260162	01.2246	270030	00.9309	280017	01.1470	280077	01.2693
260083	01.1128	260163	01.1148	270031	00.8413	280018	01.0220	280078	01.0679
260085	01.2421	260164	01.0540	270032	01.0838	280020	01.3475	280079	00.8912
260086	00.9973	260165	00.9445	270033	00.8950	280021	01.3276	280080	01.0180
260088	01.1773	260166	01.1643	270035	01.0110	280022	01.1324	280081	01.3285
260089	01.0556	260171	00.7159	270036	01.0234	280023	01.2555	280082	00.9599
260090	01.2212	260172	01.0544	270039	01.0454	280024	00.9059	280083	01.0352
260091	01.3871	260173	01.1427	270040	01.0774	280025	01.0553	280084	01.0156
260092	00.9988	260175	01.1521	270041	00.9829	280026	00.9761	280085	01.2722
260093	01.1269	260176	01.2185	270042	00.8921	280028	00.9666	280087	01.2575
260094	01.1336	260177	01.2390	270043	00.8493	280029	01.2303	280088	01.4765
260095	01.1715	260178	01.2542	270044	01.0091	280030	01.5079	280089	01.0000
260096	01.2721	260179	01.3370	270046	00.8745	280031	01.0344	280090	00.9648
260097	01.1573	260180	01.3371	270047	00.8992	280032	01.2036	280091	01.0815
260100	01.1058	260182	01.0794	270048	01.1125	280033	01.0225	280092	00.9309
260102	01.0632	260183	01.2253	270049	01.2570	280034	01.2686	280093	00.9094
260103	01.1763	260186	01.0955	270050	01.0121	280035	00.9957	280094	00.9849
260104	01.3619	260188	01.1728	270051	01.1129	280037	01.0994	280097	01.0039
260105	01.6309	260189	01.0403	270052	00.9201	280038	01.1880	280098	00.9845
260107	01.2390	260190	01.1392	270053	00.8202	280039	01.0118	280101	01.0657
260108	01.5034	260191	01.1496	270055	00.8059	280040	01.4507	280102	01.0611
260109	01.0029	260192	00.8116	270057	01.1734	280041	01.0607	280103	01.0166
260110	01.3942	260193	01.1737	270058	01.1244	280042	01.1200	280104	01.0074
260111	01.0472	260195	01.0405	270059	00.9891	280043	01.0703	280105	01.2030
260112	01.2506	260197	01.1166	270060	00.8618	280045	01.1996	280106	01.1514
260113	01.1227	260198	01.1133	270063	00.9178	280046	01.1407	280107	01.1144
260115	01.1321	260200	01.0671	270067	00.9553	280047	01.1299	280108	01.0529

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TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 14 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
280109	00.9394	300015	01.0678	310041	01.2058	310112	01.1426	320070	00.8423
280110	01.0864	300016	01.1638	310042	01.0964	310113	01.1941	320074	01.1571
280111	01.1866	300017	01.1899	310043	01.1502	310115	01.1841	320076	01.0489
280114	01.0070	300018	01.2128	310044	01.1851	310116	01.1960	320077	00.8632
280115	01.0458	300019	01.1581	310045	01.1616	310118	01.1198	330001	01.1504
280116	00.8748	300020	01.1030	310047	01.2681	310119	01.1736	330002	01.2097
280117	01.2165	300021	01.0950	310048	01.1964	310120	01.0860	330003	01.2272
280118	01.1778	300022	01.1218	310049	01.1554	310515	00.8852	330004	01.1645
280119	00.7887	300023	01.1653	310050	01.1272	320001	01.3069	330005	01.4392
280122	00.8859	300024	01.1522	310051	01.2394	320002	01.1780	330006	01.2313
280123	00.7607	300028	01.1134	310052	01.1785	320003	01.1545	330007	01.1817
290001	01.3731	300029	01.1932	310054	01.2727	320004	01.1148	330008	01.1048
290002	00.9553	300032	00.9302	310056	01.1275	320005	01.1963	330009	01.0445
290003	01.3320	300033	01.0045	310057	01.2374	320006	01.1702	330010	01.1191
290005	01.1756	300034	01.3561	310058	01.0369	320009	01.2264	330011	01.1386
290006	01.0225	310001	01.4097	310059	00.8522	320010	01.2278	330012	01.2973
290007	01.3929	310002	01.6601	310060	01.1801	320011	01.0428	330013	01.7381
290008	01.1241	310003	01.1264	310061	01.1266	320012	00.9904	330014	01.1499
290009	01.2837	310005	01.1710	310062	00.9719	320013	01.0218	330015	01.2154
290010	01.1080	310006	01.1285	310063	01.2277	320014	00.9264	330016	01.0179
290011	01.0317	310008	01.2301	310064	01.1966	320016	01.0351	330019	01.0690
290012	01.2385	310009	01.1363	310067	01.1308	320017	01.2065	330020	00.9981
290013	00.9769	310010	01.2004	310068	01.1539	320018	01.2030	330022	01.0172
290014	01.0160	310011	01.1798	310069	01.1139	320019	01.2584	330023	01.1816
290015	00.9246	310012	01.2749	310070	01.2012	320021	01.5780	330024	01.4726
290016	01.0981	310013	01.2090	310071	01.1208	320022	01.2432	330025	01.0373
290018	00.7729	310014	01.3634	310072	01.1539	320023	01.1156	330027	01.1888
290019	01.1799	310015	01.2476	310073	01.1676	320030	01.0615	330028	01.1652
290020	00.9102	310016	01.1479	310074	01.2052	320031	00.9216	330029	01.2304
290021	01.4119	310017	01.2242	310075	01.1880	320032	00.9936	330030	01.0070
290022	01.4840	310018	01.1059	310076	01.2424	320033	01.0872	330033	01.2610
290027	01.0308	310019	01.4479	310077	01.5067	320035	00.9558	330034	01.1274
290029	00.9328	310020	01.1497	310078	01.1224	320037	01.1556	330036	01.0652
290031	01.0666	310021	01.1777	310081	01.1429	320038	01.1423	330037	01.0927
290032	01.1894	310022	01.1485	310083	01.1202	320046	01.0686	330038	01.0629
290033	01.0076	310024	01.1916	310084	01.1758	320048	01.1365	330039	01.0280
290034	00.7590	310025	01.0897	310085	01.1829	320049	01.0600	330041	01.2010
300001	01.2380	310026	01.1436	310086	01.1604	320053	01.0311	330043	01.1290
300002	01.0787	310027	01.1495	310087	01.1558	320056	00.9208	330044	01.1989
300003	01.4974	310028	01.0805	310088	01.1398	320057	01.1512	330045	01.1726
300005	01.2298	310029	01.5879	310090	01.2020	320058	00.9359	330046	01.2404
300006	01.0558	310031	02.1423	310091	01.1735	320059	01.0436	330047	01.1371
300007	01.0497	310032	01.1310	310092	01.1682	320060	00.9856	330048	01.1750
300008	01.1269	310033	01.1238	310093	01.0866	320061	01.0949	330049	01.2237
300009	01.1951	310034	01.1576	310094	01.0528	320062	00.8688	330050	01.0995
300010	01.0950	310036	01.1384	310096	01.3624	320063	01.1502	330052	01.1352
300011	01.1565	310037	01.2093	310105	01.0869	320065	01.1000	330053	01.0465
300012	01.1917	310038	01.4098	310108	01.1700	320067	00.9391	330055	01.2319
300013	01.0647	310039	01.1733	310110	01.1592	320068	01.0287	330056	01.2045
300014	01.2133	310040	01.1044	310111	01.1638	320069	01.1490	330057	01.2775

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 15 OF 24

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 15 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
330058	01.1719	330132	01.0754	330201	01.2510	330265	01.2011	330372	01.1380
330059	01.3317	330133	01.1576	330202	01.1250	330267	01.1595	330373	00.7242
330061	01.1776	330135	01.1076	330203	01.2425	330268	01.1462	330381	01.0632
330062	00.9771	330136	01.2287	330204	01.1484	330270	01.7866	330383	01.1408
330064	01.1804	330140	01.4423	330205	01.0565	330272	01.0119	330385	01.1112
330065	01.1619	330141	01.1604	330208	01.1314	330273	01.1118	330386	01.1240
330066	01.1276	330142	01.1643	330209	01.1604	330275	01.1761	330387	00.8900
330067	01.2131	330144	01.0074	330210	01.0900	330276	01.1349	330389	01.7278
330072	01.2233	330148	01.0244	330211	01.1059	330277	01.0501	330390	01.0997
330073	01.0960	330151	01.0620	330212	01.0862	330279	01.1524	330391	01.5234
330074	01.1330	330152	01.1960	330213	01.0045	330281	00.8104	330393	01.4399
330075	01.0322	330153	01.2338	330214	01.5469	330285	01.4141	330394	01.1750
330076	01.1077	330154	01.3339	330215	01.1287	330286	01.1537	330395	01.1898
330078	01.2315	330155	01.1727	330217	01.0351	330288	01.0136	330396	01.0256
330079	01.1790	330157	01.1772	330218	01.1394	330290	01.4066	330397	01.2302
330080	01.0872	330158	01.1843	330219	01.2551	330291	01.0460	330398	01.1064
330082	01.1548	330159	01.2565	330221	01.1476	330293	01.0810	330399	01.1587
330084	00.9759	330160	01.1672	330222	01.1281	330297	01.0755	340001	01.2063
330085	01.3199	330161	01.0580	330223	01.0135	330304	01.1701	340002	01.5402
330086	01.1255	330162	01.2317	330224	01.1461	330306	01.2062	340003	01.1641
330088	01.1675	330163	01.0959	330225	01.1556	330307	01.0814	340004	01.3052
330090	01.4905	330164	01.3097	330226	01.1910	330308	01.0986	340005	01.1546
330091	01.1631	330165	01.0824	330229	01.1351	330309	01.1097	340006	01.0416
330092	01.0159	330166	01.0294	330230	01.2384	330314	01.1394	340007	01.1663
330094	01.2067	330167	01.3754	330231	01.0988	330315	01.0963	340008	01.0591
330095	01.1430	330168	01.0514	330232	01.1681	330316	01.2125	340009	00.9010
330096	01.0070	330169	01.1733	330233	01.1661	330320	01.0860	340010	01.2524
330097	01.0919	330171	01.2106	330234	01.7542	330327	00.9407	340011	01.0263
330100	00.6290	330174	00.9797	330235	01.1439	330331	01.0662	340012	01.0956
330101	01.4371	330175	01.0701	330236	01.2283	330332	01.0940	340013	01.1695
330102	01.1874	330176	00.9363	330238	01.0945	330333	01.1310	340014	01.3268
330103	01.1430	330177	01.0525	330239	01.1040	330335	01.0931	340015	01.2357
330104	01.1575	330179	00.9554	330240	01.0723	330336	01.0922	340016	01.1335
330106	01.4378	330180	01.1755	330241	01.6055	330338	01.1078	340017	01.1575
330107	01.1594	330181	01.1762	330242	01.1942	330339	00.8769	340018	01.3056
330108	01.1976	330182	02.0364	330244	01.0714	330340	01.0558	340019	01.1240
330110	00.9732	330183	01.2811	330245	01.2270	330345	00.7427	340020	01.1201
330111	01.1103	330184	01.1625	330246	01.1874	330350	01.5832	340021	01.2340
330114	01.0118	330185	01.0970	330247	00.6420	330351	01.0517	340022	01.1242
330115	01.1081	330186	01.0795	330249	01.1697	330353	01.1284	340023	01.1619
330116	01.0005	330188	01.1283	330250	01.1193	330354	00.9548	340024	01.1491
330118	01.3227	330189	00.7221	330252	00.8773	330357	01.2003	340025	01.1208
330119	01.2057	330191	01.1636	330254	00.9506	330359	00.9867	340026	00.9807
330120	01.5043	330193	01.2454	330256	01.1167	330362	00.7212	340027	01.1446
330121	01.0189	330194	01.3779	330257	01.0124	330363	00.8117	340028	01.2307
330122	01.1022	330195	01.4432	330258	01.1332	330366	00.7212	340030	01.6562
330125	01.4343	330196	01.1765	330259	01.1737	330367	00.7212	340031	01.1342
330126	01.0883	330197	01.0557	330261	01.1863	330368	00.7212	340032	01.2945
330127	01.1366	330198	01.2066	330263	00.9808	330369	00.7256	340034	01.2949
330128	01.1509	330199	01.1112	330264	01.0974	330371	00.7351	340035	01.0987

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
340036	01.0502	340106	01.0914	350003	01.0661	350065	00.9610	360053	01.1542
340037	01.2192	340107	01.2454	350004	01.5783	350066	00.9488	360054	01.1718
340038	01.2247	340109	01.2274	350005	01.1245	350067	00.8601	360055	01.1867
340039	01.1400	340111	01.2112	350006	01.1458	360001	01.1343	360056	01.1373
340040	01.5211	340112	00.9887	350007	00.9516	360002	01.1667	360057	01.0234
340041	01.1826	340113	01.7442	350008	00.9306	360003	01.2515	360058	01.1318
340042	01.1279	340114	01.2381	350009	01.1347	360006	01.4817	360059	01.2106
340044	00.9898	340115	01.2955	350010	01.1090	360007	00.9940	360061	00.9473
340045	01.0779	340116	01.4487	350011	01.5513	360008	01.0947	360062	01.3980
340047	01.5309	340119	01.1564	350012	01.0156	360009	01.1789	360063	01.0198
340049	00.6656	340120	01.0972	350013	01.0021	360010	01.0883	360064	01.3131
340050	01.1260	340121	01.0018	350014	00.9779	360011	01.2787	360065	01.2142
340051	01.2655	340122	01.0467	350015	01.4999	360012	01.2330	360066	01.1239
340052	00.9643	340123	01.1494	350016	01.1098	360013	01.0876	360067	01.1091
340053	01.4183	340124	01.0251	350017	01.1321	360014	01.1151	360068	01.2737
340054	01.0212	340125	01.3672	350018	00.9336	360015	01.3381	360069	01.0297
340055	01.2391	340126	01.2079	350019	01.3133	360016	01.2342	360070	01.2014
340060	01.0907	340127	01.1727	350020	01.2164	360017	01.3628	360071	01.2053
340061	01.4903	340129	01.1185	350021	01.0539	360018	01.2638	360072	01.1401
340063	01.1055	340130	01.1962	350023	00.9741	360019	01.1683	360074	01.2079
340064	01.0527	340131	01.2602	350024	00.9798	360020	01.1350	360075	01.2898
340065	01.1164	340132	01.2263	350025	01.0181	360021	01.1796	360076	01.1699
340067	00.9853	340133	01.1064	350027	01.0048	360022	01.0908	360077	01.2597
340068	01.1920	340135	01.0097	350029	00.8957	360024	01.0725	360078	01.1536
340069	01.6091	340136	01.0671	350030	01.1005	360025	01.1433	360079	01.4905
340070	01.2439	340137	01.0273	350031	01.0637	360026	01.1084	360080	01.1619
340071	01.0469	340138	01.1914	350032	01.1337	360027	01.3416	360081	01.1749
340072	01.0873	340141	01.2684	350033	00.9500	360028	01.1739	360082	01.2127
340073	01.2372	340142	01.1689	350034	00.9310	360029	01.0877	360083	01.0845
340075	01.1258	340143	01.2887	350035	00.8625	360030	01.1031	360084	01.2999
340076	01.0379	340144	01.1444	350036	00.9272	360031	01.1179	360085	01.5119
340079	00.9589	340145	01.1306	350038	00.9092	360032	01.1611	360086	01.1208
340080	01.0192	340146	00.9917	350039	00.9343	360034	01.0870	360087	01.1712
340084	01.0792	340147	01.1697	350041	00.9230	360035	01.3543	360088	01.0219
340085	01.2371	340148	01.2334	350042	00.9350	360036	01.1389	360089	01.0665
340087	01.0507	340151	01.0389	350043	01.1549	360037	01.5128	360090	01.1501
340088	01.1152	340153	01.9293	350044	00.9012	360038	01.2266	360091	01.2328
340089	00.9743	340154	00.8767	350047	00.9838	360039	01.1486	360092	01.1298
340090	01.1231	340155	01.3306	350048	00.9441	360040	01.1349	360093	01.0624
340091	01.4773	340156	00.8952	350049	01.0229	360041	01.1529	360094	01.0619
340093	01.0483	340157	01.2146	350050	00.8665	360042	01.0742	360095	01.1977
340094	01.2332	340158	01.0685	350051	00.8784	360044	01.1665	360096	01.0898
340096	01.1034	340159	01.0990	350053	00.9676	360045	01.3172	360098	01.2144
340097	01.0024	340160	01.0725	350055	00.8993	360046	01.0297	360099	01.0847
340098	01.4859	340162	01.1308	350056	00.9394	360047	01.0320	360100	01.1534
340099	01.1424	340164	01.1750	350058	00.9909	360048	01.3520	360101	01.3400
340100	01.1836	340166	01.2224	350060	00.9818	360049	01.1158	360102	01.1855
340101	01.1663	340167	00.7978	350061	01.0277	360050	01.0641	360103	01.1887
340104	01.0201	350001	00.8981	350063	00.9545	360051	01.3010	360104	00.9907
340105	01.2435	350002	01.4299	350064	00.9623	360052	01.3563	360106	01.1544

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
* : CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 17 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
360107	01.0973	360165	01.0815	370011	00.9418	370077	01.1186	370157	00.9945
360108	01.0737	360166	00.9772	370012	00.9300	370078	01.3639	370158	01.0102
360109	01.0484	360167	00.8835	370013	01.3636	370079	00.9671	370159	01.1085
360112	01.3414	360168	00.9569	370014	01.1111	370080	01.0323	370161	01.0475
360113	01.1678	360169	00.9873	370015	01.1114	370082	00.9304	370163	00.9701
360114	01.0090	360170	01.0883	370016	01.2339	370083	01.0533	370165	01.0472
360115	01.1528	360171	01.1001	370017	00.9514	370084	01.0081	370166	00.9687
360116	01.0342	360172	01.1824	370018	01.2093	370085	00.9310	370168	00.8998
360118	01.2246	360174	01.0612	370019	01.0320	370086	01.0688	370169	01.0414
360119	01.0685	360175	01.1141	370020	01.1438	370089	01.2106	370170	01.0325
360120	00.8620	360176	01.1376	370021	00.9636	370090	00.9095	370171	01.0065
360121	01.0753	360177	01.0277	370022	01.1986	370091	01.3888	370172	00.9353
360122	01.1558	360178	01.1176	370023	01.1284	370092	00.9694	370173	01.1005
360123	01.1276	360179	01.1508	370025	01.2238	370093	01.4477	370174	00.8273
360124	01.1836	360180	01.8755	370026	01.2831	370094	01.1617	370176	01.1031
360125	01.0832	360184	01.0555	370028	01.4650	370095	01.0194	370177	00.9413
360126	01.1751	360185	01.1172	370029	01.1440	370096	01.1859	370178	00.9948
360127	00.9856	360186	00.9583	370030	01.1010	370097	01.2166	370179	00.9623
360128	01.1028	360187	01.1723	370032	01.1891	370099	00.9754	370180	01.1593
360129	00.9971	360188	01.1109	370033	01.0574	370100	00.9706	370182	00.8871
360130	01.0752	360189	01.1595	370034	01.1193	370103	01.0611	370183	01.0204
360131	01.1111	360192	01.2234	370035	01.3831	370105	01.8494	370184	01.2986
360132	01.0827	360193	01.1872	370036	00.9819	370106	01.2581	380001	01.3284
360133	01.2542	360194	01.1002	370037	01.5233	370107	00.9743	380002	01.1998
360134	01.3180	360195	01.1449	370038	01.0133	370108	01.0491	380003	01.1700
360135	01.0809	360197	01.0540	370039	01.1280	370110	00.9775	380004	01.6322
360136	00.9975	360200	01.0794	370040	01.0642	370112	00.9758	380005	01.1279
360137	01.3945	360203	01.0977	370041	01.0164	370113	01.0816	380006	01.1941
360139	01.0538	360204	01.0725	370042	00.9000	370114	01.4016	380007	01.4027
360140	01.0016	360210	01.1071	370043	00.9127	370117	01.0631	380008	01.0672
360141	01.2733	360211	01.0826	370045	01.0367	370121	01.1394	380009	01.5264
360142	01.0427	360212	01.2471	370046	01.0017	370122	00.8546	380010	01.1620
360143	01.1596	360213	01.0731	370047	01.1084	370123	01.1259	380011	01.0806
360144	01.1768	360218	01.2194	370048	00.9814	370125	00.9463	380013	01.0747
360145	01.2745	360230	01.2205	370049	01.1514	370126	01.0508	380014	01.1521
360147	01.1576	360231	01.0750	370050	00.9658	370130	01.0129	380017	01.5251
360148	01.1728	360232	01.1093	370051	01.0019	370131	00.9491	380018	01.4690
360149	01.0511	360234	01.1440	370054	01.1062	370133	01.0101	380019	01.2506
360150	01.1376	360236	01.0946	370056	01.1972	370136	00.9450	380020	01.2550
360151	01.1812	360238	01.0375	370057	01.1554	370138	00.9421	380021	01.1824
360152	01.2768	360239	01.1472	370059	01.1261	370139	01.0064	380022	01.1777
360153	01.0807	360240	01.2214	370060	01.0789	370140	00.9543	380023	01.2077
360154	01.0854	360241	00.7701	370061	00.9541	370141	01.2766	380024	01.1917
360155	01.1113	370001	01.4890	370063	01.0215	370144	01.2233	380025	01.2509
360156	01.1009	370002	01.0042	370064	00.9958	370146	01.0218	380026	01.1504
360159	01.1198	370004	01.0881	370065	01.1861	370148	01.2364	380027	01.1355
360161	01.1485	370005	00.9332	370069	01.0369	370149	01.1944	380029	01.0196
360162	01.1076	370006	01.1562	370071	00.9223	370153	01.0321	380030	00.9954
360163	01.4040	370007	01.1557	370072	00.9393	370154	00.9592	380031	00.9334
360164	01.0551	370008	01.1741	370076	01.1390	370156	00.9830	380033	01.4526

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
380035	01.2367	390006	01.4440	390059	01.2671	390116	01.2004	390173	01.0695
380036	01.0608	390007	01.1298	390060	01.1138	390117	01.0785	390174	01.4714
380037	01.1480	390008	01.1431	390061	01.2167	390118	01.0339	390176	01.1418
380038	01.1990	390009	01.3035	390062	01.1300	390119	01.1672	390177	00.9203
380039	01.2068	390010	01.0824	390063	01.4308	390121	01.1831	390178	01.2878
380040	01.0989	390011	01.1700	390064	01.1959	390122	01.0765	390179	01.1614
380041	00.8115	390012	01.1964	390065	01.1745	390123	01.1825	390180	01.2095
380042	01.0481	390013	01.1404	390066	01.1752	390125	01.1205	390181	01.0698
380043	00.9651	390014	01.0379	390067	01.3635	390126	01.1474	390183	01.0430
380044	01.0084	390015	01.0588	390068	01.1657	390127	01.1101	390184	01.0873
380045	01.1231	390016	01.0989	390069	01.1376	390128	01.1228	390185	01.1447
380047	01.3707	390017	01.0626	390070	01.1330	390130	00.9924	390186	01.0264
380048	00.9244	390018	01.1376	390071	01.0924	390131	01.1847	390187	01.0829
380050	01.2029	390019	01.0603	390072	01.0088	390132	01.0375	390188	01.0860
380051	01.2540	390020	01.0728	390073	01.1593	390133	01.2577	390189	01.0611
380052	01.1621	390021	01.0979	390074	01.1996	390135	01.1609	390191	01.1110
380055	01.1884	390022	01.1402	390075	01.1536	390136	01.1481	390192	01.0360
380056	00.9823	390023	01.1399	390076	01.1633	390137	01.0827	390193	01.0909
380059	00.9775	390024	00.7711	390077	01.2001	390138	01.2197	390194	01.0736
380060	01.2645	390025	00.8024	390078	01.0169	390139	01.3619	390195	01.3769
380061	01.3883	390026	01.2340	390079	01.6247	390142	01.4170	390196	01.1645
380062	00.9824	390027	01.4025	390080	01.1580	390143	00.9060	390197	01.1846
380063	01.1233	390028	01.5007	390081	01.1979	390145	01.0959	390198	01.1409
380064	01.1623	390029	01.3896	390083	01.1069	390146	01.1500	390199	01.1927
380065	01.1632	390030	01.0608	390084	01.0086	390147	01.1264	390200	01.0659
380066	01.1478	390031	01.1199	390086	01.0792	390148	01.0789	390201	01.2137
380068	01.0917	390032	01.1655	390088	01.2553	390149	01.1913	390203	01.2272
380069	01.0298	390034	01.0695	390090	01.4841	390150	01.1367	390204	01.1571
380070	00.9923	390035	01.1587	390091	01.0850	390151	01.2167	390205	01.1265
380071	01.1998	390036	01.1714	390092	01.0889	390152	01.0495	390206	01.2020
380072	00.9169	390037	01.1764	390093	01.0976	390153	01.1682	390209	00.9616
380075	01.2099	390039	01.0735	390095	01.1881	390154	01.1103	390211	01.0624
380077	01.0148	390040	01.0530	390096	01.1704	390155	01.2566	390213	00.9900
380078	01.1261	390041	01.1146	390097	01.2575	390156	01.1808	390215	01.0977
380079	01.1627	390042	01.1815	390098	01.4768	390157	01.1026	390217	01.0683
380081	00.9435	390043	01.0424	390100	01.5131	390158	01.2367	390219	01.1572
380082	01.2098	390044	01.3862	390101	01.1882	390159	01.1568	390220	01.1420
380083	01.1458	390045	01.2056	390102	01.2096	390160	01.0966	390222	01.1687
380084	01.2468	390046	01.2994	390103	01.0208	390161	00.9988	390223	01.5710
380087	01.0307	390047	01.3393	390104	01.1116	390162	01.1798	390224	00.9095
380088	01.1518	390048	01.1133	390106	01.0136	390163	01.1332	390225	01.1467
380089	01.2674	390049	01.2667	390107	01.1545	390164	01.4299	390226	01.3976
380090	01.2530	390050	01.3103	390108	01.1990	390165	01.0550	390228	01.1765
380091	01.2413	390051	01.8584	390109	01.1481	390166	01.1329	390229	01.2349
380094	00.9798	390052	01.0617	390110	01.1525	390167	01.1246	390231	01.2425
390001	01.1330	390054	01.1376	390111	01.6168	390168	01.1403	390232	01.1185
390002	01.1964	390055	01.4785	390112	01.1033	390169	01.1114	390233	01.2143
390003	01.1130	390056	01.1465	390113	01.1515	390170	01.5721	390234	01.1868
390004	01.1834	390057	01.2054	390114	00.9776	390171	01.0626	390235	01.5192
390005	01.0250	390058	01.2368	390115	01.1618	390172	01.1090	390236	01.0877

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
390237	01.4187	420017	00.9317	420080	01.1801	430054	00.9251	440034	01.1900
390238	00.8492	420018	01.4078	420081	00.9638	430056	00.9001	440035	01.0859
390242	01.1381	420019	01.1143	420082	01.1879	430057	00.9660	440038	00.9555
390244	00.9007	420020	01.1284	420083	01.1567	430060	00.9459	440039	01.4142
390245	01.2197	420022	01.0145	420084	00.7577	430062	00.8811	440040	00.9046
390246	01.1271	420023	01.1574	420085	01.1758	430064	00.9717	440041	00.9022
390247	01.0452	420026	01.6388	420086	01.1752	430065	00.9345	440046	01.0509
390249	01.0315	420027	01.1237	420087	01.3286	430066	00.9676	440047	00.9470
390252	00.8435	420028	00.9935	420088	01.1322	430072	01.0560	440048	01.3009
390256	01.5484	420029	02.1404	420089	01.1986	430073	01.0541	440049	01.3255
390258	01.1477	420030	01.0617	430004	01.0577	430076	01.0597	440050	01.0445
390260	01.1783	420031	00.9287	430005	01.1767	430077	01.2415	440051	00.9941
390261	01.5987	420032	00.9602	430007	01.0026	430079	01.0221	440052	00.8782
390262	01.2313	420033	01.1802	430008	01.1675	430080	00.8632	440053	01.1666
390263	01.2954	420035	00.6418	430009	01.1204	430081	00.9451	440054	00.9483
390265	01.1995	420036	01.1466	430010	01.0716	430082	00.9111	440055	01.0313
390266	01.1751	420037	01.1756	430011	01.2384	430083	00.8409	440056	00.9271
390267	01.1241	420038	01.0345	430012	01.2801	430084	00.8352	440057	00.9428
390268	01.1280	420039	01.0879	430013	01.1177	430085	00.9421	440058	01.0539
390270	01.1270	420040	01.2119	430014	01.1855	430086	00.9089	440059	01.0945
390272	00.8679	420042	01.0616	430015	01.0696	430087	00.8594	440060	01.0789
390275	00.7707	420043	01.1312	430016	01.2519	430088	01.0068	440061	01.1318
390276	00.5520	420044	01.1049	430017	01.1487	440001	01.0313	440063	01.1327
410001	01.1527	420048	01.0061	430018	00.9329	440002	01.3334	440064	00.9280
410002	01.0825	420049	01.0504	430020	00.9694	440003	01.0881	440065	01.0509
410004	01.2055	420050	00.9237	430022	00.8745	440005	00.9986	440067	00.9936
410005	01.2667	420051	01.4075	430023	00.9735	440006	01.1716	440068	01.0639
410006	01.2033	420053	01.0526	430024	01.0023	440007	00.9780	440069	01.1132
410007	01.3691	420054	01.0699	430025	00.9959	440008	00.9867	440070	00.9232
410008	01.0688	420055	01.0303	430026	00.9684	440009	00.9339	440071	01.1390
410009	01.1923	420056	01.1502	430027	01.5034	440010	01.0144	440072	01.0872
410010	00.9940	420057	01.0910	430028	00.9800	440011	01.1406	440073	01.1619
410011	01.1308	420059	01.1061	430029	00.9413	440012	01.1716	440074	00.9023
410012	01.3414	420061	01.0442	430030	01.1495	440014	00.9522	440078	00.9184
410013	01.1142	420062	01.0676	430031	00.9424	440015	01.4696	440079	00.8448
410014	01.1224	420064	01.0523	430033	01.1053	440016	00.9961	440081	01.1036
410016	01.0210	420065	01.1967	430034	01.0415	440017	01.3015	440082	01.6228
410811	01.0760	420066	00.9592	430036	01.0516	440018	01.1328	440083	00.9049
420002	01.2086	420067	01.0948	430037	00.8996	440019	01.3746	440084	01.0636
420003	01.1166	420068	01.1673	430038	01.0762	440020	00.9968	440087	00.8833
420004	01.5795	420069	01.0045	430039	00.9560	440022	01.1141	440090	00.9965
420005	01.0633	420070	01.1591	430040	00.9663	440023	00.9215	440091	01.3100
420006	01.1362	420071	01.2008	430041	00.9544	440024	01.0993	440095	00.9595
420007	01.3313	420072	00.8713	430042	00.9623	440025	01.0770	440100	00.9312
420009	01.2013	420073	01.1689	430043	01.0658	440026	01.1655	440102	01.0428
420010	01.0275	420074	00.9919	430044	00.9124	440029	01.1429	440103	01.0657
420011	01.0783	420075	00.9987	430047	01.0640	440030	01.0521	440104	01.3082
420014	01.0723	420076	00.9641	430048	01.0701	440031	01.0010	440105	00.8724
420015	01.1151	420078	01.3464	430049	00.9170	440032	00.9706	440109	01.0638
420016	01.2180	420079	01.3133	430051	00.9412	440033	01.0239	440110	01.0270

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 20 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
440111	01.1106	440182	00.8967	450045	01.1920	450111	01.2559	450178	00.9684
440113	01.0286	440183	01.1927	450046	01.2511	450112	01.1901	450179	01.0704
440114	01.0418	440184	01.1004	450047	01.1261	450113	01.0991	450181	00.9478
440115	01.0786	440185	01.0040	450048	01.0344	450115	01.0753	450182	00.9224
440117	00.8711	440186	00.9959	450050	01.0301	450116	01.2184	450183	01.1373
440120	01.1802	440187	00.9359	450051	01.5729	450118	01.2381	450184	01.3559
440121	01.1146	440189	01.2731	450052	01.1202	450119	01.2147	450185	00.9982
440125	01.2073	440191	01.0745	450053	01.0325	450121	01.2058	450187	01.3206
440128	00.9183	440192	01.0190	450054	01.4128	450122	00.9558	450188	00.9766
440130	01.0944	440193	00.9812	450055	01.1544	450123	01.1527	450190	01.1989
440131	01.0362	440194	01.0492	450056	01.3567	450124	01.4277	450191	01.2267
440132	00.9701	440196	00.9760	450057	01.1810	450126	01.1810	450192	01.0528
440133	01.3069	440197	01.2371	450058	01.3246	450127	00.9970	450193	02.0495
440134	01.0774	440200	00.9832	450059	01.1932	450128	01.1720	450194	01.0862
440135	01.1200	440203	00.9680	450060	01.1715	450130	01.3385	450195	01.2256
440136	01.0395	440204	01.0457	450063	01.0024	450131	01.2002	450196	01.1866
440137	01.0304	450002	01.2209	450064	01.3221	450132	01.3398	450197	01.2518
440141	00.8871	450004	01.0384	450065	01.0355	450133	01.2075	450200	01.2107
440142	00.8752	450005	00.9988	450066	01.4020	450134	01.1785	450201	00.9761
440143	00.9642	450007	01.2025	450068	01.3354	450135	01.3822	450203	01.1659
440144	00.9715	450008	01.2378	450070	01.0617	450137	01.1882	450206	01.0629
440145	00.9449	450010	01.2072	450072	01.1106	450140	00.9649	450207	01.2098
440146	00.9218	450011	01.2264	450073	01.0863	450141	01.0089	450208	01.1494
440147	00.9379	450013	01.3585	450074	01.1049	450142	01.1858	450209	01.2168
440148	00.9789	450014	01.0308	450076	01.1404	450143	01.0456	450210	01.0664
440149	00.9922	450015	01.3729	450077	00.9932	450144	01.1329	450211	01.1505
440150	01.1824	450016	01.4254	450078	01.0690	450145	01.0324	450213	01.2376
440151	01.0938	450018	01.3128	450079	01.2959	450146	00.9019	450214	01.1436
440152	01.2956	450019	01.1605	450080	01.1757	450147	01.1914	450217	01.0418
440153	00.8949	450020	01.0560	450081	01.1150	450148	01.2258	450218	01.0751
440154	00.8215	450021	01.5539	450082	01.0375	450149	01.2271	450219	01.0896
440156	01.2162	450022	00.9876	450083	01.3201	450150	01.0865	450221	01.0895
440157	00.8716	450023	01.3058	450084	01.1259	450151	01.0659	450222	01.1975
440159	01.1198	450024	01.1733	450085	01.0771	450152	01.2860	450224	01.1119
440160	00.9906	450025	01.3888	450087	01.2480	450153	01.3475	450229	01.3110
440161	01.4202	450027	01.1202	450090	01.1635	450154	01.1920	450230	01.0728
440162	00.9878	450028	01.2406	450092	01.1507	450155	01.2513	450231	01.4223
440166	01.2283	450029	01.1826	450094	01.1517	450157	01.0986	450233	01.0223
440167	01.1748	450031	01.1462	450095	01.0855	450160	00.8502	450234	00.9436
440168	01.0023	450032	01.1725	450096	01.3878	450162	01.4067	450235	01.1213
440170	01.0337	450033	01.4648	450097	01.2978	450163	01.0723	450236	01.0756
440171	00.9884	450034	01.3620	450098	01.0566	450164	00.9920	450237	01.3613
440173	01.1283	450035	01.2984	450099	01.1081	450165	01.0567	450239	01.1291
440174	00.9384	450037	01.2514	450101	01.2554	450166	01.0078	450241	00.9833
440175	01.0290	450039	01.1440	450102	01.4086	450169	00.9182	450242	00.9802
440176	01.1285	450040	01.4163	450104	01.1385	450170	01.1757	450243	01.0558
440177	00.9328	450041	01.0134	450107	01.2466	450174	01.1798	450246	00.9833
440178	01.1259	450042	01.4312	450108	01.0455	450175	01.1052	450248	01.0690
440180	00.9274	450043	01.2081	450109	01.0613	450176	01.1274	450249	01.0296
440181	01.0476	450044	01.4660	450110	01.2145	450177	01.1091	450250	00.9642

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 21 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
450253	01.0515	450341	00.9231	450438	01.1783	450561	01.3188	450638	01.3541
450256	00.9583	450342	00.9966	450440	01.0252	450563	01.1033	450639	01.2179
450258	00.8456	450343	01.1120	450446	01.0122	450565	01.1391	450641	00.9309
450259	01.1611	450346	01.1993	450447	01.1842	450568	01.0532	450643	01.0892
450263	01.1707	450347	01.1342	450450	01.0777	450569	01.0350	450644	02.1571
450264	00.9388	450348	01.1272	450451	01.0735	450570	00.9975	450646	01.2023
450268	01.1109	450349	01.2159	450454	00.9771	450571	01.2704	450647	01.5782
450269	00.9680	450351	01.2064	450457	01.3952	450573	01.0931	450648	01.1212
450270	01.0157	450352	01.1987	450458	00.9102	450574	00.9237	450649	01.0985
450271	01.1635	450353	01.0554	450459	01.2219	450575	01.0720	450651	01.2772
450272	01.1487	450355	01.0324	450460	00.9618	450578	00.9846	450652	00.9667
450275	01.0249	450357	01.2172	450462	01.3737	450580	01.1252	450653	01.2399
450276	01.0630	450358	01.6389	450464	00.9602	450581	01.1254	450654	01.0246
450278	00.9931	450359	00.9403	450465	01.1416	450583	00.9962	450656	01.1870
450280	01.2790	450362	00.9702	450467	01.0756	450584	01.2365	450658	01.0580
450281	01.3134	450365	01.1306	450469	01.2469	450586	01.0281	450659	01.3219
450282	00.8378	450366	01.1854	450472	01.1439	450587	01.1475	450660	01.4741
450283	01.0180	450369	01.1527	450473	00.9930	450588	00.9191	450661	01.0447
450286	01.2328	450370	01.0531	450475	01.1425	450590	00.9270	450662	01.1936
450288	01.1535	450371	01.0640	450476	00.9936	450591	01.1093	450665	01.0290
450289	01.0947	450372	01.2658	450484	01.1433	450595	01.0635	450666	01.1482
450292	01.1474	450373	01.0790	450486	01.0699	450596	01.1246	450667	00.9445
450293	00.9491	450374	00.8306	450488	01.0359	450597	01.1132	450668	01.4308
450296	01.0366	450376	01.3289	450489	01.1867	450600	00.9925	450669	01.1842
450297	00.9925	450378	01.2288	450492	00.9782	450603	00.7833	450670	01.1262
450299	01.2105	450379	01.2302	450493	01.0186	450604	01.2432	450671	00.8384
450300	00.9574	450381	01.0670	450497	01.1190	450605	01.2192	450672	01.3842
450303	00.9665	450388	01.4260	450498	01.0156	450607	01.0401	450673	01.0193
450305	00.8652	450389	01.1339	450508	01.2305	450609	01.0079	450674	00.9043
450306	01.0544	450391	01.1770	450513	01.0673	450610	01.2598	450675	01.1950
450307	01.1475	450393	01.2654	450514	01.0902	450613	01.0497	450677	01.2446
450309	01.1743	450394	01.2000	450517	00.9607	450614	01.0367	450678	01.2066
450311	00.9555	450395	01.0657	450518	01.1542	450615	01.0089	450679	01.0001
450315	01.1823	450399	01.0420	450523	01.3109	450616	02.7296	450681	01.3261
450317	00.9658	450400	01.0812	450527	01.0807	450617	01.2450	450682	01.1411
450320	01.2328	450402	01.0448	450530	01.2333	450620	01.1096	450683	01.2999
450321	00.9862	450403	01.3016	450534	00.9910	450621	00.9696	450684	01.1792
450322	00.8796	450410	01.0519	450535	01.1864	450623	01.0259	450685	01.1346
450324	01.2877	450411	01.0462	450537	01.2293	450624	01.0998	450686	01.3081
450325	01.0742	450415	01.1948	450538	01.2717	450626	01.1733	450687	01.0713
450327	00.9648	450416	01.2271	450539	01.2181	450627	01.2792	450688	01.0797
450328	00.9072	450417	00.9132	450544	01.1542	450628	00.9758	450690	01.2467
450330	01.1489	450418	01.2749	450545	01.1990	450629	00.9833	450691	01.2042
450331	01.0088	450419	01.1947	450546	01.2107	450630	01.5654	450694	01.1030
450332	01.2526	450422	00.7865	450547	00.9595	450631	01.4832	450696	01.2488
450333	01.0154	450423	01.2600	450550	01.1312	450632	00.9304	450697	01.2217
450334	01.0234	450424	01.1113	450551	01.0563	450633	01.3953	450698	00.9101
450337	01.0898	450425	01.0002	450557	00.9932	450634	01.2009	450700	00.9829
450338	00.8798	450429	01.0105	450558	01.4817	450635	00.8396	450702	01.2044
450340	01.1773	450431	01.3361	450559	00.9869	450637	01.1836	450703	01.0656

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 22 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
450704	01.1375	460018	00.8671	490012	01.0125	490083	00.7418	500011	01.1939
450705	00.9464	460019	00.9857	490013	01.0616	490084	01.0521	500012	01.3858
450706	01.2094	460020	00.9774	490014	01.3999	490085	01.0666	500014	01.4728
450709	01.1316	460021	01.1969	490015	01.2048	490088	01.0763	500015	01.2446
450711	01.3445	460022	00.9501	490017	01.1678	490089	01.0352	500016	01.3455
450712	00.8230	460023	01.1577	490018	01.1081	490090	01.1170	500017	01.1440
450713	01.2007	460024	00.9998	490019	01.1390	490091	01.2180	500019	01.1401
450715	01.1919	460025	00.9208	490020	01.0358	490092	01.0762	500020	01.2144
450716	01.1091	460026	00.9914	490021	01.1127	490093	01.1833	500021	01.3100
450717	01.2023	460027	00.9392	490022	01.1754	490094	01.1013	500023	01.1089
450718	01.1127	460029	00.9537	490023	01.1354	490095	01.1942	500024	01.3002
450719	01.1780	460030	01.0165	490024	01.4011	490097	01.1045	500025	01.8907
450722	00.9829	460032	01.0060	490027	01.0356	490098	01.1155	500026	01.2425
450723	01.2107	460033	00.9290	490028	01.1351	490099	00.9694	500027	01.4694
450724	01.3393	460035	00.9117	490029	01.0945	490100	01.2151	500028	00.9748
450725	01.1137	460036	00.9503	490030	01.1461	490101	01.0743	500029	00.9329
450726	00.9778	460037	00.9276	490031	01.0686	490104	00.8090	500030	01.3233
450727	01.1892	460039	00.9011	490032	01.5685	490105	00.8604	500031	01.1671
450728	01.1359	460041	01.1713	490033	01.1685	490106	00.8847	500033	01.2295
450729	01.0380	460042	01.2767	490035	01.0563	490107	01.1020	500034	01.0643
450730	01.1398	460043	01.1504	490037	01.0944	490108	00.8586	500035	01.3097
450732	01.0629	460044	01.1242	490038	01.1038	490109	00.9716	500036	01.2075
450733	01.2256	460046	01.0912	490040	01.1394	490110	01.0463	500037	01.0823
450734	01.0781	470001	01.1484	490041	01.1343	490111	01.0623	500039	01.1888
450735	00.9061	470003	01.6184	490042	01.0986	490112	01.3761	500040	01.1225
450736	00.9025	470004	01.0754	490043	01.1604	490113	01.0838	500041	01.1833
450737	00.7386	470005	01.1940	490044	01.1648	490114	01.0315	500042	01.2178
450739	01.1898	470006	01.1405	490045	01.1337	490115	01.0584	500043	01.1443
450740	00.9847	470008	01.1307	490046	01.2326	490116	01.0212	500044	01.7199
450741	00.8762	470010	01.0926	490047	01.1171	490117	00.9608	500045	01.1173
450742	01.1486	470011	01.2469	490048	01.2132	490118	01.4340	500046	01.2619
450743	01.1347	470012	01.1585	490050	01.1471	490119	01.1545	500048	00.8703
450744	01.0244	470013	01.0620	490052	01.3432	490120	01.1902	500049	01.2944
450746	00.6032	470015	01.1505	490053	01.1971	490122	01.1096	500050	01.1553
460001	01.4813	470016	01.0420	490054	01.0775	490123	01.1029	500051	01.3722
460003	01.3648	470018	01.0923	490055	00.9146	490124	01.1520	500052	01.1656
460004	01.4552	470020	00.9809	490057	01.1713	490125	00.9683	500053	01.0960
460005	01.2170	470023	01.2370	490059	01.2563	490126	01.1057	500054	01.6779
460006	01.1971	470024	01.1157	490060	00.9263	490127	00.9214	500055	00.9755
460007	01.1798	490001	00.9365	490063	01.3991	490129	01.1035	500057	01.1937
460008	01.1366	490002	00.9489	490066	01.0425	490130	01.1493	500058	01.2635
460009	01.5282	490003	00.7702	490067	01.1002	490131	00.8999	500059	01.2818
460010	01.6716	490004	01.1835	490069	01.1696	500001	01.3005	500060	01.0978
460011	01.1295	490005	01.2772	490071	01.1734	500002	01.2974	500061	01.0173
460012	01.4150	490006	01.1653	490073	01.1582	500003	01.2333	500062	01.0613
460013	01.3756	490007	01.5684	490074	01.2691	500005	01.4913	500064	01.3079
460014	01.0054	490008	01.0265	490075	01.1494	500007	01.2413	500065	01.1671
460015	01.2014	490009	01.4519	490077	01.1290	500008	02.0000	500066	00.8466
460016	00.9249	490010	01.0400	490078	00.9150	500009	01.2720	500068	00.9977
460017	01.2357	490011	01.1796	490079	01.1149	500010	01.2028	500069	01.0222

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 23 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
500070	01.0810	510004	00.9690	510068	01.1139	520041	01.0644	520107	01.1808
500071	01.0750	510005	00.9964	510070	01.0638	520042	01.0873	520109	01.0346
500072	01.1522	510006	01.1930	510071	01.2294	520043	01.4561	520110	01.0969
500073	01.1116	510007	01.2840	510072	01.0699	520044	01.2788	520111	01.1142
500074	01.1592	510008	01.1594	510074	00.9903	520045	01.4232	520112	01.0702
500075	01.3296	510009	01.0984	510076	00.9880	520047	00.9642	520113	01.1970
500076	01.2843	510011	00.9341	510077	00.9957	520048	01.2728	520114	01.1171
500077	01.2058	510012	01.0641	510080	00.9531	520049	01.6835	520115	01.1478
500078	01.2483	510013	01.1186	510081	01.0123	520051	01.6583	520116	01.1118
500079	01.1405	510014	01.1956	510082	00.9533	520053	01.0400	520117	01.0436
500080	00.9319	510015	00.9851	510084	00.9704	520054	01.1090	520118	00.9314
500084	01.0148	510016	01.0214	510085	01.1440	520056	01.1216	520120	01.0769
500085	01.0666	510018	01.1296	510086	00.9915	520057	01.1019	520121	00.9795
500086	01.2174	510019	00.8991	520001	01.2529	520058	01.0911	520122	01.0850
500087	01.2497	510020	01.1103	520002	01.2502	520059	01.2332	520123	01.0707
500088	01.2552	510022	01.3875	520003	01.1034	520060	01.1409	520124	01.0640
500089	01.0836	510023	01.0231	520004	01.2461	520062	01.1901	520126	00.9415
500090	00.8773	510024	01.1644	520006	01.1110	520063	01.2026	520127	00.9213
500092	01.0464	510025	00.8896	520007	01.1267	520064	01.3677	520130	00.9761
500093	01.1084	510026	00.9526	520008	01.1784	520066	01.1889	520131	01.1081
500094	01.1156	510027	01.0479	520009	01.2325	520068	00.9664	520132	01.1743
500096	01.0963	510028	01.0724	520010	01.0722	520069	01.2228	520134	01.0626
500097	01.0563	510029	01.1296	520011	01.1005	520070	01.2315	520135	00.9664
500098	00.8679	510030	01.0850	520012	00.9893	520071	01.1406	520136	01.3643
500100	01.0694	510031	01.1602	520013	01.1942	520074	01.0787	520138	01.6742
500101	00.9839	510033	01.1855	520014	01.1798	520075	01.2519	520139	01.2368
500102	00.9353	510035	01.0041	520015	01.1498	520076	01.1801	520140	01.2972
500104	01.1115	510036	01.1889	520016	01.0450	520077	01.0582	520141	01.0595
500106	00.9034	510038	01.0632	520017	01.0908	520078	01.2009	520142	00.9755
500107	01.1470	510039	01.1500	520018	01.0995	520081	01.2222	520143	01.0498
500108	01.4870	510040	01.0148	520019	01.1873	520082	01.1959	520144	00.9924
500109	01.1319	510043	01.0313	520020	01.3455	520083	01.4150	520145	01.0606
500110	01.2136	510045	00.8518	520021	01.1664	520084	01.0788	520146	01.1485
500114	01.2679	510046	01.1937	520022	01.0775	520087	01.4083	520148	01.1427
500118	01.1835	510047	01.1871	520024	01.0060	520088	01.1850	520149	01.0580
500119	01.2391	510048	01.1011	520025	01.1231	520089	01.2473	520151	01.0567
500122	01.2374	510050	01.1489	520026	01.1469	520090	01.1192	520152	01.1365
500123	00.8632	510053	00.9963	520027	01.2090	520091	01.2937	520153	01.0414
500124	01.2340	510054	00.9141	520028	01.3124	520092	01.1250	520154	01.1306
500125	01.0885	510055	01.1863	520029	00.9959	520094	01.3553	520156	01.0865
500129	01.5233	510058	01.1654	520030	01.3411	520095	01.2003	520157	01.0625
500132	01.0024	510059	00.7718	520031	01.1592	520096	01.2171	520159	00.9446
500133	01.1782	510060	01.0494	520032	01.1592	520097	01.2031	520160	01.6267
500135	01.1291	510061	01.0253	520033	01.2190	520098	01.5260	520161	01.0273
500138	03.1139	510062	01.1915	520034	01.2132	520100	01.1010	520167	01.1771
500139	01.0975	510063	01.1823	520035	01.1739	520101	01.1283	520170	01.1753
500140	00.9993	510064	01.0163	520037	01.5448	520102	01.1389	520171	00.9446
500141	01.1554	510065	00.9947	520038	01.1629	520103	01.2525	520173	01.1330
510001	01.3482	510066	01.0806	520039	01.0352	520104	00.9644	520174	01.3625
510002	01.1429	510067	01.1587	520040	01.2211	520105	00.9443	520175	00.7370

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

TABLE 3C : HOSPITAL CASE MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 1987 PAGE 24 OF 24

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
520177	01.3271								
520178	01.1740								
520184	00.7449								
520185	00.9327								
530001	01.1106								
530002	01.1422								
530003	00.8915								
530004	00.9731								
530005	01.0323								
530006	01.0939								
530007	01.1810								
530008	01.0875								
530009	01.0362								
530010	01.0428								
530011	01.0903								
530012	01.3738								
530014	01.1101								
530015	01.0881								
530016	01.1480								
530017	00.9137								
530018	00.9482								
530019	00.8794								
530022	01.0063								
530023	00.9446								
530024	01.0033								
530025	01.1647								
530026	01.1026								
530027	00.9423								
530029	01.0527								
530031	00.8581								
530032	00.9935								

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH DECEMBER 1987.

BILLING CODE 4120-01-C

TABLE 4A.—WAGE INDEX FOR URBAN AREAS

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Abilene, TX	0.8256
Taylor, TX	
Aguadilla, PR	0.4624
Aguada, PR	
Aguadilla, PR	
Isabella, PR	
Moca, PR	
Akron, OH	0.9689
Portage, OH	
Summit, OH	
Albany, GA	0.7847
Dougherty, GA	
Lee, GA	
Albany-Schenectady-Troy, NY	0.8759
Albany, NY	
Greene, NY	
Montgomery, NY	
Rensselaer, NY	
Saratoga, NY	
Schenectady, NY	
Albuquerque, NM	1.0021
Bernalillo, NM	
Alexandria, LA	0.7793
Rapides, LA	
Allentown-Bethlehem, PA-NJ	0.9944
Warren, NJ	
Carbon, PA	
Lehigh, PA	
Northhampton, PA	
Altoona, PA	0.9581
Blair, PA	
Amarillo, TX	0.9683
Potter, TX	
Randall, TX	
Anaheim-Santa Ana, CA *	1.2269
Orange CA	
Anchorage, AK	1.4424
Anchorage, AK	
Anderson, IN	0.9062
Henry, IN	
Madison, IN	
Anderson, SC	0.7855
Anderson, SC	
Ann Arbor, MI	1.1559
Lenawee	
Washtenaw, MI	
Anniston, AL	0.7732
Calhoun, AL	
Appleton-Oshkosh-Neenah, WI	0.9580
Calumet, WI	
Outagamie, WI	
Winnebago, WI	
Arecibo, PR	0.4401
Arecibo, PR	
Camuy, PR	
Hatillo, PR	
Quebradillas, PR	
Asheville, NC	0.8735
Buncombe, NC	
Athens, GA	0.7774
Clarke, GA	
Jackson, GA	
Madison, GA	
Oconee, GA	
Atlanta, GA *	0.9360
Barrow, GA	
Butts, GA	
Cherokee, GA	
Clayton, GA	
Cobb, GA	
Coweta, GA	
De Kalb, GA	
Douglas, GA	
Fayette, GA	
Forsyth, GA	
Fulton, GA	
Gwinnett, GA	
Henry, GA	
Newton, GA	
Paulding, GA	
Rockdale, GA	
Spalding, GA	
Walton, GA	
Atlantic City, NJ	0.9919
Atlantic, NJ	
Cape May, NJ	
Augusta, GA-SC	0.8841
Columbia, GA	
McDuffie, GA	
Richmond, GA	
Aiken, SC	
Aurora-Elgin, IL	0.9950
Kane, IL	
Kendall, IL	
Austin, TX	1.0371
Hays, TX	
Travis, TX	
Williamson, TX	
Bakersfield, CA	1.0957
Kern, CA	
Baltimore, MD *	0.9935
Anne Arundel, MD	
Baltimore, MD	
Baltimore City, MD	
Carroll, MD	
Harford, MD	
Howard, MD	
Queen Annes, MD	
Bangor, ME	0.9135
Penobscot, ME	
Baton Rouge, LA	0.8146
Ascension, LA	
East Baton Rouge, LA	
Livingston, LA	
West Baton Rouge, LA	
Battle Creek, MI	0.9710
Barry, MI	
Calhoun, MI	
Beaumont-Port Arthur, TX	0.9364
Hardin, TX	
Jefferson, TX	
Orange, TX	
Beaver County, PA	0.9526
Columbiana, OH	
Beaver, PA	
Lawrence, PA	
Bellingham, WA	1.0923
Whatcom, WA	
Benton Harbor, MI	0.8496
Berrien, MI	
Cass, MI	
Bergen-Passaic, NJ*	1.0552
Bergen, NJ	
Passaic, NJ	
Billings, MT	0.9953
Yellowstone, MT	
Biloxi-Gulfport, MS	0.8089
Hancock, MS	
Harrison, MS	
Binghamton, NY	0.9279
Broome, NY	
Tioga, NY	
Birmingham, AL	0.9419
Blount, AL	
Jefferson, AL	
Saint Clair, AL	
Shelby, AL	
Walker, AL	
Bismarck, ND	0.9337
Burleigh, ND	
Morton, ND	
Bloomington, IN	0.9178
Monroe, IN	
Owen, IN	
Bloomington-Normal, IL	0.9725
McLean, IL	
Boise City, ID	1.0241
Ada, ID	
Boston-Lawrence-Salem-Lowell-Brockton, MA*	1.0845
Essex, MA	
Middlesex, MA	
Norfolk, MA	
Plymouth, MA	
Suffolk, MA	
Boulder-Longmont, CO	1.0849
Boulder, CO	
Bradenton, FL	0.8996
Manatee, FL	
Brazoria, TX	0.8495
Brazoria, TX	
Bremerton, WA	0.9642
Kitsap, WA	
Bridgeport-Stamford-Norwalk-Danbury, CT	1.1387
Fairfield, CT	
Brownsville-Harlingen, TX	0.8685
Cameron, TX	
Bryan-College Station, TX	0.9810
Brazos, TX	
Buffalo, NY	0.9463
Erie, NY	
Burlington, NC	0.7688
Alamance, NC	
Burlington, VT	0.9458
Chittenden, VT	
Grand Isle, VT	
Caguas, PR	0.4002
Caguas, PR	
Gurabo, PR	
San Lorenz, PR	
Aguas Buenas, PR	
Cayey, PR	
Cidra, PR	
Canton, OH	0.8967
Carroll, OH	
Stark, OH	
Casper, WY	0.9343
Natrona, WY	
Cedar Rapids, IA	0.8974
Linn, IA	
Champaign-Urbana-Rantoul, IL	0.8968
Champaign, IL	
Charleston, SC	0.8604
Berkeley, SC	
Charleston, SC	
Dorchester, SC	
Charleston, WV	0.9716
Kanawha, WV	
Lincoln, WV	
Putnam, WV	
Charlotte-Gastonia-Rock Hill, NC-SC*	0.8443

TABLE 4A.—WAGE INDEX FOR URBAN AREAS—Continued

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Cabarrus, NC	
Gaston, NC	
Lincoln, NC	
Mecklenburg, NC	
Roway, NC	
Union, NC	
York, SC	
Charlottesville, VA	0.8909
Albermarle, VA	
Charlottesville City, VA	
Fluvanna, VA	
Greene, VA	
Chattanooga, TN-GA	0.8944
Catoosa, GA	
Dade, GA	
Walker, GA	
Hamilton, TN	
Marion, TN	
Sequatchie, TN	
Cheyenne, WY	0.8849
Laramie, WY	
Chicago, IL*	1.0878
Cook, IL	
Du Page, IL	
McHenry, IL	
Chico, CA	1.0640
Butte, CA	
Cincinnati, OH-KY-IN*	1.0310
Dearborn, IN	
Boone, KY	
Campbell, KY	
Kenton, KY	
Clermont, OH	
Hamilton, OH	
Warren, OH	
Clarksville-Hopkinsville, TN-KY	0.7321
Christian, KY	
Montgomery, TN	
Cleveland, OH*	1.0842
Cuyahoga, OH	
Geauga, OH	
Lake, OH	
Median, OH	
Colorado Springs, CO	1.0336
El Paso, CO	
Columbia, MO	1.0453
Boone, MO	
Columbia, SC	0.8331
Lexington, SC	
Richland, SC	
Columbus, GA-AL	0.7399
Russell, AL	
Chattanoochee, GA	
Muscogee, GA	
Columbus, OH*	0.9540
Delaware, OH	
Fairfield, OH	
Franklin, OH	
Licking, OH	
Madison, OH	
Pickaway, OH	
Union, OH	
Corpus Christi, TX	0.8349
Nueces, TX	
San Patricio, TX	
Cumberland, MD-WV	0.9188
Allegeny, MD	
Mineral, WV	
Dallas, TX*	0.9098
Collin, TX	
Dallas, TX	
Denton, TX	
Ellis, TX	
Kaufman, TX	
Rockwall, TX	
Danville, VA	0.7684
Caswell, NC	
Danville City, VA	
Pittsylvania, VA	
Davenport-Rock Island-Moline, IA-IL	0.9514
Scott, IA	
Henry, IL	
Rock Island, IL	
Dayton-Springfield, OH	0.9990
Clark, OH	
Greene, OH	
Miami, OH	
Montgomery, OH	
Preble, OH	
Daytona Beach, FL	0.8549
Volusia, FL	
Decatur, IL	0.8967
Macon, IL	
Denver, CO*	1.1843
Adams, CO	
Arapahoe, CO	
Denver, CO	
Douglas, CO	
Jefferson, CO	
Des Moines, IA	0.9781
Dallas, IA	
Polk, IA	
Warren, IA	
Detroit, MI*	1.0862
Lapeer, MI	
Livingston, MI	
Macomb, MI	
Monroe, MI	
Oakland, MI	
Saint Clair, MI	
Wayne, MI	
Dothan, AL	0.7949
Dale, AL	
Houston, AL	
Dubuque, IA	0.9525
Dubuque, IA	
Duluth, MN-WI	0.9672
St. Louis, MN	
Douglas, WI	
Eau Claire, WI	0.8930
Chippewa, WI	
Eau Claire, WI	
El Paso, TX	0.8878
El Paso, TX	
Elkhart-Goshen, IN	0.9264
Elkhart, IN	
Elmira, NY	0.9200
Chemung, NY	
Enid, OK	0.9253
Garfield, OK	
Erie, PA	0.9637
Erie, PA	
Eugene-Springfield, OR	1.0272
Lane, OR	
Evansville, IN-KY	1.0376
Posey, IN	
Vanderburgh, IN	
Warrick, IN	
Henderson, KY	
Fargo-Moorhead, ND-MN	1.0112
Clay, MN	
Cass, ND	
Fayetteville, NC	0.8094
Cumberland, NC	
Harnett, NC	
Fayetteville-Springdale, AR	0.7436
Washington, AR	
Flint, MI	1.1654
Genesee, MI	
Shiawassee, MI	
Florence, AL	0.7137
Colbert, AL	
Lauderdale, AL	
Florence, SC	0.7759
Florence, SC	
Fort Collins-Loveland, CO	1.0366
Larimor, CO	
Fort Lauderdale-Hollywood-Pompano Beach, FL*	1.0334
Broward, FL	
Fort Myers-Cape Coral, FL	0.9068
Lee, FL	
Fort Pierce, FL	0.9831
Indian River, FL	
Martin, FL	
St. Lucie, FL	
Fort Smith, AR-OK	0.8813
Crawford, AR	
Sebastian, AR	
Sequoyah, OK	
Fort Walton Beach, FL	0.8241
Okaloosa, FL	
Fort Wayne, IN	0.9073
Allen, IN	
De Kalb, IN	
Whitley, IN	
Fort Worth-Arlington, TX*	0.9604
Johnson, TX	
Parker, TX	
Tarrant, TX	
Fresno, CA	1.1217
Fresno, CA	
Gadsden, AL	0.8585
Etowah, AL	
Gainesville, FL	0.8791
Alachua, FL	
Bradford, FL	
Galveston-Texas City, TX	1.0898
Galveston, TX	
Gary-Hammond, IN	1.0568
Lake, IN	
Porter, IN	
Glens Falls, NY	0.8799
Warren, NY	
Washington, NY	
Grand Forks, ND	0.9697
Grand Forks, ND	
Grand Rapids, MI	1.0149
Allegan, MI	
Kent, MI	
Ottawa, MI	
Great Falls, MT	0.9910
Cascade, MT	
Greeley, CO	1.0288
Weld, CO	
Green Bay, WI	0.9731
Brown, WI	
Greensboro-Winston-Salem-High Point, NC	0.8645
Davidson, NC	
Davie, NC	
Forsyth, NC	
Guilford, NC	
Randolph, NC	
Stokes, NC	
Yadkin, NC	
Greenville-Spartanburg, SC	0.9242

TABLE 4A.—WAGE INDEX FOR URBAN AREAS—Continued

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Cherokee, SC	
Greenville, SC	
Pickens, SC	
Spartanburg, SC	
Hagerstown, MD	0.8778
Washington, MD	
Hamilton-Middletown, OH	0.9751
Butler, OH	
Harrisburg-Lebanon-Carlisle, PA	1.0590
Cumberland, PA	
Dauphin, PA	
Lebanon, PA	
Perry, PA	
Hartford-Middletown-New Britain-Bristol, CT *	1.1082
Hartford, CT	
Litchfield, CT	
Middlesex, CT	
Tolland, CT	
Hickory, NC	0.8274
Alexander, NC	
Burke, NC	
Catawba, NC	
Honolulu, HI	1.1449
Honolulu, HI	
Houma-Thibodaux, LA	0.7539
Lafourche, LA	
Terrebonne, LA	
Houston, TX *	0.9757
Fort Bend, TX	
Harris, TX	
Liberty, TX	
Montgomery, TX	
Waller, TX	
Huntington-Ashland, WV-KY-OH	0.9243
Boyd, KY	
Carter, KY	
Greenup, KY	
Lawrence, OH	
Cabell, WV	
Wayne, WV	
Huntsville, AL	0.8139
Madison, AL	
Marshall, AL	
Indianapolis, IN *	0.9981
Boone, IN	
Hamilton, IN	
Hancock, IN	
Hendricks, IN	
Johnson, IN	
Marion, IN	
Morgan, IN	
Shelby, IN	
Iowa City, IA	1.1029
Johnson, IA	
Jackson, MI	0.9350
Jackson, MI	
Jackson, MS	0.8134
Hinds, MS	
Madison, MS	
Rankin, MS	
Jackson, TN	0.7614
Madison, TN	
Jacksonville, FL	0.8985
Clay, FL	
Duval, FL	
Nassau, FL	
St. Johns, FL	
Jacksonville, NC	0.7271
Onslow, NC	
Janesville-Beloit, WI	0.9063
Rock, WI	
Jersey City, NJ	1.0814
Hudson, NJ	
Johnson City-Kingsport-Bristol, TN-VA	0.8839
Carter, TN	
Hawkins, TN	
Sullivan, TN	
Unicoi, TN	
Washington, TN	
Bristol City, VA	
Scott, VA	
Washington, VA	
Johnstown, PA	0.9215
Cambria, PA	
Somerset, PA	
Joliet, IL	1.0496
Grundy, IL	
Will, IL	
Joplin, MO	0.8697
Jasper, Mo	
Newton, MO	
Kalamazoo, MI	1.0966
Kalamazoo, MI	
Van Buren, MI	
Kankakee, IL	0.9089
Kankakee, IL	
Kansas City, KS-MO*	1.0144
Johnson, KS	
Leavenworth, KS	
Miami, KS	
Wyandotte, KS	
Cass, MO	
Clay, MO	
Clinton, MO	
Jackson, MO	
Lafayette, MO	
Platte, MO	
Ray, MO	
Kenosha, WI	1.0603
Kenosha, WI	
Killeen-Temple, TX	1.1308
Bell, TX	
Coryell, TX	
Knoxville, TN	0.8261
Anderson, TN	
Blount, TN	
Grainger, TN	
Jefferson, TN	
Knox, TN	
Sevier, TN	
Union, TN	
Kokomo, IN	0.9478
Howard, IN	
Tipton, IN	
LaCrosse, WI	0.9756
LaCrosse, WI	
Lafayette, LA	0.9067
Lafayette, LA	
St. Martin, LA	
Lafayette, IN	0.8847
Clinton, IN	
Tippecanoe, IN	
Lake Charles, LA	0.8964
Calcasieu, LA	
Lake County, IL	1.0932
Lake, IL	
Lakeland-Winter Haven, FL	0.8248
Polk, FL	
Lancaster, PA	1.0015
Lancaster, PA	
Lansing-East Lansing, MI	1.0374
Clinton, MI	
Eaton, MI	
Ingham, MI	
Ionia, MI	
Laredo, TX	0.7413
Webb, TX	
La Cruces, NM	0.8530
Dona Ana, NM	
Las Vegas, NV	1.1227
Clark, NV	
Lawrence, KS	0.9981
Douglas, KS	
Lawton, OK	0.8307
Comache, OK	
Lewiston-Auburn, ME	0.9258
Androscoggin, ME	
Lexington-Fayette, KY	0.9226
Bourbon, KY	
Clark, KY	
Fayette, KY	
Jessamine, KY	
Scott, KY	
Woodford, KY	
Lima, OH	0.9173
Allen, OH	
Auglaize, OH	
Van Wert, OH	
Lincoln, NE	0.9497
Lancaster, NE	
Little Rock-North Little Rock, AR	0.8369
Faulkner, AR	
Lonoke, AR	
Pulaski, AR	
Saline, AR	
Longview-Marshall, TX	0.8213
Gregg, TX	
Harrison, TX	
Lorain-Elyria, OH	0.9429
Lorain, OH	
Los Angeles-Long Beach, CA*	1.2505
Los Angeles, CA	
Louisville, KY-IN	0.9616
Clark, IN	
Floyd, IN	
Harrison, IN	
Bullitt, KY	
Jefferson, KY	
Oldham, KY	
Shelby, KY	
Lubbock, TX	0.9669
Lubbock, TX	
Lynchburg, VA	0.8559
Amherst, VA	
Campbell, VA	
Lynchburg City, VA	
Macon-Warner Robins, GA	0.7859
Bibb, GA	
Houston, GA	
Jones, GA	
Peach, GA	
Madison, WI	1.0145
Dane, WI	
Manchester-Nashua, NH	0.9454
Hillsborough, NH	
Merrimack, NH	
Mansfield, OH	0.8814
Morrow, OH	
Richland, OH	
Mayaguez, PR	0.4842
Anasco, PR	
Cabo Rojo, PR	
Hormigueros, PR	
Mayaguez, PR	
San German, PR	
McAllen-Edinburg-Mission, TX	0.7734
Hidalgo, TX	
Medford, OR	0.9722
Jackson, OR	
Melbourne-Titusville, FL	0.8958
Brevard, FL	
Memphis, TN-AR-MS	0.9480

TABLE 4A.—WAGE INDEX FOR URBAN AREAS—Continued

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Crittenden, AR	
De Soto, MS	
Shelby, TN	
Tipton, TN	
Merced, CA	1.0126
Merced, CA	
Miami-Hialeah, FL*	1.0298
Dade, FL	
Middlesex-Somerset-Hunterdon, NJ	1.0000
Hunterdon, NJ	
Middlesex, NJ	
Somerset, NJ	
Midland, TX	1.0586
Midland, TX	
Milwaukee, WI*	1.0165
Jefferson, WI	
Milwaukee, WI	
Ozaukee, WI	
Walworth, WI	
Washington, WI	
Waukesha, WI	
Minneapolis-St. Paul, MN-WI*	1.1427
Anoka, MN	
Carver, MN	
Chisago, MN	
Dakota, MN	
Hennepin, MN	
Isanti, MN	
Ramsey, MN	
Scott, MN	
Washington, MN	
Wright, MN	
St. Croix, WI	
Mobile, AL	0.8294
Baldwin, AL	
Mobile, AL	
Modesto, CA	1.0776
Stanislaus, CA	
Monmouth-Ocean, NJ	0.9455
Monmouth, NJ	
Ocean, NJ	
Monroe, LA	0.8208
Ouachita, LA	
Montgomery, AL	0.8026
Autauga, AL	
Elmore, AL	
Montgomery, AL	
Muncie, IN	0.9722
Delaware, IN	
Muskegon, MI	0.9976
Muskegon, MI	
Naples, FL	1.0072
Collier, FL	
Nashville, TN	0.8957
Cheatham, TN	
Davidson, TN	
Dickson, TN	
Robertson, TN	
Rutherford, TN	
Sumner, TN	
Williamson, TN	
Wilson, TN	
Nassau-Suffolk, NY*	1.2194
Nassau, NY	
Suffolk, NY	
New Bedford-Fall River-Attleboro, MA	0.9547
Bristol, MA	
New Haven-Waterbury-Meriden, CT	1.0846
New Haven, CT	
New London-Norwich, CT	1.0746
New London, CT	
New Orleans, LA*	0.9420

TABLE 4A.—WAGE INDEX FOR URBAN AREAS—Continued

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Jefferson, LA	
Orleans, LA	
St. Bernard, LA	
St. Charles, LA	
St. John The Baptist, LA	
St. Tammany, LA	
New York, NY *	1.3277
Bronx, NY	
Kings, NY	
New York City, NY	
Putnam, NY	
Queens, NY	
Richmond, NY	
Rockland, NY	
Westchester, NY	
Newark, NJ*	1.0957
Essex, NJ	
Morris, NJ	
Sussex, NJ	
Union, NJ	
Niagara Falls, NY	0.8607
Niagara, NY	
Norfolk-Virginia Beach-Newport News, VA*	0.9334
Currituck, NC	
Chesapeake City, VA	
Gloucester, VA	
Hampton City, VA	
Isle of Wight, VA	
James City Co., VA	
Newport News City, VA	
Norfolk City, VA	
Poquoson, VA	
Portsmouth City, VA	
Suffolk City, VA	
Virginia Beach City, VA	
Williamsburg City, VA	
York, VA	
Oakland, CA *	1.4126
Alameda, CA	
Contra Costa, CA	
Ocala, FL	0.8201
Marion, FL	
Odessa, TX	0.8847
Ector, TX	
Oklahoma City, OK	0.9915
Canadian, OK	
Cleveland, OK	
Logan, OK	
McClain, OK	
Oklahoma, OK	
Pottawatomie, OK	
Olympia, WA	1.0616
Thurston, WA	
Omaha, NE-IA	0.9821
Pottawattamie, IA	
Cass, NE	
Douglas, NE	
Sarpy, NE	
Washington, NE	
Orange County, NY	0.8964
Orange, NY	
Orlando, FL	0.9190
Orange, FL	
Osceola, FL	
Seminole, FL	
Owensboro, KY	0.9016
Daviess, KY	
Oxnard-Ventura, CA	1.4003
Ventura, CA	
Panama City, FL	0.7957
Bay, FL	
Parkersburg-Marietta, WV-OH	0.9130
Washington, OH	
Wood, WV	
Pascagoula, OH	0.8812

TABLE 4A.—WAGE INDEX FOR URBAN AREAS—Continued

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Jackson, MS	
Pensacola, FL	0.8310
Escambia, FL	
Santa Rosa, FL	
Peoria, IL	0.9914
Mason, IL	
Peoria, IL	
Tazewell, IL	
Woodford, IL	
Philadelphia, PA-NJ *	1.0852
Burlington, NJ	
Camden, NJ	
Gloucester, NJ	
Bucks, PA	
Chester, PA	
Delaware, PA	
Montgomery, PA	
Philadelphia, PA	
Phoenix, AZ *	1.0088
Maricopa, AZ	
Pine Bluff, AR	0.8048
Jefferson, AR	
Pittsburgh, PA *	1.0181
Allegheny, PA	
Fayette, PA	
Washington, PA	
Westmoreland, PA	
Pittsfield, MA	1.0315
Berkshire, MA	
Ponce, PR	0.5513
Juana Diaz, PR	
Ponce, PR	
Portland, ME	0.9688
Cumberland, ME	
Sagadahoc, ME	
York, ME	
Portland, OR *	1.1298
Clackamas, OR	
Multnomah, OR	
Washington, OR	
Yamhill, OR	
Portsmouth-Dover-Rochester, NH	0.9467
Rockingham, NH	
Strafford, NH	
Poughkeepsie, NY	0.9798
Dutchess, NY	
Providence-Pawtaucket-Woonsocket, RI*	0.9805
Bristol, RI	
Kent, RI	
Newport, RI	
Providence, RI	
Washington, RI	
Provo-Orem, UT	0.9342
Utah, UT	
Pueblo, CO	0.9362
Pueblo, CO	
Racine, WI	0.9249
Racine, WI	
Raleigh-Durham, NC	0.9463
Durham, NC	
Franklin, NC	
Orange, NC	
Wake, NC	
Rapid City, SD	0.8409
Pennington, SD	
Reading, PA	0.9183
Berks, PA	
Redding, CA	0.9972
Shasta, CA	
Reno, NV	1.1338
Washoe, NV	
Richland-Kennewick, WA	0.9790
Benton, WA	
Franklin, WA	
Richmond-Petersburg, VA	0.8928

TABLE 4A.—WAGE INDEX FOR URBAN AREAS—Continued

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Charles City Co., VA	
Chesterfield, VA	
Colonial Heights City, VA	
Dinwiddie, VA	
Goochland, VA	
Hanover, VA	
Henrico, VA	
Hopewell City, VA	
New Kent, VA	
Petersburg City, VA	
Powhatan, VA	
Prince George, VA	
Richmond City, VA	
Riverside-San Bernardino, CA*	1.1373
Riverside, CA	
San Bernardino, CA	
Roanoke, VA	0.8222
Bedford, VA	
Botetourt, VA	
Roanoke, VA	
Roanoke City, VA	
Salem City, VA	
Rochester, MN	1.0441
Olmsted, MN	
Rochester, NY	0.9444
Genesee, NY	
Livingston, NY	
Monroe, NY	
Ontario, NY	
Orleans, NY	
Wayne, NY	
Rockford, IL	0.9877
Boone, IL	
Winnebago, IL	
Sacramento, CA*	1.2159
Eldorado, CA	
Placer, CA	
Sacramento, CA	
Yolo, CA	
Saginaw-Bay City-Midland, MI	1.0782
Bay, MI	
Midland, MI	
Saginaw, MI	
Tuscola, MI	
St. Cloud, MN	0.9961
Benton, MN	
Sherburne, MN	
Stearns, MN	
St. Joseph, MO	0.8754
Buchanan, MO	
St. Louis, MO-IL*	1.0192
Clinton, IL	
Jersey, IL	
Macoupin, IL	
Madison, IL	
Monroe, IL	
St. Clair, IL	
Franklin, MO	
Jefferson, MO	
St. Charles, MO	
St. Louis, MO	
St. Louis City, MO	
Salem, OR	1.0578
Marion, OR	
Polk, OR	
Salinas-Seaside-Monterey, CA	1.2673
Monterey, CA	
Salt Lake City-Ogden, UT*	0.9338
Davis, UT	
Salt Lake, UT	
Weber, UT	
San Angelo, TX	0.8456
Tom Green, TX	
San Antonio, TX*	0.8394
Bexar, TX	
Comal, TX	
Guadalupe, TX	
San Diego, CA*	1.2453
San Diego, CA	
San Francisco, CA*	1.4454
Marin, CA	
San Francisco, CA	
San Mateo, CA	
San Jose, CA*	1.4808
Santa Clara, CA	
San Juan, PR*	0.5402
Barcelona, PR	
Bayoman, PR	
Canovanas, PR	
Caroliina, PR	
Catano, PR	
Corozal, PR	
Dorado, PR	
Fajardo, PR	
Florida, PR	
Guaynabo, PR	
Humacao, PR	
Juncos, PR	
Los Piedras, PR	
Loiza, PR	
Luguillo, PR	
Manati, PR	
Naranjito, PR	
Rio Grande, PR	
San Juan, PR	
Toa Alta, PR	
Toa Baja, PR	
Trojillo Alto, PR	
Vega Alta, PR	
Vega Baja, PR	
Santa Barbara-Santa Maria-Lompoc, CA	1.1806
Santa Barbara, CA	
Santa Cruz, CA	1.2414
Santa Cruz, CA	
Santa Fe, NM	0.9556
Los Alamos, NM	
Santa Fe, NM	
Santa Rosa-Petaluma, CA	1.4293
Sonoma, CA	
Sarasota, FL	0.9025
Charlotte, FL	
Sarasota, FL	
Savannah, GA	0.8476
Chatham, GA	
Effingham, GA	
Scranton-Wilkes Barre, PA	0.9306
Columbia, PA	
Lackawanna, PA	
Luzerne, PA	
Monroe, PA	
Wyoming, PA	
Seattle, WA*	1.0980
King, WA	
Snohomish, WA	
Sharon, PA	0.9276
Mercer, PA	
Sheboygan, WI	0.9396
Sheboygan, WI	
Sherman-Denison, TX	0.8514
Grayson, TX	
Shreveport, LA	0.9004
Bossier, LA	
Caddo, LA	
Sioux City, IA-NE	0.9091
Woodbury, IA	
Dakota, NE	
Sioux Falls, SD	0.9581
Minnehaha, SD	
South Bend-Mishawaka, IN	0.9782
St. Joseph, IN	
Spokane, WA	1.0841
Spokane, WA	
Springfield, IL	0.9966
Christian, IL	
Menard, IL	
Sangamon, IL	
Springfield, MO	0.8930
Christian, MO	
Greene, MO	
Springfield, MA	1.0112
Hampden, MA	
Hampshire, MA	
State College, PA	1.0538
Centre, PA	
Steubenville-Weirton, OH-WV	0.9187
Jefferson, OH	
Brooke, WV	
Hancock, WV	
Stockton, CA	1.1454
San Joaquin, CA	
Syracuse, NY	0.9830
Madison, NY	
Onondaga, NY	
Oswego, NY	
Tacoma, WA	1.0320
Pierce, WA	
Tallahassee, FL	0.8173
Gadsden, FL	
Leon, FL	
Tampa-St. Petersburg-Clearwater, FL*	0.9062
Hernando, FL	
Hillsborough, FL	
Pasco, FL	
Pinellas, FL	
Terre Haute, IN	0.8277
Clay, IN	
Vigo, IN	
Texarkana, TX-Texarkana, AR	0.8056
Miller, AR	
Bowie, TX	
Toledo, OH	1.0736
Fulton, OH	
Lucas, OH	
Wood, OH	
Topeka, KS	0.9799
Jefferson, KS	
Shawnee, KS	
Trenton, NJ	1.0384
Mercer, NJ	
Tucson, AZ	0.9847
Pima, AZ	
Tulsa, OK	0.9224
Creeks, OK	
Osage, OK	
Rogers, OK	
Tulsa, OK	
Wagoner, OK	
Tuscaloosa, Al	0.9490
Tuscaloosa, Al	
Tyler, TX	0.9272
Smith, TX	
Utica-Rome, NY	0.8159
Herkimer, NY	
Oneida, NY	
Vallejo-Fairfield-Napa, CA	1.2368
Napa, CA	
Solano, CA	
Vancouver, WA	1.0646
Clark, WA	
Victoria, TX	0.8317
Victoria, TX	
Vineland-Millville-Bridgeton, NJ	0.9878
Cumberland, NJ	
Visalia-Tulare-Porterville, CA	1.2889

TABLE 4A.—WAGE INDEX FOR URBAN AREAS—Continued

[Areas that qualify as large urban areas are designated with an asterisk]

Urban area (Constituent Counties or County Equivalents)	Wage index
Tulare, CA	
Waco, TX	0.8650
McLennan, TX	
Washington, DC-MD-VA*	1.0815
District of Columbia, DC	
Calvert, MD	
Charles, MD	
Frederick, MD	
Montgomery, MD	
Prince Georges, MD	
Alexandria City, VA	
Arlington, VA	
Fairfax, VA	
Fairfax City, VA	
Falls Church City, VA	
Loudoun, VA	
Manassas City, VA	
Manassas Park City, VA	
Prince William, VA	
Spotsylvania, VA	
Stafford, VA	
Jefferson, WV	
Waterloo-Cedar Falls, IA	0.9524
Black Hawk, IA	
Bremer, IA	
Wausau, WI	0.9687
Marathon, WI	
West Palm Beach-Boca Raton, Delray Beach, FL	0.9541
Palm Beach, FL	
Wheeling, WV-OH	0.8615
Belmont, OH	
Marshall, WV	
Ohio, WV	
Wichita, KS	1.0299
Butler, KS	
Harvey, KS	
Sedgwick, KS	
Wichita Falls, TX	0.8375
Wichita, TX	
Williamsport, PA	0.9152
Lycoming, PA	
Wilmington, DE-NJ-MD	1.0353
New Castle, DE	
Cecil, MD	
Salem, NJ	
Wilmington, NC	0.8238
New Hanover, NC	
Worcester-Fitchburg-Leominster, MA	0.9485
Worcester, MA	
Yakima, WA	0.9990
Yakima, WA	
York, PA	0.9471
Adams, PA	
York, PA	
Youngstown-Warren, OH	1.0088
Mahoning, OH	
Trumbull, OH	
Yuba City, CA	1.0163
Sutter, CA	
Yuba, CA	

TABLE 4B.—WAGE INDEX FOR RURAL AREAS

Nonurban area	Wage index
Alabama	0.7019
Alaska	1.3833
Arizona	0.8845
Arkansas	0.7042
California	1.0215
Colorado	0.8615
Connecticut	1.0248
Delaware	0.8392
Florida	0.8082
Georgia	0.7500
Hawaii	0.8904
Idaho	0.8119
Illinois	0.8052
Indiana	0.8079
Iowa	0.7991
Kansas	0.7966
Kentucky	0.7996
Louisiana	0.7639
Maine	0.8293
Maryland	0.8023
Massachusetts	1.0208
Michigan	0.9082
Minnesota	0.8995
Mississippi	0.7228
Missouri	0.7507
Montana	0.8560
Nebraska	0.7735
Nevada	0.9541
New Hampshire	0.8936
New Jersey [1]	
New Mexico	0.8107
New York	0.8117
North Carolina	0.7694
North Dakota	0.8457
Ohio	0.8698
Oklahoma	0.7966
Oregon	0.9980
Pennsylvania	0.8825
Puerto Rico	0.5409
Rhode Island [1]	
South Carolina	0.7156
South Dakota	0.7613
Tennessee	0.7096
Texas	0.7527
Utah	0.8680
Vermont	0.8467
Virginia	0.7910
Washington	0.9992
West Virginia	0.8568
Wisconsin	0.8480
Wyoming	0.9091

[1] All counties within the State are classified urban.

BILLING CODE 4120-01-M

TABLE 5

LIST OF DIAGNOSIS RELATED GROUPS (DRGS), RELATIVE WEIGHTING FACTORS, ARITHMETIC AND GEOMETRIC MEAN LENGTH OF STAY, AND LENGTH OF STAY OUTLIER CUTOFF POINTS USED IN THE PROSPECTIVE PAYMENT SYSTEM

					RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
1	01	SURG		CRANIOTOMY AGE >17 EXCEPT FOR TRAUMA	3.4415	18.7	13.9	38
2	01	SURG		CRANIOTOMY FOR TRAUMA AGE >17	4.0382	18.9	12.8	37
3	01	SURG	*	CRANIOTOMY AGE 0-17	2.9183		12.7	37
4	01	SURG		SPINAL PROCEDURES	2.6175	16.4	12.0	36
5	01	SURG		EXTRACRANIAL VASCULAR PROCEDURES	1.5632	7.8	6.5	30
6	01	SURG		CARPAL TUNNEL RELEASE	.4508	2.6	2.0	16
7	01	SURG		PERIPH & CRANIAL NERVE & OTHER NERV SYST PROC WITH CC	2.7264	21.6	11.5	35
8	01	SURG		PERIPH & CRANIAL NERVE & OTHER NERV SYST PROC W/O CC	.7451	5.2	3.3	27
9	01	MED		SPINAL DISORDERS & INJURIES	1.2649	10.6	7.0	31
10	01	MED		NERVOUS SYSTEM NEOPLASMS WITH CC	1.2403	11.5	7.8	32
11	01	MED		NERVOUS SYSTEM NEOPLASMS W/O CC	.7866	7.5	5.0	29
12	01	MED		DEGENERATIVE NERVOUS SYSTEM DISORDERS	.9294	9.8	6.9	31
13	01	MED		MULTIPLE SCLEROSIS & CEREBELLAR ATAXIA	.9226	9.6	7.4	31
14	01	MED		SPECIFIC CEREBROVASCULAR DISORDERS EXCEPT TIA	1.2376	10.4	7.5	31
15	01	MED		TRANSIENT ISCHEMIC ATTACK & PRECEREBRAL OCCLUSIONS	.6370	5.4	4.2	28
16	01	MED		NONSPECIFIC CEREBROVASCULAR DISORDERS W CC	1.0540	8.9	6.6	31
17	01	MED		NONSPECIFIC CEREBROVASCULAR DISORDERS W/O CC	.6320	6.0	4.5	29
18	01	MED		CRANIAL & PERIPHERAL NERVE DISORDERS WITH CC	.9471	8.5	6.2	30
19	01	MED		CRANIAL & PERIPHERAL NERVE DISORDERS W/O CC	.6110	5.9	4.3	28
20	01	MED		NERVOUS SYSTEM INFECTION EXCEPT VIRAL MENINGITIS	1.7056	11.6	7.9	32
21	01	MED		VIRAL MENINGITIS	1.3689	9.6	7.3	31
22	01	MED		HYPERTENSIVE ENCEPHALOPATHY	.7067	5.7	4.5	29
23	01	MED		NONTRAUMATIC STUPOR & COMA	.9405	6.7	4.5	28
24	01	MED		SEIZURE & HEADACHE AGE >17 WITH CC	.9555	7.3	5.3	29
25	01	MED		SEIZURE & HEADACHE AGE >17 W/O CC	.5367	4.6	3.6	28
26	01	MED		SEIZURE & HEADACHE AGE 0-17	.9521	5.2	3.1	27
27	01	MED		TRAUMATIC STUPOR & COMA, COMA >1 HR	1.5858	9.2	4.7	29
28	01	MED		TRAUMATIC STUPOR & COMA, COMA <1 HR AGE >17 WITH CC	1.1966	9.3	5.9	30
29	01	MED		TRAUMATIC STUPOR & COMA, COMA <1 HR AGE >17 W/O CC	.5953	5.2	3.5	28
30	01	MED	*	TRAUMATIC STUPOR & COMA, COMA <1 HR AGE 0-17	.3539		2.0	17
31	01	MED		CONCUSSION AGE >17 WITH CC	.6630	6.0	4.2	28
32	01	MED		CONCUSSION AGE >17 W/O CC	.4066	3.7	2.8	26
33	01	MED	*	CONCUSSION AGE 0-17	.2457		1.6	9
34	01	MED		OTHER DISORDERS OF NERVOUS SYSTEM WITH CC	1.2633	9.1	6.1	30
35	01	MED		OTHER DISORDERS OF NERVOUS SYSTEM W/O CC	.5817	5.4	3.9	28

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** DRGS 469 AND 470 CONTAIN CASES WHICH COULD NOT BE ASSIGNED TO VALID DRGS.
NOTE: GEOMETRIC MEAN IS USED ONLY TO DETERMINE PAYMENT FOR OUTLIER AND TRANSFER CASES.
NOTE: RELATIVE WEIGHTS ARE BASED ON MEDICARE PATIENT DATA AND MAY NOT BE APPROPRIATE FOR OTHER PATIENTS.

LIST OF DIAGNOSIS RELATED GROUPS (DRGS), RELATIVE WEIGHTING FACTORS, ARITHMETIC AND GEOMETRIC MEAN LENGTH OF STAY, AND LENGTH OF STAY OUTLIER CUTOFF POINTS USED IN THE PROSPECTIVE PAYMENT SYSTEM

					RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
36	02	SURG		RETINAL PROCEDURES	.6603	3.4	2.9	16
37	02	SURG		ORBITAL PROCEDURES	.7319	4.3	3.0	27
38	02	SURG		PRIMARY IRIS PROCEDURES	.3685	2.8	2.2	17
39	02	SURG		LENS PROCEDURES WITH OR WITHOUT VITRECTOMY	.4739	2.0	1.7	7
40	02	SURG		EXTRAOCULAR PROCEDURES EXCEPT ORBIT AGE >17	.4768	2.7	2.0	17
41	02	SURG	*	EXTRAOCULAR PROCEDURES EXCEPT ORBIT AGE 0-17	.3657		1.6	7
42	02	SURG		INTRAOCULAR PROCEDURES EXCEPT RETINA, IRIS & LENS	.6458	3.0	2.4	17
43	02	MED		HYPHEMA	.3721	4.6	3.7	28
44	02	MED		ACUTE MAJOR EYE INFECTIONS	.6406	7.0	5.8	30
45	02	MED		NEUROLOGICAL EYE DISORDERS	.5549	4.3	3.4	27
46	02	MED		OTHER DISORDERS OF THE EYE AGE >17 W CC	.6331	5.8	3.9	28
47	02	MED		OTHER DISORDERS OF THE EYE AGE >17 W/O CC	.3658	3.6	2.6	27
48	02	MED	*	OTHER DISORDERS OF THE EYE AGE 0-17	.4018		2.9	27
49	03	SURG		MAJOR HEAD & NECK PROCEDURES	2.8283	15.3	11.0	35
50	03	SURG		SIALOADENECTOMY	.6539	3.2	2.6	17
51	03	SURG		SALIVARY GLAND PROCEDURES EXCEPT SIALOADENECTOMY	.5844	3.0	2.4	17
52	03	SURG		CLEFT LIP & PALATE REPAIR	.8356	4.3	2.9	27
53	03	SURG		SINUS & MASTOID PROCEDURES AGE >17	.6251	3.0	2.1	21
54	03	SURG	*	SINUS & MASTOID PROCEDURES AGE 0-17	.6889		3.2	22
55	03	SURG		MISCELLANEOUS EAR, NOSE, MOUTH & THROAT PROCEDURES	.4639	2.3	1.7	12
56	03	SURG		RHINOPLASTY	.4731	2.3	1.8	13
57	03	SURG		T&A PROC, EXCEPT TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE >17	.9260	6.0	3.6	28
58	03	SURG	*	T&A PROC, EXCEPT TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE 0-17	.3097		1.5	4
59	03	SURG		TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE >17	.3930	2.1	1.6	11
60	03	SURG	*	TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE 0-17	.2616		1.5	4
61	03	SURG		MYRINGOTOMY W TUBE INSERTION AGE >17	.8017	5.4	2.7	27
62	03	SURG	*	MYRINGOTOMY W TUBE INSERTION AGE 0-17	.3089		1.3	5
63	03	SURG		OTHER EAR, NOSE, MOUTH & THROAT O.R. PROCEDURES	.9428	5.6	3.5	27
64	03	MED		EAR, NOSE, MOUTH & THROAT MALIGNANCY	1.0654	8.6	4.9	29
65	03	MED		DYSEQUILIBRIUM	.4584	4.2	3.4	23
66	03	MED		EPISTAXIS	.4425	4.1	3.2	25
67	03	MED		EPIGLOTTITIS	1.0538	6.2	4.8	29
68	03	MED		OTITIS MEDIA & URI AGE >17 WITH CC	.7814	6.3	5.1	29
69	03	MED		OTITIS MEDIA & URI AGE >17 W/O CC	.5379	4.7	3.9	27
70	03	MED		OTITIS MEDIA & URI AGE 0-17	.5495	4.2	3.3	27

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					RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
71	03	MED		LARYNGOTRACHEITIS	.9000	6.4	4.4	28
72	03	MED		NASAL TRAUMA & DEFORMITY	.5170	4.5	3.2	27
73	03	MED		OTHER EAR, NOSE, MOUTH & THROAT DIAGNOSES AGE >17	.7662	5.8	3.8	28
74	03	MED	*	OTHER EAR, NOSE, MOUTH & THROAT DIAGNOSES AGE 0-17	.3427		2.1	20
75	04	SURG		MAJOR CHEST PROCEDURES	3.0203	14.8	12.1	36
76	04	SURG		OTHER RESP SYSTEM O.R. PROCEDURES W CC	2.1260	13.0	8.9	33
77	04	SURG		OTHER RESP SYSTEM O.R. PROCEDURES W/O CC	1.0406	6.4	4.1	28
78	04	MED		PULMONARY EMBOLISM	1.4780	10.7	8.9	33
79	04	MED		RESPIRATORY INFECTIONS & INFLAMMATIONS AGE >17 WITH CC	2.0729	12.8	9.7	34
80	04	MED		RESPIRATORY INFECTIONS & INFLAMMATIONS AGE >17 W/O CC	1.3052	9.6	7.7	32
81	04	MED	*	RESPIRATORY INFECTIONS & INFLAMMATIONS AGE 0-17	1.1032		6.1	30
82	04	MED		RESPIRATORY NEOPLASMS	1.2396	9.6	6.6	31
83	04	MED		MAJOR CHEST TRAUMA WITH CC	.9954	8.4	6.5	30
84	04	MED		MAJOR CHEST TRAUMA W/O CC	.5177	5.2	4.1	28
85	04	MED		PLEURAL EFFUSION WITH CC	1.1695	9.2	6.9	31
86	04	MED		PLEURAL EFFUSION W/O CC	.7442	6.2	4.8	29
87	04	MED		PULMONARY EDEMA & RESPIRATORY FAILURE	1.5159	8.1	5.8	30
88	04	MED		CHRONIC OBSTRUCTIVE PULMONARY DISEASE	1.1240	8.0	6.3	30
89	04	MED		SIMPLE PNEUMONIA & PLEURISY AGE >17 WITH CC	1.3044	9.3	7.4	31
90	04	MED		SIMPLE PNEUMONIA & PLEURISY AGE >17 W/O CC	.8926	7.1	6.1	30
91	04	MED		SIMPLE PNEUMONIA & PLEURISY AGE 0-17	.7775	5.1	4.2	28
92	04	MED		INTERSTITIAL LUNG DISEASE WITH CC	1.3193	9.1	6.9	31
93	04	MED		INTERSTITIAL LUNG DISEASE W/O CC	.8569	6.8	5.2	29
94	04	MED		PNEUMOTHORAX WITH CC	1.3899	9.9	7.4	31
95	04	MED		PNEUMOTHORAX W/O CC	.7060	6.3	5.0	29
96	04	MED		BRONCHITIS & ASTHMA AGE >17 WITH CC	1.0152	7.3	6.1	30
97	04	MED		BRONCHITIS & ASTHMA AGE >17 W/O CC	.7119	5.7	4.9	27
98	04	MED		BRONCHITIS & ASTHMA AGE 0-17	.6343	4.6	3.7	28
99	04	MED		RESPIRATORY SIGNS & SYMPTOMS WITH CC	.7477	5.2	4.0	28
100	04	MED		RESPIRATORY SIGNS & SYMPTOMS W/O CC	.5116	3.5	2.8	19
101	04	MED		OTHER RESPIRATORY SYSTEM DIAGNOSES WITH CC	.9861	7.2	5.4	29
102	04	MED		OTHER RESPIRATORY SYSTEM DIAGNOSES W/O CC	.6650	5.4	4.0	28
103	05	SURG		HEART TRANSPLANT	15.9576	48.9	34.6	59
104	05	SURG		CARDIAC VALVE PROCEDURE W PUMP & W CARDIAC CATH	7.5652	21.3	17.9	42
105	05	SURG		CARDIAC VALVE PROCEDURE W PUMP & W/O CARDIAC CATH	5.9195	16.1	13.2	37

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				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
106	05	SURG	CORONARY BYPASS W CARDIAC CATH	5.5574	16.1	14.2	38
107	05	SURG	CORONARY BYPASS W/O CARDIAC CATH	4.2998	12.4	11.0	35
108	05	SURG	OTHER CARDIOTHORACIC OR VASCULAR PROCEDURES, W PUMP	5.7536	16.2	11.0	35
109	05	SURG	OTHER CARDIOTHORACIC PROCEDURES W/O PUMP	3.7440	11.9	7.4	31
110	05	SURG	MAJOR RECONSTRUCTIVE VASCULAR PROC W/O PUMP WITH CC	3.6449	16.2	12.7	37
111	05	SURG	MAJOR RECONSTRUCTIVE VASCULAR PROC W/O PUMP W/O CC	2.1715	10.1	8.9	33
112	05	SURG	VASCULAR PROCEDURES EXCEPT MAJOR RECONSTRUCTION W/O PUMP	1.9092	7.8	5.6	30
113	05	SURG	AMPUTATION FOR CIRC SYSTEM DISORDERS EXCEPT UPPER LIMB & TOE	2.4615	18.8	14.6	39
114	05	SURG	UPPER LIMB & TOE AMPUTATION FOR CIRC SYSTEM DISORDERS	1.7199	13.8	10.1	34
115	05	SURG	PERM CARDIAC PACEMAKER IMPLANT W AMI, HEART FAILURE OR SHOCK	3.9884	15.2	12.8	37
116	05	SURG	PERM CARDIAC PACEMAKER IMPLANT W/O AMI, HEART FAILURE OR SHOCK	2.6738	8.1	6.5	30
117	05	SURG	CARDIAC PACEMAKER REVISION EXCEPT DEVICE REPLACEMENT	1.2065	6.4	4.6	29
118	05	SURG	CARDIAC PACEMAKER DEVICE REPLACEMENT	1.6598	3.9	2.8	27
119	05	SURG	VEIN LIGATION & STRIPPING	.8357	6.0	4.0	28
120	05	SURG	OTHER CIRCULATORY SYSTEM O.R. PROCEDURES	2.6574	17.1	11.1	35
121	05	MED	CIRCULATORY DISORDERS W AMI & C.V. COMP DISCH ALIVE	1.6615	10.9	9.1	33
122	05	MED	CIRCULATORY DISORDERS W AMI W/O C.V. COMP DISCH ALIVE	1.1537	8.2	6.8	31
123	05	MED	CIRCULATORY DISORDERS W AMI, EXPIRED	1.4217	5.4	3.0	27
124	05	MED	CIRCULATORY DISORDERS EXCEPT AMI, W CARD CATH & COMPLEX DIAG	1.1910	6.2	4.5	28
125	05	MED	CIRCULATORY DISORDERS EXCEPT AMI, W CARD CATH W/O COMPLEX DIAG	.6862	3.1	2.4	19
126	05	MED	ACUTE & SUBACUTE ENDOCARDITIS	3.0366	22.5	17.1	41
127	05	MED	HEART FAILURE & SHOCK	1.0402	8.0	6.2	30
128	05	MED	DEEP VEIN THROMBOPHLEBITIS	.8391	9.0	8.0	32
129	05	MED	CARDIAC ARREST, UNEXPLAINED	1.5096	5.6	2.8	27
130	05	MED	PERIPHERAL VASCULAR DISORDERS WITH CC	.8934	8.0	5.8	30
131	05	MED	PERIPHERAL VASCULAR DISORDERS W/O CC	.5927	5.8	4.2	28
132	05	MED	ATHEROSCLEROSIS WITH CC	.7779	5.8	4.5	28
133	05	MED	ATHEROSCLEROSIS W/O CC	.5660	4.3	3.4	27
134	05	MED	HYPERTENSION	.6053	5.5	4.4	28
135	05	MED	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE > 17 WITH CC	.8952	6.9	5.2	29
136	05	MED	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE > 17 W/O CC	.5766	4.5	3.6	28
137	05	MED	* CARDIAC CONGENITAL & VALVULAR DISORDERS AGE 0-17	.6315		3.3	27
138	05	MED	CARDIAC ARRHYTHMIA & CONDUCTION DISORDERS WITH CC	.8521	6.2	4.8	29
139	05	MED	CARDIAC ARRHYTHMIA & CONDUCTION DISORDERS W/O CC	.5779	4.4	3.5	27
140	05	MED	ANGINA PECTORIS	.6597	4.9	4.1	26

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				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
141	05	MED	SYNCOPE & COLLAPSE WITH CC	.6911	5.7	4.5	28
142	05	MED	SYNCOPE & COLLAPSE W/O CC	.5239	4.2	3.4	24
143	05	MED	CHEST PAIN	.5424	3.7	3.0	20
144	05	MED	OTHER CIRCULATORY SYSTEM DIAGNOSES W CC	1.1499	7.9	5.8	30
145	05	MED	OTHER CIRCULATORY SYSTEM DIAGNOSES W/O CC	.6452	4.7	3.6	28
146	06	SURG	RECTAL RESECTION WITH CC	3.4287	17.9	15.3	39
147	06	SURG	RECTAL RESECTION W/O CC	2.0086	12.3	11.3	35
148	06	SURG	MAJOR SMALL & LARGE BOWEL PROCEDURES WITH CC	3.1988	17.1	14.3	38
149	06	SURG	MAJOR SMALL & LARGE BOWEL PROCEDURES W/O CC	1.7505	11.1	10.3	34
150	06	SURG	PERITONEAL ADHESIOLYSIS WITH CC	2.7130	15.0	12.5	37
151	06	SURG	PERITONEAL ADHESIOLYSIS W/O CC	1.4612	9.8	8.7	33
152	06	SURG	MINOR SMALL & LARGE BOWEL PROCEDURES WITH CC	1.4755	10.1	8.0	32
153	06	SURG	MINOR SMALL & LARGE BOWEL PROCEDURES W/O CC	1.0722	7.8	6.8	31
154	06	SURG	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE > 17 WITH CC	3.7808	17.3	13.2	37
155	06	SURG	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE > 17 W/O CC	1.7226	10.2	8.5	32
156	06	SURG *	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE 0-17	.8382		6.0	30
157	06	SURG	ANAL & STOMAL PROCEDURES WITH CC	.9784	7.3	5.5	30
158	06	SURG	ANAL & STOMAL PROCEDURES W/O CC	.5311	4.0	3.2	25
159	06	SURG	HERNIA PROCEDURES EXCEPT INGUINAL & FEMORAL AGE >17 WITH CC	1.1184	7.2	5.7	30
160	06	SURG	HERNIA PROCEDURES EXCEPT INGUINAL & FEMORAL AGE >17 W/O CC	.6619	4.4	3.7	25
161	06	SURG	INGUINAL & FEMORAL HERNIA PROCEDURES AGE >17 WITH CC	.7368	4.9	3.7	28
162	06	SURG	INGUINAL & FEMORAL HERNIA PROCEDURES AGE >17 W/O CC	.4745	2.9	2.4	15
163	06	SURG	HERNIA PROCEDURES AGE 0-17	.9831	6.5	5.1	29
164	06	SURG	APPENDECTOMY W COMPLICATED PRINCIPAL DIAG WITH CC	2.4194	12.9	11.2	35
165	06	SURG	APPENDECTOMY W COMPLICATED PRINCIPAL DIAG W/O CC	1.4358	8.6	7.9	27
166	06	SURG	APPENDECTOMY W/O COMPLICATED PRINCIPAL DIAG WITH CC	1.4604	8.5	7.0	31
167	06	SURG	APPENDECTOMY W/O COMPLICATED PRINCIPAL DIAG W/O CC	.8097	5.0	4.5	18
168	03	SURG	MOUTH PROCEDURES WITH CC	1.3375	8.0	5.1	29
169	03	SURG	MOUTH PROCEDURES W/O CC	.6186	3.7	2.5	27
170	06	SURG	OTHER DIGESTIVE SYSTEM O.R. PROCEDURES WITH CC	2.7199	16.0	11.2	35
171	06	SURG	OTHER DIGESTIVE SYSTEM O.R. PROCEDURES W/O CC	1.3338	8.8	6.3	30
172	06	MED	DIGESTIVE MALIGNANCY WITH CC	1.2005	10.4	7.0	31
173	06	MED	DIGESTIVE MALIGNANCY W/O CC	.6975	6.2	4.2	28
174	06	MED	G.I. HEMORRHAGE WITH CC	.9849	7.2	5.7	30
175	06	MED	G.I. HEMORRHAGE W/O CC	.6405	5.1	4.3	26

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** DRGS 469 AND 470 CONTAIN CASES WHICH COULD NOT BE ASSIGNED TO VALID DRGS.
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TABLE 5

LIST OF DIAGNOSIS RELATED GROUPS (DRGS), RELATIVE WEIGHTING FACTORS, ARITHMETIC AND GEOMETRIC MEAN LENGTH OF STAY, AND LENGTH OF STAY OUTLIER CUTOFF POINTS USED IN THE PROSPECTIVE PAYMENT SYSTEM

				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
176	06	MED	COMPLICATED PEPTIC ULCER	.9976	7.8	6.1	30
177	06	MED	UNCOMPLICATED PEPTIC ULCER WITH CC	.7761	6.5	5.4	29
178	06	MED	UNCOMPLICATED PEPTIC ULCER W/O CC	.5719	4.9	4.2	23
179	06	MED	INFLAMMATORY BOWEL DISEASE	1.0913	9.4	7.3	31
180	06	MED	G.I. OBSTRUCTION WITH CC	.9188	7.7	5.9	30
181	06	MED	G.I. OBSTRUCTION W/O CC	.5369	5.0	4.1	28
182	06	MED	ESOPHAGITIS, GASTROENT & MISC DIGEST DISORDERS AGE >17 WITH CC	.7402	6.3	5.0	29
183	06	MED	ESOPHAGITIS, GASTROENT & MISC DIGEST DISORDERS AGE >17 W/O CC	.5308	4.6	3.7	27
184	06	MED	ESOPHAGITIS, GASTROENT & MISC DIGEST DISORDERS AGE 0-17	.6576	4.6	2.9	27
185	03	MED	DENTAL & ORAL DIS EXCEPT EXTRACTIONS & RESTORATIONS, AGE >17	.7550	6.1	4.3	28
186	03	MED	* DENTAL & ORAL DIS EXCEPT EXTRACTIONS & RESTORATIONS, AGE 0-17	.4112		2.9	23
187	03	MED	DENTAL EXTRACTIONS & RESTORATIONS	.4574	2.8	2.1	16
188	06	MED	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE >17 WITH CC	.9556	7.3	5.1	29
189	06	MED	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE >17 W/O CC	.4902	4.2	3.0	27
190	06	MED	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE 0-17	.7953	5.8	4.2	28
191	07	SURG	PANCREAS, LIVER & SHUNT PROCEDURES WITH CC.	5.1989	22.8	17.6	42
192	07	SURG	PANCREAS, LIVER & SHUNT PROCEDURES W/O CC	2.4795	13.8	11.7	36
193	07	SURG	BILIARY TRACT PROC EXCEPT TOT CHOLECYSTECTOMY WITH CC	3.0632	17.5	14.8	39
194	07	SURG	BILIARY TRACT PROC EXCEPT TOT CHOLECYSTECTOMY W/O CC	1.8838	12.4	10.7	35
195	07	SURG	TOTAL CHOLECYSTECTOMY W C.D.E. WITH CC	2.3457	13.6	12.1	36
196	07	SURG	TOTAL CHOLECYSTECTOMY W C.D.E. W/O CC	1.5778	10.2	9.3	31
197	07	SURG	TOTAL CHOLECYSTECTOMY W/O C.D.E. WITH CC	1.7836	10.6	9.2	33
198	07	SURG	TOTAL CHOLECYSTECTOMY W/O C.D.E. W/O CC	1.0541	7.1	6.5	22
199	07	SURG	HEPATOBILIARY DIAGNOSTIC PROCEDURE FOR MALIGNANCY	2.2733	15.5	12.5	36
200	07	SURG	HEPATOBILIARY DIAGNOSTIC PROCEDURE FOR NON-MALIGNANCY	2.6573	13.8	9.5	34
201	07	SURG	OTHER HEPATOBILIARY OR PANCREAS O.R. PROCEDURES	2.4448	13.0	8.8	33
202	07	MED	CIRRHOSIS & ALCOHOLIC HEPATITIS	1.2418	10.2	7.4	31
203	07	MED	MALIGNANCY OF HEPATOBILIARY SYSTEM OR PANCREAS	1.0889	9.6	6.6	31
204	07	MED	DISORDERS OF PANCREAS EXCEPT MALIGNANCY	1.0305	7.7	6.1	30
205	07	MED	DISORDERS OF LIVER EXCEPT MALIG,CIRR,ALC HEPA WITH CC	1.2410	9.5	6.8	31
206	07	MED	DISORDERS OF LIVER EXCEPT MALIG,CIRR,ALC HEPA W/O CC	.6433	5.7	4.0	28
207	07	MED	DISORDERS OF THE BILIARY TRACT WITH CC	.9597	7.3	5.7	30
208	07	MED	DISORDERS OF THE BILIARY TRACT W/O CC	.5835	4.6	3.7	28
209	08	SURG	MAJOR JOINT & LIMB REATTACHMENT PROCEDURES	2.3940	13.0	11.9	36
210	08	SURG	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE >17 WITH CC	2.1276	15.4	13.2	37

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				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
211	08	SURG	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE >17 W/O CC	1.5499	11.8	10.7	35
212	08	SURG	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE 0-17	1.4789	10.4	7.3	31
213	08	SURG	AMPUTATION FOR MUSCULOSKELETAL SYSTEM & CONN TISSUE DISORDERS	1.7680	13.6	10.1	34
214	08	SURG	BACK & NECK PROCEDURES WITH CC	2.0479	14.4	12.0	36
215	08	SURG	BACK & NECK PROCEDURES W/O CC	1.3118	9.6	8.4	32
216	08	SURG	BIOPSIES OF MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE	1.6324	13.4	8.5	32
217	08	SURG	WND DEBRID & SKN GRFT EXCEPT HAND,FOR MUSCSKELET & CONN TISS DIS	2.9579	21.8	13.7	38
218	08	SURG	LOWER EXTREM & HUMER PROC EXCEPT HIP,FOOT,FEMUR AGE >17 WITH CC	1.5606	11.0	8.7	33
219	08	SURG	LOWER EXTREM & HUMER PROC EXCEPT HIP,FOOT,FEMUR AGE >17 W/O CC	.9878	6.7	5.5	30
220	08	SURG *	LOWER EXTREM & HUMER PROC EXCEPT HIP,FOOT,FEMUR AGE 0-17	.9242		5.3	29
221	08	SURG	KNEE PROCEDURES WITH CC	1.5128	9.9	6.5	30
222	08	SURG	KNEE PROCEDURES W/O CC	.8305	5.0	3.5	27
223	08	SURG	MAJOR SHOULDER/ELBOW PROC, OR OTHER UPPER EXTREMITY PROC W CC	1.0635	6.2	4.8	29
224	08	SURG	SHOULDER,ELBOW OR FOREARM PROC,EXC MAJOR JOINT PROC, W/O CC	.6418	3.6	2.9	20
225	08	SURG	FOOT PROCEDURES	.6988	4.5	3.2	27
226	08	SURG	SOFT TISSUE PROCEDURES WITH CC	1.3651	9.9	6.6	31
227	08	SURG	SOFT TISSUE PROCEDURES W/O CC	.6651	4.3	3.2	27
228	08	SURG	MAJOR THUMB OR JOINT PROC,OR OTH HAND OR WRIST PROC W CC	.8124	4.2	3.0	27
229	08	SURG	HAND OR WRIST PROC, EXCEPT MAJOR JOINT PROC, W/O CC	.5179	2.7	2.0	16
230	08	SURG	LOCAL EXCISION & REMOVAL OF INT FIX DEVICES OF HIP & FEMUR	.8542	6.4	4.3	28
231	08	SURG	LOCAL EXCISION & REMOVAL OF INT FIX DEVICES EXCEPT HIP & FEMUR	.8727	5.8	3.6	28
232	08	SURG	ARTHROSCOPY	.9520	6.1	3.3	27
233	08	SURG	OTHER MUSCULOSKELET SYS & CONN TISS O.R. PROC WITH CC	1.6451	12.0	8.7	33
234	08	SURG	OTHER MUSCULOSKELET SYS & CONN TISS O.R. PROC W/O CC	.8617	6.1	4.6	29
235	08	MED	FRACTURES OF FEMUR	1.1890	13.8	8.3	32
236	08	MED	FRACTURES OF HIP & PELVIS	.8845	9.8	7.1	31
237	08	MED	SPRAINS, STRAINS, & DISLOCATIONS OF HIP, PELVIS & THIGH	.5694	6.1	4.6	29
238	08	MED	OSTEOMYELITIS	1.6532	14.6	10.7	35
239	08	MED	PATHOLOGICAL FRACTURES & MUSCULOSKELETAL & CONN TISS MALIGNANCY	.9735	10.0	7.6	32
240	08	MED	CONNECTIVE TISSUE DISORDERS WITH CC	1.1129	9.6	7.3	31
241	08	MED	CONNECTIVE TISSUE DISORDERS W/O CC	.6383	6.5	5.1	29
242	08	MED	SEPTIC ARTHRITIS	1.3182	11.3	8.5	33
243	08	MED	MEDICAL BACK PROBLEMS	.6576	6.8	5.1	29
244	08	MED	BONE DISEASES & SPECIFIC ARTHROPATHIES WITH CC	.7197	7.3	5.5	30
245	08	MED	BONE DISEASES & SPECIFIC ARTHROPATHIES W/O CC	.5235	5.5	4.2	28

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				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
246	08	MED	NON-SPECIFIC ARTHROPATHIES	.5715	5.7	4.6	29
247	08	MED	SIGNS & SYMPTOMS OF MUSCULOSKELETAL SYSTEM & CONN TISSUE	.5378	5.1	3.8	28
248	08	MED	TENDONITIS, MYOSITIS & BURSITIS	.6219	5.9	4.5	28
249	08	MED	AFTERCARE, MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE	.6700	6.7	4.4	28
250	08	MED	FX, SPRN, STRN & DISL OF FOREARM, HAND, FOOT AGE >17 WITH CC	.6646	6.5	4.4	28
251	08	MED	FX, SPRN, STRN & DISL OF FOREARM, HAND, FOOT AGE >17 W/O CC	.4223	3.4	2.5	24
252	08	MED	* FX, SPRN, STRN & DISL OF FOREARM, HAND, FOOT AGE 0-17	.3496		1.8	15
253	08	MED	FX, SPRN, STRN & DISL OF UPARM,LOWLEG EX FOOT AGE >17 WITH CC	.7800	8.2	5.9	30
254	08	MED	FX, SPRN, STRN & DISL OF UPARM,LOWLEG EX FOOT AGE >17 W/O CC	.4451	5.0	3.7	28
255	08	MED	* FX, SPRN, STRN & DISL OF UPARM,LOWLEG EX FOOT AGE 0-17	.4638		2.9	27
256	08	MED	OTHER MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE DIAGNOSES	.6412	5.5	4.0	28
257	09	SURG	TOTAL MASTECTOMY FOR MALIGNANCY WITH CC	.9909	6.9	6.0	29
258	09	SURG	TOTAL MASTECTOMY FOR MALIGNANCY W/O CC	.7930	5.3	4.8	20
259	09	SURG	SUBTOTAL MASTECTOMY FOR MALIGNANCY WITH CC	.9846	7.2	5.0	29
260	09	SURG	SUBTOTAL MASTECTOMY FOR MALIGNANCY W/O CC	.6006	3.6	2.9	20
261	09	SURG	BREAST PROC FOR NON-MALIGNANCY EXCEPT BIOPSY & LOCAL EXCISION	.6352	3.2	2.6	17
262	09	SURG	BREAST BIOPSY & LOCAL EXCISION FOR NON-MALIGNANCY	.4333	2.4	1.9	12
263	09	SURG	SKIN GRAFT &/OR DEBRID FOR SKN ULCER OR CELLULITIS WITH CC	2.6665	21.5	15.6	40
264	09	SURG	SKIN GRAFT &/OR DEBRID FOR SKN ULCER OR CELLULITIS W/O CC	1.5825	14.3	10.6	35
265	09	SURG	SKIN GRAFT &/OR DEBRID EXCEPT FOR SKIN ULCER OR CELLULITIS W CC	1.4163	10.8	6.9	31
266	09	SURG	SKIN GRAFT &/OR DEBRID EXCEPT FOR SKIN ULCER OR CELLULITIS W/O CC	.6900	4.9	3.3	27
267	09	SURG	PERIANAL & PILONIDAL PROCEDURES	.6152	4.5	3.1	27
268	09	SURG	SKIN, SUBCUTANEOUS TISSUE & BREAST PLASTIC PROCEDURES	.6202	3.8	2.5	27
269	09		OTHER SKIN, SUBCUT TISS & BREAST PROCEDURE WITH CC	1.6018	11.8	7.8	32
270	09		OTHER SKIN, SUBCUT TISS & BREAST PROCEDURE W/O CC	.6857	4.9	3.4	27
271	09	MED	SKIN ULCERS	1.2173	11.7	8.8	33
272	09	MED	MAJOR SKIN DISORDERS WITH CC	1.0332	9.6	7.4	31
273	09	MED	MAJOR SKIN DISORDERS W/O CC	.7092	7.7	5.9	30
274	09	MED	MALIGNANT BREAST DISORDERS WITH CC	1.0473	9.8	6.3	30
275	09	MED	MALIGNANT BREAST DISORDERS W/O CC	.5766	5.3	3.4	27
276	09	MED	NON-MALIGANT BREAST DISORDERS	.5386	4.6	3.1	27
277	09	MED	CELLULITIS AGE >17 WITH CC	.9689	8.9	7.3	31
278	09	MED	CELLULITIS AGE >17 W/O CC	.6879	6.8	5.8	30
279	09	MED	* CELLULITIS AGE 0-17	.7367		4.2	24
280	09	MED	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE >17 WITH CC	.6410	6.4	4.7	29

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				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
281	09	MED	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE >17 W/O CC	.4268	4.5	3.4	27
282	09	MED	* TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE 0-17	.3424		2.2	19
283	09	MED	MINOR SKIN DISORDERS WITH CC	.7751	7.4	5.5	30
284	09	MED	MINOR SKIN DISORDERS W/O CC	.4811	5.0	3.7	28
285	10	SURG	AMPUTAT OF LOWER LIMB FOR ENDOCRINE,NUTRIT,& METABOL DISORDERS	2.9829	23.2	17.3	41
286	10	SURG	ADRENAL & PITUITARY PROCEDURES	2.6038	13.7	11.2	35
287	10	SURG	SKIN GRAFTS & WOUND DEBRID FOR ENDOC, NUTRIT & METAB DISORDERS	2.1823	19.0	13.6	38
288	10	SURG	O.R. PROCEDURES FOR OBESITY	2.0573	11.5	8.0	32
289	10	SURG	PARATHYROID PROCEDURES	1.0939	6.7	5.1	29
290	10	SURG	THYROID PROCEDURES	.8065	4.5	3.7	22
291	10	SURG	THYROGLOSSAL PROCEDURES	.5098	2.6	2.1	13
292	10	SURG	OTHER ENDOCRINE, NUTRIT & METAB O.R. PROC WITH CC	2.6606	17.3	12.2	36
293	10	SURG	OTHER ENDOCRINE, NUTRIT & METAB O.R. PROC W/O CC	1.2020	9.2	6.6	31
294	10	MED	DIABETES AGE >35	.7623	7.5	6.1	30
295	10	MED	DIABETES AGE 0-35	.7779	6.1	4.7	29
296	10	MED	NUTRITIONAL & MISC METABOLIC DISORDERS AGE >17 WITH CC	.9399	8.3	6.1	30
297	10	MED	NUTRITIONAL & MISC METABOLIC DISORDERS AGE >17 W/O CC	.5751	5.6	4.4	28
298	10	MED	NUTRITIONAL & MISC METABOLIC DISORDERS AGE 0-17	.5892	4.3	3.3	27
299	10	MED	INBORN ERRORS OF METABOLISM	.8414	7.0	4.7	29
300	10	MED	ENDOCRINE DISORDERS WITH CC	1.1237	9.6	7.2	31
301	10	MED	ENDOCRINE DISORDERS W/O CC	.6458	6.0	4.6	29
302	11	SURG	KIDNEY TRANSPLANT	3.7180	18.4	15.9	40
303	11	SURG	KIDNEY,URETER & MAJOR BLADDER PROCEDURES FOR NEOPLASM	2.7287	14.9	12.6	37
304	11	SURG	KIDNEY,URETER & MAJOR BLADDER PROC FOR NON-NEOPL WITH CC	2.4872	14.3	10.9	35
305	11	SURG	KIDNEY,URETER & MAJOR BLADDER PROC FOR NON-NEOPL W/O CC	1.3634	8.3	6.3	30
306	11	SURG	PROSTATECTOMY WITH CC	1.4358	10.3	8.1	32
307	11	SURG	PROSTATECTOMY W/O CC	.8672	6.1	5.2	29
308	11	SURG	MINOR BLADDER PROCEDURES WITH CC	1.5388	10.3	7.2	31
309	11	SURG	MINOR BLADDER PROCEDURES W/O CC	.8420	5.5	4.0	28
310	11	SURG	TRANSURETHRAL PROCEDURES WITH CC	.9140	6.3	4.6	29
311	11	SURG	TRANSURETHRAL PROCEDURES W/O CC	.5486	3.4	2.7	21
312	11	SURG	URETHRAL PROCEDURES, AGE >17 WITH CC	.8261	5.9	4.2	28
313	11	SURG	URETHRAL PROCEDURES, AGE >17 W/O CC	.5069	3.4	2.6	23
314	11	SURG *	URETHRAL PROCEDURES, AGE 0-17	.4323		2.3	26
315	11	SURG	OTHER KIDNEY & URINARY TRACT O.R. PROCEDURES	2.4135	13.7	8.5	32

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					RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
316	11	MED		RENAL FAILURE	1.2852	9.3	6.4	30
317	11	MED		ADMIT FOR RENAL DIALYSIS	.3507	2.8	2.0	18
318	11	MED		KIDNEY & URINARY TRACT NEOPLASMS WITH CC	1.0643	9.2	6.1	30
319	11	MED		KIDNEY & URINARY TRACT NEOPLASMS W/O CC	.5775	4.5	3.0	27
320	11	MED		KIDNEY & URINARY TRACT INFECTIONS AGE >17 WITH CC	1.0457	8.6	7.0	31
321	11	MED		KIDNEY & URINARY TRACT INFECTIONS AGE >17 W/O CC	.7286	6.5	5.5	29
322	11	MED		KIDNEY & URINARY TRACT INFECTIONS AGE 0-17	.7584	6.3	5.2	29
323	11	MED		URINARY STONES WITH CC, &/OR ESW LITHOTRIPSY	.8048	4.2	3.0	27
324	11	MED		URINARY STONES W/O CC	.4219	3.1	2.4	18
325	11	MED		KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE >17 WITH CC	.6848	6.1	4.6	29
326	11	MED		KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE >17 W/O CC	.4361	3.9	3.1	26
327	11	MED	*	KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE 0-17	.5511		3.1	27
328	11	MED		URETHRAL STRICTURE AGE >17 WITH CC	.6250	5.1	3.9	28
329	11	MED		URETHRAL STRICTURE AGE >17 W/O CC	.4259	3.3	2.5	21
330	11	MED	*	URETHRAL STRICTURE AGE 0-17	.2788		1.6	9
331	11	MED		OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE >17 WITH CC	.9133	7.5	5.4	29
332	11	MED		OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE >17 W/O CC	.5677	4.9	3.5	27
333	11	MED		OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE 0-17	.7223	5.7	3.9	28
334	12	SURG		MAJOR MALE PELVIC PROCEDURES W CC	1.8573	12.3	11.0	35
335	12	SURG		MAJOR MALE PELVIC PROCEDURES W/O CC	1.3671	9.5	8.9	26
336	12	SURG		TRANSURETHRAL PROSTATECTOMY WITH CC	1.0205	7.2	6.2	30
337	12	SURG		TRANSURETHRAL PROSTATECTOMY W/O CC	.6993	5.0	4.5	16
338	12	SURG		TESTES PROCEDURES, FOR MALIGNANCY	.7532	5.2	3.2	27
339	12	SURG		TESTES PROCEDURES, NON-MALIGNANCY AGE >17	.5868	3.8	2.7	27
340	12	SURG	*	TESTES PROCEDURES, NON-MALIGNANCY AGE 0-17	.4335		2.4	13
341	12	SURG		PENIS PROCEDURES	.9864	5.0	4.0	28
342	12	SURG		CIRCUMCISION AGE >17	.4508	2.9	2.1	20
343	12	SURG	*	CIRCUMCISION AGE 0-17	.3788		1.7	6
344	12	SURG		OTHER MALE REPRODUCTIVE SYSTEM O.R. PROCEDURES FOR MALIGNANCY	1.0867	7.1	5.5	30
345	12	SURG		OTHER MALE REPRODUCTIVE SYSTEM O.R. PROC EXCEPT FOR MALIGNANCY	.7907	5.7	4.1	28
346	12	MED		MALIGNANCY, MALE REPRODUCTIVE SYSTEM, WITH CC	.9165	8.2	5.5	30
347	12	MED		MALIGNANCY, MALE REPRODUCTIVE SYSTEM, W/O CC	.4884	3.7	2.6	27
348	12	MED		BENIGN PROSTATIC HYPERTROPHY WITH CC	.6748	5.5	3.8	28
349	12	MED		BENIGN PROSTATIC HYPERTROPHY W/O CC	.3873	2.8	2.1	17
350	12	MED		INFLAMMATION OF THE MALE REPRODUCTIVE SYSTEM	.6806	5.9	5.0	29

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NOTE: RELATIVE WEIGHTS ARE BASED ON MEDICARE PATIENT DATA AND MAY NOT BE APPROPRIATE FOR OTHER PATIENTS.

LIST OF DIAGNOSIS RELATED GROUPS (DRGS), RELATIVE WEIGHTING FACTORS, ARITHMETIC AND GEOMETRIC MEAN LENGTH OF STAY, AND LENGTH OF STAY OUTLIER CUTOFF POINTS USED IN THE PROSPECTIVE PAYMENT SYSTEM

				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
351	12	MED	* STERILIZATION, MALE	.3333		1.3	5
352	12	MED	OTHER MALE REPRODUCTIVE SYSTEM DIAGNOSES	.5267	4.1	2.9	27
353	13	SURG	PELVIC EVISCERATION, RADICAL HYSTERECTOMY & RADICAL VULVECTOMY	2.2528	14.7	12.5	36
354	13	SURG	UTERINE,ADNEXA PROC FOR NON-OVARIAN/ADNEXAL MALIG WITH CC	1.5082	9.9	8.7	33
355	13	SURG	UTERINE,ADNEXA PROC FOR NON-OVARIAN/ADNEXAL MALIG W/O CC	.9474	6.6	6.3	17
356	13	SURG	FEMALE REPRODUCTIVE SYSTEM RECONSTRUCTIVE PROCEDURES	.7651	5.8	5.3	20
357	13	SURG	UTERINE & ADNEXA PROC FOR OVARIAN OR ADNEXAL MALIG	2.1869	13.2	11.2	35
358	13	SURG	UTERINE & ADNEXA PROC FOR NON-MALIGNANCY WITH CC	1.2525	8.6	7.7	30
359	13	SURG	UTERINE & ADNEXA PROC FOR NON-MALIGNANCY W/O CC	.8579	6.1	5.8	15
360	13	SURG	VAGINA, CERVIX & VULVA PROCEDURES	.7472	5.5	3.7	28
361	13	SURG	LAPAROSCOPY & INCISIONAL TUBAL INTERRUPTION	.7253	4.4	2.9	27
362	13	SURG	ENDOSCOPIC TUBAL INTERRUPTION	.3853	2.0	1.6	10
363	13	SURG	D&C, CONIZATION & RADIO-IMPLANT, FOR MALIGNANCY	.6850	5.0	3.5	28
364	13	SURG	D&C, CONIZATION EXCEPT FOR MALIGNANCY	.4417	3.0	2.2	18
365	13	SURG	OTHER FEMALE REPRODUCTIVE SYSTEM O.R. PROCEDURES	1.8970	12.4	9.4	33
366	13	MED	MALIGNANCY, FEMALE REPRODUCTIVE SYSTEM WITH CC	1.1247	9.9	6.3	30
367	13	MED	MALIGNANCY, FEMALE REPRODUCTIVE SYSTEM W/O CC	.5149	4.5	3.0	27
368	13	MED	INFECTIONS, FEMALE REPRODUCTIVE SYSTEM	.8805	7.3	5.9	30
369	13	MED	MENSTRUAL & OTHER FEMALE REPRODUCTIVE SYSTEM DISORDERS	.5057	4.6	3.3	27
370	14	SURG	CESAREAN SECTION W CC	.9616	7.6	6.3	30
371	14	SURG	CESAREAN SECTION W/O CC	.7174	5.1	4.8	14
372	14	MED	VAGINAL DELIVERY W COMPLICATING DIAGNOSES	.4518	3.8	3.1	21
373	14	MED	VAGINAL DELIVERY W/O COMPLICATING DIAGNOSES	.3125	2.5	2.3	9
374	14	SURG	VAGINAL DELIVERY W STERILIZATION &/OR D&C	.5577	3.3	2.9	11
375	14	SURG	* VAGINAL DELIVERY W O.R. PROC EXCEPT STERIL &/OR D&C	.6817		4.4	28
376	14	MED	POSTPARTUM & POST ABORTION DIAGNOSES W/O O.R. PROCEDURE	.4039	3.6	2.8	20
377	14	SURG	POSTPARTUM & POST ABORTION DIAGNOSES W O.R. PROCEDURE	.6878	4.3	3.2	27
378	14	MED	ECTOPIC PREGNANCY	.7902	5.0	4.4	20
379	14	MED	THREATENED ABORTION	.3014	2.8	2.2	18
380	14	MED	ABORTION W/O D&C	.2511	2.0	1.6	10
381	14	SURG	ABORTION W D&C, ASPIRATION CURETTAGE OR HYSTEROTOMY	.3889	2.1	1.6	11
382	14	MED	FALSE LABOR	.1254	1.5	1.3	5
383	14	MED	OTHER ANTEPARTUM DIAGNOSES W MEDICAL COMPLICATIONS	.4431	5.1	3.6	28
384	14	MED	OTHER ANTEPARTUM DIAGNOSES W/O MEDICAL COMPLICATIONS	.3085	3.3	2.3	25
385	15		* NEONATES, DIED OR TRANSFERRED TO ANOTHER ACUTE CARE FACILITY	1.2232		1.8	26

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LIST OF DIAGNOSIS RELATED GROUPS (DRGS), RELATIVE WEIGHTING FACTORS, ARITHMETIC AND GEOMETRIC MEAN LENGTH OF STAY, AND LENGTH OF STAY OUTLIER CUTOFF POINTS USED IN THE PROSPECTIVE PAYMENT SYSTEM

				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
386	15		* EXTREME IMMATURITY OR RESPIRATORY DISTRESS SYNDROME, NEONATE	3.6480		17.9	42
387	15		* PREMATURITY W MAJOR PROBLEMS	1.8267		13.3	37
388	15		* PREMATURITY W/O MAJOR PROBLEMS	1.1571		8.6	33
389	15		FULL TERM NEONATE W MAJOR PROBLEMS	1.8319	14.1	7.0	31
390	15		NEONATE W OTHER SIGNIFICANT PROBLEMS	1.0173	7.4	4.9	29
391	15		* NORMAL NEWBORN	.2218		3.1	11
392	16	SURG	SPLENECTOMY AGE >17	3.6194	16.5	12.8	37
393	16	SURG	* SPLENECTOMY AGE 0-17	1.5206		9.1	33
394	16	SURG	OTHER O.R. PROCEDURES OF THE BLOOD AND BLOOD FORMING ORGANS	1.2136	7.8	4.8	29
395	16	MED	RED BLOOD CELL DISORDERS AGE >17	.7455	6.2	4.5	29
396	16	MED	RED BLOOD CELL DISORDERS AGE 0-17	.6619	4.1	2.0	26
397	16	MED	COAGULATION DISORDERS	1.0418	7.6	5.6	30
398	16	MED	RETICULOENDOTHELIAL & IMMUNITY DISORDERS WITH CC	1.2464	9.0	6.6	31
399	16	MED	RETICULOENDOTHELIAL & IMMUNITY DISORDERS W/O CC	.6917	5.6	4.1	28
400	17	SURG	LYMPHOMA & LEUKEMIA W MAJOR O.R. PROCEDURE	2.7296	15.3	11.0	35
401	17	SURG	LYMPHOMA & NON-ACUTE LEUKEMIA W OTHER O.R. PROC W CC	2.1581	15.0	10.2	34
402	17	SURG	LYMPHOMA & NON-ACUTE LEUKEMIA W OTHER O.R. PROC W/O CC	.9068	6.4	4.3	28
403	17	MED	LYMPHOMA & NON-ACUTE LEUKEMIA W CC	1.5663	11.8	8.1	32
404	17	MED	LYMPHOMA & NON-ACUTE LEUKEMIA W/O CC	.8004	6.9	4.8	29
405	17		* ACUTE LEUKEMIA W/O MAJOR O.R. PROCEDURE AGE 0-17	1.0407		4.9	29
406	17	SURG	MYELOPROLIF DISORD OR POORLY DIFF NEOPL W MAJ O.R.PROC W CC	2.7678	16.8	12.6	37
407	17	SURG	MYELOPROLIF DISORD OR POORLY DIFF NEOPL W MAJ O.R.PROC W/O CC	1.4493	9.2	7.0	31
408	17	SURG	MYELOPROLIF DISORD OR POORLY DIFF NEOPL W OTHER O.R.PROC	.9202	6.4	4.1	28
409	17	MED	RADIOTHERAPY	1.0395	10.4	6.9	31
410	17	MED	CHEMOTHERAPY	.4838	3.2	2.5	20
411	17	MED	HISTORY OF MALIGNANCY W/O ENDOSCOPY	.4801	3.8	2.8	27
412	17	MED	HISTORY OF MALIGNANCY W ENDOSCOPY	.4319	3.1	2.2	22
413	17	MED	OTHER MYELOPROLIF DIS OR POORLY DIFF NEOPL DIAG WITH CC	1.2392	10.7	7.1	31
414	17	MED	OTHER MYELOPROLIF DIS OR POORLY DIFF NEOPL DIAG W/O CC	.7899	7.4	4.9	29
415	18	SURG	O.R. PROCEDURE FOR INFECTIOUS & PARASITIC DISEASES	3.5386	20.5	14.8	39
416	18	MED	SEPTICEMIA AGE >17	1.5907	10.6	7.6	32
417	18	MED	SEPTICEMIA AGE 0-17	1.0726	7.6	6.0	30
418	18	MED	POSTOPERATIVE & POST-TRAUMATIC INFECTIONS	1.0168	8.8	6.9	31
419	18	MED	FEVER OF UNKNOWN ORIGIN AGE >17 WITH CC	.9650	7.6	5.9	30
420	18	MED	FEVER OF UNKNOWN ORIGIN AGE >17 W/O CC	.6790	5.7	4.6	29

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				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
421	18	MED	VIRAL ILLNESS AGE >17	.6523	5.5	4.4	28
422	18	MED	VIRAL ILLNESS & FEVER OF UNKNOWN ORIGIN AGE 0-17	.6802	5.0	3.5	27
423	18	MED	OTHER INFECTIOUS & PARASITIC DISEASES DIAGNOSES	1.6050	11.5	8.1	32
424	19	SURG	O.R. PROCEDURE W PRINCIPAL DIAGNOSES OF MENTAL ILLNESS	2.2528	21.0	12.6	37
425	19	MED	ACUTE ADJUST REACT & DISTURBANCES OF PSYCHOSOCIAL DYSFUNCTION	.6202	6.0	4.4	28
426	19	MED	DEPRESSIVE NEUROSES	.6292	8.0	5.8	30
427	19	MED	NEUROSES EXCEPT DEPRESSIVE	.6020	7.7	5.4	29
428	19	MED	DISORDERS OF PERSONALITY & IMPULSE CONTROL	.7325	10.0	6.1	30
429	19	MED	ORGANIC DISTURBANCES & MENTAL RETARDATION	.8895	10.7	7.3	31
430	19	MED	PSYCHOSES	.9100	12.7	8.8	33
431	19	MED	CHILDHOOD MENTAL DISORDERS	.7135	8.9	6.1	30
432	19	MED	OTHER MENTAL DISORDER DIAGNOSES	.6739	6.7	4.3	28
433	20		ALCOHOL/DRUG ABUSE OR DEPENDENCE, LEFT AMA	.4162	5.1	3.2	27
434	20		ALC/DRUG ABUSE OR DEPENDENCE, DETOX OR OTHER SYMPT TRT WITH CC	.8126	8.4	5.9	30
435	20		ALC/DRUG ABUSE OR DEPENDENCE, DETOX OR OTHER SYMPT TRT W/O CC	.5756	7.6	5.0	29
436	20		ALC/DRUG DEPENDENCE W REHABILITATION THERAPY	1.0160	15.8	11.3	35
437	20		ALC/DRUG DEPENDENCE, COMBINED REHAB & DETOX THERAPY	1.2813	18.1	14.4	38
438	20		NO LONGER VALID	.0000		.0	0
439	21	SURG	SKIN GRAFTS FOR INJURIES	1.6445	12.3	7.0	31
440	21	SURG	WOUND DEBRIDEMENTS FOR INJURIES	2.4467	16.8	10.4	34
441	21	SURG	HAND PROCEDURES FOR INJURIES	.7008	3.8	2.5	26
442	21	SURG	OTHER O.R. PROCEDURES FOR INJURIES WITH CC	1.9049	9.8	5.8	30
443	21	SURG	OTHER O.R. PROCEDURES FOR INJURIES W/O CC	1.1927	6.6	4.2	28
444	21	MED	MULTIPLE TRAUMA AGE >17 WITH CC	.7813	7.0	5.2	29
445	21	MED	MULTIPLE TRAUMA AGE >17 W/O CC	.5217	5.0	3.8	28
446	21	MED	* MULTIPLE TRAUMA AGE 0-17	.4796		2.4	22
447	21	MED	ALLERGIC REACTIONS AGE >17	.4738	3.5	2.6	24
448	21	MED	* ALLERGIC REACTIONS AGE 0-17	.3470		2.9	17
449	21	MED	POISONING & TOXIC EFFECTS OF DRUGS AGE >17 WITH CC	.8113	6.1	4.5	28
450	21	MED	POISONING & TOXIC EFFECTS OF DRUGS AGE >17 W/O CC	.4818	4.0	2.9	27
451	21	MED	POISONING & TOXIC EFFECTS OF DRUGS AGE 0-17	.4836	4.9	2.9	27
452	21	MED	COMPLICATIONS OF TREATMENT WITH CC	.9387	6.9	4.7	29
453	21	MED	COMPLICATIONS OF TREATMENT W/O CC	.5050	4.5	3.2	27
454	21	MED	OTHER INJURY, POISONING & TOXIC EFF DIAG WITH CC	.8980	6.7	4.4	28
455	21	MED	OTHER INJURY, POISONING & TOXIC EFF DIAG W/O CC	.4416	3.7	2.7	27

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TABLE 5

LIST OF DIAGNOSIS RELATED GROUPS (DRGS), RELATIVE WEIGHTING FACTORS, ARITHMETIC AND GEOMETRIC MEAN LENGTH OF STAY, AND LENGTH OF STAY OUTLIER CUTOFF POINTS USED IN THE PROSPECTIVE PAYMENT SYSTEM

				RELATIVE WEIGHTS	ARITHMETIC MEAN LOS	GEOMETRIC MEAN LOS	OUTLIER THRESHOLD
456	22		BURNS, TRANSFERRED TO ANOTHER ACUTE CARE FACILITY	1.6439	9.2	4.8	29
457	22	MED	EXTENSIVE BURNS W/O O.R. PROCEDURE	2.5594	8.3	3.6	28
458	22	SURG	NON-EXTENSIVE BURNS W SKIN GRAFT	4.0064	24.2	17.1	41
459	22	SURG	NON-EXTENSIVE BURNS W WOUND DEBRIDEMENT OR OTHER O.R. PROC	1.9638	15.0	10.2	34
460	22	MED	NON-EXTENSIVE BURNS W/O O.R. PROCEDURE	1.0122	9.1	6.4	30
461	23	SURG	O.R. PROC W DIAGNOSES OF OTHER CONTACT W HEALTH SERVICES	.7309	4.4	2.4	26
462	23	MED	REHABILITATION	1.7643	18.2	13.4	37
463	23	MED	SIGNS & SYMPTOMS W CC	.7689	7.0	5.2	29
464	23	MED	SIGNS & SYMPTOMS W/O CC	.4851	4.5	3.5	27
465	23	MED	AFTERCARE W HISTORY OF MALIGNANCY AS SECONDARY DIAGNOSIS	.3450	2.5	1.9	14
466	23	MED	AFTERCARE W/O HISTORY OF MALIGNANCY AS SECONDARY DIAGNOSIS	.5490	4.9	2.7	27
467	23	MED	OTHER FACTORS INFLUENCING HEALTH STATUS	.4431	8.5	3.1	27
468			UNRELATED OPERATING ROOM PROCEDURES	3.2568	18.7	12.5	36
469		**	PRINCIPAL DIAGNOSIS INVALID AS DISCHARGE DIAGNOSIS	.0000		.0	0
470		**	UNGROUPABLE	.0000		.0	0
471	08	SURG	BILATERAL OR MULTIPLE MAJOR JOINT PROCS OF LOWER EXTREMITY	4.1429	19.0	16.8	41
472	22	SURG	EXTENSIVE BURNS W O.R. PROCEDURE	12.3422	33.6	19.1	43
473	17		ACUTE LEUKEMIA W/O MAJOR O.R. PROCEDURE AGE >17	2.9017	15.7	8.9	33
474	04		RESPIRATORY SYSTEM DIAGNOSIS WITH TRACHEOSTOMY	12.2149	44.9	34.0	58
475	04	MED	RESPIRATORY SYSTEM DIAGNOSIS WITH VENTILATOR SUPPORT	3.1196	13.1	8.8	33
476			UNRELATED PROTASTIC OR PROCEDURE	2.2884	17.9	15.0	39
477			UNRELATED NON-EXTENSIVE OR PROCEDURE ONLY	1.5289	11.1	6.7	31

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BILLING CODE 4120-01-C

TABLE 6a.—NEW DIAGNOSIS CODES

Diagnosis code	Description	DRG
764.00	"Light-for-dates" without mention of fetal malnutrition, unspecified [weight]	390
764.01	"Light-for-dates" without mention of fetal malnutrition, less than 500 grams	390
764.02	"Light-for-dates" without mention of fetal malnutrition, 500–749 grams	390
764.03	"Light-for-dates" without mention of fetal malnutrition, 750–999 grams	390
764.04	"Light-for-dates" without mention of fetal malnutrition, 1,000–1,249 grams	390
764.05	"Light-for-dates" without mention of fetal malnutrition, 1,250–1,499 grams	390
764.06	"Light-for-dates" without mention of fetal malnutrition, 1,500–1749 grams	390
764.07	"Light-for-dates" without mention of fetal malnutrition, 1,750–1,999 grams	390
764.08	"Light-for-dates" without mention of fetal malnutrition, 2,000–2,499 grams	390
764.09	"Light-for-dates" without mention of fetal malnutrition, 2,500+ grams	391
764.10	"Light-for-dates" with signs of fetal malnutrition, unspecified [weight]	390
764.11	"Light-for-dates" with signs of fetal malnutrition, less than 500 grams	389
764.12	"Light-for-dates" with signs of fetal malnutrition, 500–749 grams	389
764.13	"Light-for-dates" with signs of fetal malnutrition, 750–999 grams	389
764.14	"Light-for-dates" with signs of fetal malnutrition, 1,000–1,249 grams	389
764.15	"Light-for-dates" with signs of fetal malnutrition, 1,250–1,499 grams	389
764.16	"Light-for-dates" with signs of fetal malnutrition, 1,500–1,749 grams	389
764.17	"Light-for-dates" with signs of fetal malnutrition, 1,750–1,999 grams	389
764.18	"Light-for-dates" with signs of fetal malnutrition, 2,000–2,499 grams	389
764.19	"Light-for-dates" with signs of fetal malnutrition, 2,500+ grams	390
764.20	Fetal malnutrition without mention of "light-for-dates", unspecified [weight]	390
764.21	Fetal malnutrition without mention of "light-for-dates", less than 500 grams	389
764.22	Fetal malnutrition without mention of "light-for-dates", 500–749 grams	389
764.23	Fetal malnutrition without mention of "light-for-dates", 750–999 grams	389
764.24	Fetal malnutrition without mention of "light-for-dates", 1,000–1,249 grams	389
764.25	Fetal malnutrition without mention of "light-for-dates", 1,250–1,499 grams	389
764.26	Fetal malnutrition without mention of "light-for-dates", 1,500–1,749 grams	389
764.27	Fetal malnutrition without mention of "light-for-dates", 1,750–1,999 grams	389
764.28	Fetal malnutrition without mention of "light-for-dates", 2,000–2,499 grams	389
764.29	Fetal malnutrition without mention of "light-for-dates", 2,500+ grams	390
764.90	Fetal growth retardation, unspecified, unspecified [weight]	390
764.91	Fetal growth retardation, unspecified, less than 500 grams	390
764.92	Fetal growth retardation, unspecified, 500–749 grams	390
764.93	Fetal growth retardation, unspecified, 750–999 grams	390
764.94	Fetal growth retardation, unspecified, 1,000–1,249 grams	390
764.95	Fetal growth retardation, unspecified, 1,250–1,499 grams	390
764.96	Fetal growth retardation, unspecified, 1,500–1,749 grams	390
764.97	Fetal growth retardation, unspecified, 1,750–1,999 grams	390
764.98	Fetal growth retardation, unspecified, 2,000–2,499 grams	390
764.99	Fetal growth retardation, unspecified, 2,500+ grams	391
765.00	Extreme immaturity, unspecified [weight]	387
765.01	Extreme immaturity, less than 500 grams	386
765.02	Extreme immaturity, 500–749 grams	386
765.03	Extreme immaturity, 750–999 grams	386
765.04	Extreme immaturity, 1,000–1,249 grams	386
765.05	Extreme immaturity, 1,250–1,499 grams	386
765.06	Extreme immaturity, 1,500–1,749 grams	387
765.07	Extreme immaturity, 1,750–1,999 grams	387
765.08	Extreme immaturity, 2,000–2,499 grams	387
765.09	Extreme immaturity, 2,500+ grams	470
765.10	Other preterm infants, unspecified [weight]	388
765.11	Other preterm infants, less than 500 grams	387, 388
765.12	Other preterm infants, 500–749 grams	387, 388
765.13	Other preterm infants, 750–999 grams	387, 388
765.14	Other preterm infants, 1,000–1,249 grams	387, 388
765.15	Other preterm infants, 1,250–1,499 grams	387, 388
765.16	Other preterm infants, 1,500–1,749 grams	387, 388
765.17	Other preterm infants, 1,750–1,999 grams	387, 388
765.18	Other preterm infants, 2,000–2,499 grams	387, 388
765.19	Other preterm infants, 2,500+ grams	387, 388

TABLE 6b.—NEW OR REVISED PROCEDURE CODES

Procedure code	Description	DRG
20.95	Implantation of electromagnetic hearing device.	3.
22.11	Closed [endoscopic] [needle] biopsy of nasal sinus.	Non-OR.
22.12	Open biopsy of nasal sinus	53, 54.
25.01	Closed [needle] biopsy of tongue.	Non-OR.
25.02	Open biopsy of tongue Wedge biopsy.	168, 169
26.11	Closed [needle] biopsy of salivary gland or duct.	Non-OR.
26.12	Open biopsy of salivary gland or duct.	51
31.43	Closed [endoscopic] biopsy of larynx.	Non-OR.
31.44	Closed [endoscopic] biopsy of trachea.	Non-OR.
31.45	Open biopsy of larynx or trachea.	55, 76, 77
35.84	Total correction of transposition of great vessels, not elsewhere classified.	108, 109
37.26	Cardiac electrophysiologic stimulation and recording studies.	Non-OR.
37.27	Cardiac mapping	Non-OR.
37.33	Excision or destruction of other lesion or tissue of heart.	Non-OR.
37.34	Catherer ablation of lesion or tissues of heart.	Non-OR.
39.61	Extracorporeal circulation auxiliary to open heart surgery.	Non-OR.
39.65	Extracorporeal membrane oxygenation [ECMO].	Non-OR.
41.00	Bone marrow transplant, not otherwise specified.	394, 400, 406, 407.
41.01	Autologous bone marrow transplant.	394, 400, 406, 407
41.02	Allogeneic bone marrow transplant with purging.	394, 400, 406, 407
41.03	Allogeneic bone marrow transplant without purging.	394, 400, 406, 407
42.24	Closed [endoscopic] biopsy of esophagus.	Non-OR.
42.25	Open biopsy of esophagus	63, 154, 155, 400, 406, 407
45.16	Esophagogastroduodenoscopy [EGD] with close biopsy.	Non-OR.
45.23	Colonoscopy	Non-OR.
45.24	Flexible sigmoidoscopy	Non-OR.
45.42	Endoscopic polypectomy of large intestine.	Non-OR.
48.23	Rigid proctosigmoidoscopy	Non-OR.
48.29	Other diagnostic procedures on rectum, rectosigmoid, and perirectal tissue.	Non-OR.
86.22	Excisional debridement of wound, infection, or burn.	7, 8, 40, 41, 63, 76, 77, 120, 170, 171, 201, 217, 263, 264, 265, 266, 287, 315, 365, 394, 440, 459, 472.
86.28	Nonexcisional debridement of wound, infection, or burn.	Non-OR.
89.17	Polysomnogram	Non-OR.

TABLE 6b.—NEW OR REVISED PROCEDURE CODES—Continued

Procedure code	Description	DRG
89.18	Other sleep disorder function tests.	Non-OR.
89.59	Other nonoperative cardiac and vascular measurements.	Non-OR.
93.90	Continuous positive airway pressure [CPAP].	[1] Non-OR.
93.92	Other mechanical ventilation.	[1] Non-OR.
99.71	Therapeutic plasmapheresis..	Non-OR.
99.72	Therapeutic leukopheresis.....	Non-OR.
99.73	Therapeutic erythrocytapheresis.	Non-OR.
99.74	Therapeutic plateletpheresis.	Non-OR.
99.79	Other [2].....	Non-OR.
99.88	Therapeutic photopheresis....	Non-OR.

[1] If coded in addition with 96.04, Insertion of endotracheal tube, case may be assigned to DRG 475.
[2] Other therapeutic apheresis.

TABLE 6c.—ELECTIVE, DIAGNOSTIC AND OTHER NONEXTENSIVE PROCEDURES UNRELATED TO PRINCIPAL PROCEDURES THAT GROUP TO DRG 477

Procedure code	Procedure
04.07	Other excision or avulsion of cranial and peripheral nerves.
04.43	Release of carpal tunnel.
08.11	Biopsy of eyelid.
08.20	Removal of lesion of eyelid, not otherwise specified (NOS).
08.21	Excision of chalazion.
08.22	Excision of other minor lesion of eyelid.
08.25	Destruction of lesion of eyelid.
08.33	Repair of blepharoptosis by resection or advancement of levator muscle or aponeurosis.
08.36	Repair of blepharoptosis by other techniques.
08.49	Other repair or entropion or ectropion.
08.52	Blepharorrhaphy.
08.59	Other adjustment of lid position.
08.70	Reconstruction of eyelid, NOS.
08.74	Other reconstruction of eyelid, full-thickness.
08.81	Linear repair of laceration of eyelid or eyebrow.
08.82	Repair of laceration involving lid margin, partial-thickness.
08.83	Other repair of laceration of eyelid, partial-thickness.
08.84	Repair of laceration involving lid margin, full-thickness.
08.85	Other repair of laceration of eyelid, full-thickness.
08.86	Lower eyelid rhytidectomy.
08.87	Upper eyelid rhytidectomy.
08.89	Other eyelid repair.
08.91	Electrosurgical epilation of eyelid.
08.92	Cryosurgical epilation of eyelid.
08.93	Other epilation of eyelid.
08.99	Other operations on eyelids.
09.20	Excision of lacrimal gland, NOS.
09.21	Excision of lesion of lacrimal gland.
10.6	Repair of laceration of conjunctiva.
12.72	Cyclocryotherapy.
13.11	Intracapsular extraction of lens by temporal inferior route.
13.19	Other intracapsular extraction of lens.

TABLE 6c.—ELECTIVE, DIAGNOSTIC AND OTHER NONEXTENSIVE PROCEDURES UNRELATED TO PRINCIPAL PROCEDURES THAT GROUP TO DRG 477—Continued

Procedure code	Procedure
13.2	Extracapsular extraction of lens by linear extraction technique.
13.3	Extracapsular extraction of lens by simple aspiration (and irrigation) technique.
13.41	Phacoemulsification and aspiration of cataract.
13.42	Mechanical phacofragmentation and aspiration of cataract by posterior route.
13.43	Mechanical phacofragmentation and other aspiration of cataract.
13.51	Extracapsular extraction of lens by temporal inferior route.
13.59	Other extracapsular extraction of lens.
13.61	Discission of primary membranous cataract.
13.62	Excision of primary membranous cataract.
13.63	Mechanical fragmentation of primary membranous cataract.
13.64	Discission of secondary membrane [after cataract].
13.65	Excision of secondary membrane [after cataract].
13.66	Mechanical fragmentation of secondary membrane [after cataract].
13.69	Other cataract extraction.
13.70	Insertion of pseudophakos, NOS.
13.71	Insertion of intraocular lens prosthesis of time of cataract extraction, one-stage.
13.8	Removal of implanted lens.
13.9	Other operations on lens.
14.71	Removal of vitreous, anterior approach.
14.72	Other removal of vitreous.
14.73	Mechanical vitrectomy by anterior approach.
14.74	Other mechanical vitrectomy.
14.75	Injection of vitreous substitute.
14.79	Other operations on vitreous.
15.13	Resection of one extraocular muscle.
20.09	Other myringotomy.
21.5	Submucous resection of nasal septum.
21.84	Revision rhinoplasty.
21.85	Augmentation rhinoplasty.
21.86	Limited rhinoplasty.
21.87	Other rhinoplasty.
21.88	Other septoplasty.
21.89	Other repair and plastic operations on nose.
21.99	Other operations on nose.
25.1	Excision or destruction of lesion or tissue of tongue.
26.21	Marsupialization of salivary gland cyst.
26.29	Other excision of salivary gland lesion.
26.30	Sialoadenectomy, NOS.
26.31	Partial sialoadenectomy.
26.32	Complete sialoadenectomy.
27.43	Other excision of lesion or tissue of lip.
28.11	Biopsy of tonsils and adenoids.
30.09	Other excision or destruction of lesion or tissue of larynx.
34.3	Excision or destruction of lesion or tissue of mediastinum.
34.4	Excision or destruction of lesion of chest wall.
38.00	Incision of vessel, unspecified site.
39.94	Replacement of vessel-to-vessel cannula.
40.0	Incision of lymphatic structures.
40.11	Biopsy of lymphatic structure.
40.19	Other diagnostic procedures on lymphatic structures.
40.21	Excision of deep cervical lymph node.
40.23	Excision of axillary lymph node.

TABLE 6c.—ELECTIVE, DIAGNOSTIC AND OTHER NONEXTENSIVE PROCEDURES UNRELATED TO PRINCIPAL PROCEDURES THAT GROUP TO DRG 477—Continued

Procedure code	Procedure
40.24	Excision of inguinal lymph node.
40.29	Simple excision of other lymphatic structure.
43.42	Local excision of other lesion or tissue of stomach.
43.49	Other destruction of lesion or tissue of stomach.
45.31	Local excision of lesion of duodenum.
45.32	Other destruction of lesion of duodenum.
45.33	Local excision of lesion or tissue of small intestine, except duodenum.
45.34	Other destruction of lesion of small intenstine, except duodenum.
45.41	Local excision of lesion or tissue of large intestine.
45.49	Other destruction of lesion of large intestine.
46.43	Other revision of stoma of large intestine.
48.35	Local excision of rectal lesion or tissue.
49.3	Local excision or destruction of other lesion or tissue of anus.
49.44	Destruction of hemorrhoids by cryotherapy.
49.45	Ligation of hemorrhoids.
49.46	Excision of hemorrhoids.
53.00	Unilateral repair of inguinal hernia, NOS.
53.01	Repair of direct inguinal hernia.
53.02	Repair of indirect inguinal hernia.
53.03	Repair of direct inguinal hernia with graft or prosthesis.
53.04	Repair of indirect inguinal hernia with graft or prosthesis.
53.05	Repair inguinal hernia with graft or prosthesis, NOS.
53.10	Bilateral repair of inguinal hernia, NOS.
53.11	Bilateral repair of direct inguinal hernia.
53.12	Bilateral repair of indirect inguinal hernia.
53.13	Bilateral repair of inguinal hernia, one direct and one indirect.
53.14	Bilateral repair of direct inguinal hernia with graft or prosthesis.
53.15	Bilateral repair of indirect inguinal hernia with graft or prosthesis.
53.16	Bilateral repair of inguinal hernia, one direct and one indirect, with graft or prosthesis.
53.17	Bilateral inguinal hernia repair with graft or prosthesis, NOS.
53.21	Unilateral repair of femoral hernia with graft or prosthesis.
53.29	Other unilateral femoral herniorrhaphy.
53.31	Bilateral repair of femoral hernia with graft or prosthesis.
53.39	Other bilateral femoral herniorrhaphy.
54.21	Laparoscopy.
54.22	Biopsy of abdominal wall or umbilicus.
54.3	Excision or destruction of lesion or tissue of abdominal wall or umbilicus.
56.0	Transurethral removal of obstruction from ureter and renal pelvis.
56.1	Ureteral meatotomy.
56.2	Ureterotomy.
56.39	Other diagnostic procedures on ureter.
57.33	Closed [transurethral] biopsy of bladder.
57.39	Other diagnostic procedures on bladder.
57.49	Other transurethral excision or destruction of lesion or tissue of bladder.
57.59	Open excision or destruction of other lesion or tissue of bladder.

TABLE 6C.—ELECTIVE, DIAGNOSTIC AND OTHER NONEXTENSIVE PROCEDURES UNRELATED TO PRINCIPAL PROCEDURES THAT GROUP TO DRG 477—Continued

Procedure code	Procedure
57.82	Closure of cystostomy.
58.0	Urethrotomy.
58.1	Urethral meatotomy.
61.2	Excision of hydrocele (of tunica vaginalis).
63.09	Other diagnostic procedures on spermatic cord, epididymis, and vas deferens.
63.1	Excision of varicocele and hydrocele of spermatic cord.
63.2	Excision of cyst of epididymis.
63.3	Excision of other lesion or tissue of spermatic cord and epididymis.
64.0	Circumcision.
64.11	Biopsy of penis.
64.2	Local excision or destruction of lesion of penis.
64.95	Insertion or replacement of non-inflatable internal prosthesis of penis.
64.96	Removal of internal prosthesis of penis.
64.97	Insertion or replacement of inflatable penile prosthesis.
66.21	Bilateral endoscopic ligation and crushing of fallopian tubes.
66.22	Bilateral endoscopic ligation and division of fallopian tubes.
66.29	Other bilateral endoscopic destruction or occlusion of fallopian tubes.
66.31	Other bilateral ligation and crushing of fallopian tubes.
66.32	Other bilateral ligation and division of fallopian tubes.
66.39	Other bilateral destruction or occlusion of fallopian tubes.
66.92	Unilateral destruction or occulusion of fallopian tube.
67.11	Endocervical biopsy.
67.12	Other cervical biopsy.
67.19	Other diagnostic procedures on cervix.
67.2	Conization of cervix.
67.31	Marsupialization of cervical cyst.
67.32	Destruction of lesion of cervix by cauterization.
67.33	Destruction of lesion of cervix by cryosurgery.
67.39	Other excision or destruction of lesion or tissue of cervix.
68.15	Closed biopsy of uterine ligaments.
68.16	Closed biopsy of uterus.
69.01	Dilation and curettage for termination of pregnancy.
69.09	Other dilation and curettage.
69.51	Aspiration curettage of uterus for termination of pregnancy.
69.52	Aspiration currettage following delivery or abortion.
69.95	Incision of cervix.
70.23	Biopsy of cul-de-sac.
70.24	Vaginal biopsy.
70.29	Other diagnostic procedures on vagina and cul-de-sac.
70.31	Hymenectomy.
70.32	Excision or destruction of lesion of cul-de-sac.
70.33	Excision or destruction of lesion of vagina.
70.76	Hymenorrhaphy.
71.11	Biopsy of vulva.
71.19	Other diagnostic procedures on vulva.
71.23	Marsupialization of Bartholin's gland (cyst).
71.3	Other local excision or destruction of vulva and perineum.
71.4	Operations on clitoris.
71.71	Suture of laceration of vulva or perineum.
71.79	Other repair of vulva and perineum.
76.2	Local excision or destruction of lesion of facial bone.
77.41	Biopsy of bone, scapula, clavicle, and thorax [ribs and sternum].
77.51	Bunionectomy with soft tissue correction and osteotomy of the first metatarsal.
77.52	Bunionectomy with soft tissue correction and arthrodesis.
77.53	Other bunionectomy with soft tissue correction.
77.54	Excision of bunionette.
77.59	Other bunionectomy.
77.68	Local excision of lesion or tissue of bone, tarsals and metatarsals.
77.69	Local excision of lesion or tissue of bone, other.
80.26	Arthroscopy of knee.
80.6	Excision of semilunar cartilage of knee.
80.88	Other local excision or destruction of lesion of joint, foot, and toe.
80.98	Other excision of joint, foot, and toe.
81.18	Other fusion of toe.
82.11	Tenotomy of hand.
82.21	Excision of lesion of tendon sheath of hand.
82.29	Excision of other lesion of soft tissue of hand.
82.41	Suture of tendon sheath of hand.
82.45	Other suture of other tendon of hand.
82.46	Suture of muscle or fascia of hand.
83.03	Bursotomy.
83.21	Biopsy of soft tissue.
83.39	Excision of lesion of other soft tissue.
83.61	Suture of tendon sheath.
85.12	Open biopsy of breast.
85.20	Excision or destruction of breast tissue, NOS.
85.21	Local excision of lesion of breast.
85.23	Subtotal mastectomy.
85.50	Augmentation mammoplasty, NOS.
85.53	Unilateral breast implant.
85.54	Bilateral breast implant.
86.09	Other incision of skin and subcutaneous tissue.
86.21	Excision of pilonidal cyst or sinus.
86.25	Dermabrasion.
86.3	Other local excision or destruction of lesion or tissue of skin and subcutaneous tissue.
86.60	Free skin graft, NOS.
86.82	Facial rhytidectomy.
86.83	Size reduction plastic operation.
86.84	Relaxation of scar or web contracture of skin.
95.04	Eye examination under anesthesia.

BILLING CODE 4120-01-M

Table 6d -- Additions to the CC Exclusions List

CCs that would be added to the list are in Table 6d -- Additions to the CC Exclusions List. (Currently, the indented diagnoses are recognized by the GROUPER as valid CCs for the asterisked principal diagnosis but would be excluded and thus ignored by the GROUPER beginning with discharges on or after October 1, 1988.)

Example:

*3488
 3240

Diagnosis code 324.0 (Intracranial abscess) (Tuberculous pneumonia confirmed by other methods) is currently recognized by the GROUPER as a CC for principal diagnosis 348.8 (Brain conditions NEC). Beginning with discharges occurring on or after October 1, 1988 diagnosis code 3240 would not be recognized as a CC for the principal diagnosis 348.8.

*01166	1531	1920	01306	3979	*55001	5529	8088	*80003
01166	1532	1921	01310	*3952	5528	*5513	8089	430
*01481	1533	1922	01311	3979	5529	5528	82000	431
01481	1534	1923	01312	*3959	*55002	5529	82001	4320
*0361	1535	1928	01313	3979	5528	*5518	82002	4321
0361	1536	1960	01314	*3971	5529	5528	82003	436
*0363	1537	1961	01315	3979	*55003	5529	82009	7800
0363	1538	1962	01316	*39890	5528	*5519	82010	*80004
*03640	1539	1963	0360	3970	5529	5528	82011	430
03640	1540	1965	0530	3971	*55010	5529	82012	431
*03641	1541	1966	05472	3979	5528	*55200	82013	4320
03641	1542	1968	0721	3980	5529	5528	82019	4321
*03642	1543	1969	09042	39891	*55011	5529	82020	436
03642	1548	1970	0942	*39891	5528	*55201	82021	7800
*03643	1550	1971	11283	40201	5529	5528	82022	*80005
03643	1551	1972	1142	40211	*55012	5529	82030	430
*03681	1552	1973	11501	40291	5528	*55202	82031	431
03681	1560	1974	11511	5184	5529	5528	82032	4320
*03682	1561	1975	11591	*4290	*55013	5529	8208	4321
03682	1562	1976	*3499	4290	5528	*55203	8209	436
*0550	1568	1977	01300	*430	5529	5528	82100	7800
0550	1569	1978	01301	436	*55090	5529	82101	*80006
*0551	1570	1980	01302	7800	5528	*5521	82110	430
0551	1571	1981	01303	*431	5529	5528	82111	431
*0552	1572	1982	01304	436	*55091	5529	*7800	4320
0552	1573	1983	01305	7800	5528	*55220	430	4321
*05571	1574	1984	01306	*4320	5529	5528	431	436
05571	1578	1985	01310	436	*55092	5529	4320	7800
*05671	1579	1986	01311	7800	5528	*55221	4321	*80009
05671	1622	1987	01312	*4321	5529	5528	436	430
*1124	1623	19881	01313	436	*55093	5529	*7854	431
1124	1624	19882	01314	7800	5528	*55229	7854	4320
*1125	1625	19889	01315	*4329	5529	5528	*7991	4321
1125	1628	1990	01316	436	*55100	5529	51881	436
*11505	1629	*20281	0360	7800	5528	*5523	51882	7800
11515	1630	20241	0530	*4340	5529	5518	*80000	*80010
11595	1631	*2899	05472	436	*55101	5519	430	430
*11515	1638	2880	0721	*4341	5528	5528	431	431
11595	1639	2881	09042	436	5529	5529	4320	4320
*1958	1642	*3241	0942	*4349	*55102	*5531	4321	4321
1510	1643	3240	11283	436	5528	5528	436	436
1511	1648	3249	1142	*436	5529	5529	7800	7800
1512	1649	325	11501	4340	*55103	*5920	*80001	*80011
1513	1890	*3481	11511	4341	5528	5921	430	430
1514	1891	3481	11591	4349	5529	*70583	431	431
1515	1892	*3488	*3940	*5171	*5511	6820	4320	4320
1516	1910	3240	3979	5171	5528	*7331	4321	4321
1518	1911	*3489	*3941	*51881	5529	8080	436	436
1519	1912	3240	3979	51882	*55120	8082	7800	7800
1520	1913	*34989	*3942	7991	5528	8083	*80002	*80012
1521	1914	01300	3979	*51882	5529	80848	430	430
1522	1915	01301	*3949	51881	*55121	80849	431	431
1523	1916	01302	3979	7991	5528	80851	4320	4320
1528	1917	01303	*3950	*55000	5529	80852	4321	4321
1529	1918	01304	3979	5528	*55129	80853	436	436
1530	1919	01305	*3951	5529	5528	80859	7800	7800

*80013	*80023	*80033	*80043	*80053	*80063	*80073	*80083	*80093
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80014	*80024	*80034	*80044	*80054	*80064	*80074	*80084	*80094
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80015	*80025	*80035	*80045	*80055	*80065	*80075	*80085	*80095
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80016	*80026	*80036	*80046	*80056	*80066	*80076	*80086	*80096
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80019	*80029	*80039	*80049	*80059	*80069	*80079	*80089	*80099
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80020	*80030	*80040	*80050	*80060	*80070	*80080	*80090	*80100
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80021	*80031	*80041	*80051	*80061	*80071	*80081	*80091	*80101
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80022	*80032	*80042	*80052	*80062	*80072	*80082	*80092	*80102
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800

*80103	*80113	*80123	*80133	*80143	*80153	*80163	*80173	*80183
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80104	*80114	*80124	*80134	*80144	*80154	*80164	*80174	*80184
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80105	*80115	*80125	*80135	*80145	*80155	*80165	*80175	*80185
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80106	*80116	*80126	*80136	*80146	*80156	*80166	*80176	*80186
430	430	430	430	430	430	430	430	430
431	431	431	431	431	431	431	431	431
4320	4320	4320	4320	4320	4320	4320	4320	4320
4321	4321	4321	4321	4321	4321	4321	4321	4321
436	436	436	436	436	436	436	436	436
7800	7800	7800	7800	7800	7800	7800	7800	7800
*80109	*80119	*80129	*80139	*80149	*80159	*80169	*80179	*80189
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*80193	*80303	*80313	*80323	*80333	*80343	*80353	*80363	*80373
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*80383	*80393	*80403	*80413	*80423	*80433	*80443	*80453	*80463
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*80384	*80394	*80404	*80414	*80424	*80434	*80444	*80454	*80464
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*80385	*80395	*80405	*80415	*80425	*80435	*80445	*80455	*80465
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*80473	*80483	*80493	95205	95206	95207	95208	95201	95202
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*80474	*80484	*80494	95201	95202	95203	95204	95208	95209
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*80475	*80485	*80495	95208	95209	*80515	95211	95204	95205
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7800	7800	7800	95203	95204	95205	95217	*80602	95200
*80476	*80486	*80496	95204	95205	95206	95218	95200	95201
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*80480	*80490	95206	95207	95208	95209	95206	95203	95204
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*80481	*80491	95202	95203	95204	95205	95213	*80604	95200
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*80482	*80492	95209	*80507	95200	95201	9522	95206	95207
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95207	95208	83910	95207	95211	95215	95219	9528	436
95208	95209	83911	95208	95212	95216	9522	9529	7800
95209	*80616	83912	95209	95213	95217	9523	*8500	*85101
*80611	95200	83913	95210	95214	95218	9524	430	430
95200	95201	83914	95211	95215	95219	9528	431	431
95201	95202	83915	95212	95216	9522	9529	4320	4320
95202	95203	83916	95213	95217	9523	*8399	4321	4321
95203	95204	83917	95214	95218	9524	95200	436	436
95204	95205	83918	95215	95219	9528	95201	7800	7800
95205	95206	95200	95216	9522	9529	95202	*8501	*85102
95206	95207	95201	95217	9523	*83979	95203	430	430
95207	95208	95202	95218	9524	95200	95204	431	431
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95209	*80617	95204	9522	9529	95202	95206	4321	4321
*80612	95200	95205	9523	*83959	95203	95207	436	436
95200	95201	95206	9524	95200	95204	95208	7800	7800
95201	95202	95207	9528	95201	95205	95209	*8502	*85103
95202	95203	95208	9529	95202	95206	95210	430	430
95203	95204	95209	*83949	95203	95207	95211	431	431
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95207	95208	83902	95203	95207	95211	95215	7800	7800
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95209	*80618	83904	95205	95209	95213	95217	430	430
*80613	95200	83905	95206	95210	95214	95218	431	431
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95203	95204	83910	95210	95214	95218	9524	7800	7800
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95205	95206	83912	95212	95216	9522	9529	430	430
95206	95207	83913	95213	95217	9523	*8479	431	431
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95209	*80619	83916	95216	9522	9529	95202	436	436
*80614	95200	83917	95217	9523	*8398	95203	7800	7800
95200	95201	83918	95218	9524	95200	95204	*8505	*85106
95201	95202	95200	95219	9528	95201	95205	430	430
95202	95203	95201	9522	9529	95202	95206	431	431
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95205	95206	95204	9528	95201	95205	95209	436	436
95206	95207	95205	9529	95202	95206	95210	7800	7800
95207	95208	95206	*83950	95203	95207	95211	*8509	*85109
95208	95209	95207	95200	95204	95208	95212	430	430
95209	*8068	95208	95201	95205	95209	95213	431	431
*80615	83900	95209	95202	95206	95210	95214	4320	4320
95200	83901	*83940	95203	95207	95211	95215	4321	4321
95201	83902	95200	95204	95208	95212	95216	436	436
95202	83903	95201	95205	95209	95213	95217	7800	7800
95203	83904	95202	95206	95210	95214	95218	*85100	*85110

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*85111	*85121	*85131	*85141	*85151	*85161	*85171	*85181	*85191
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*85112	*85122	*85132	*85142	*85152	*85162	*85172	*85182	*85192
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*85116	*85126	*85136	*85146	*85156	*85166	*85176	*85186	*85196
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*85119	*85129	*85139	*85149	*85159	*85169	*85179	*85189	*85199
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*85120	*85130	*85140	*85150	*85160	*85170	*85180	*85190	*85200

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431	431	*85221	*85231	*85241	*85251	*85301	*85311	*85401
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85201	*85211	436	436	436	436	436	436	436
430	430	7800	7800	7800	7800	7800	7800	7800
431	431	*85222	*85232	*85242	*85252	*85302	*85312	*85402
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85202	*85212	436	436	436	436	436	436	436
430	430	7800	7800	7800	7800	7800	7800	7800
431	431	*85223	*85233	*85243	*85253	*85303	*85313	*85403
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85203	*85213	436	436	436	436	436	436	436
430	430	7800	7800	7800	7800	7800	7800	7800
431	431	*85224	*85234	*85244	*85254	*85304	*85314	*85404
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85204	*85214	436	436	436	436	436	436	436
430	430	7800	7800	7800	7800	7800	7800	7800
431	431	*85225	*85235	*85245	*85255	*85305	*85315	*85405
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85205	*85215	436	436	436	436	436	436	436
430	430	7800	7800	7800	7800	7800	7800	7800
431	431	*85226	*85236	*85246	*85256	*85306	*85316	*85406
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85206	*85216	436	436	436	436	436	436	436
430	430	7800	7800	7800	7800	7800	7800	7800
431	431	*85229	*85239	*85249	*85259	*85309	*85319	*85409
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85209	*85219	436	436	436	436	436	436	436
430	430	7800	7800	7800	7800	7800	7800	7800
431	431	*85230	*85240	*85250	*85300	*85310	*85400	*85410
4320	4320	430	430	430	430	430	430	430
4321	4321	431	431	431	431	431	431	431
436	436	4320	4320	4320	4320	4320	4320	4320
7800	7800	4321	4321	4321	4321	4321	4321	4321
*85210	*85220	436	436	436	436	436	436	436

7800	95203	8069
*85411	95204	*95203
430	95205	8068
431	95206	8069
4320	95207	*95204
4321	95208	8068
436	95209	8069
7800	95210	*95205
*85412	95211	8068
430	95212	8069
431	95213	*95206
4320	95214	8068
4321	95215	8069
436	95216	*95207
7800	95217	8068
*85413	95218	8069
430	95219	*95208
431	9522	8068
4320	9523	8069
4321	9524	*95209
436	9528	8068
7800	9529	8069
*85414	*92611	*9528
430	95200	9529
431	95201	*9529
4320	95202	9528
4321	95203	*9591
436	95204	95200
7800	95205	95201
*85415	95206	95202
430	95207	95203
431	95208	95204
4320	95209	95205
4321	95210	95206
436	95211	95207
7800	95212	95208
*85416	95213	95209
430	95214	95210
431	95215	95211
4320	95216	95212
4321	95217	95213
436	95218	95214
7800	95219	95215
*85419	9522	95216
430	9523	95217
431	9524	95218
4320	9528	95219
4321	9529	9522
436	*95200	9523
7800	8068	9524
*8739	8069	9528
8739	*95201	9529
*9051	8068	
95200	8069	
95201	*95202	
95202	8068	

Table 6e -- Deletions from the CC Exclusions List

CCs that would be deleted from the list are in Table 6e -- Deletions from the CC Exclusions List. (Currently, the indented diagnoses are excluded and are not recognized by the GROUPER as valid CCs for the asterisked principal diagnosis but would be recognized as valid CCs beginning with discharges on or after October 1, 1988.)

Example:

*01100
494
496

Diagnosis codes 494 (Bronchiectasis) and 496 (Chronic obstructive pulmonary disease) are currently not recognized by the GROUPER as CCs for principal diagnosis 011.00 (Tuberculosis of lung, infiltrative, unspecified documentation). Beginning with discharges occurring on or after October 1, 1988, diagnosis codes 494 and 496 would be recognized as CCs for the principal diagnosis 011.00.

*01100	496	494	*01180	496	4958	496	494	*4870
494	*01125	496	494	*01205	4959	*0391	496	494
496	494	*01153	496	494	496	494	*4809	496
*01101	496	494	*01181	496	500	496	494	*490
494	*01126	496	494	*01206	501	*11505	496	4911
496	494	*01154	496	494	502	494	*481	4912
*01102	496	494	*01182	496	503	496	494	4918
494	*01130	496	494	*01210	504	*11515	496	4919
496	494	*01155	496	494	505	494	*4820	*4910
*01103	496	494	*01183	496	5060	496	494	4911
494	*01131	496	494	*01211	5061	*11595	496	4912
496	494	*01156	496	494	5070	494	*4821	4918
*01104	496	494	*01184	496	5071	496	494	4919
494	*01132	496	494	*01212	5078	*1221	496	*4950
496	494	*01160	496	494	5080	494	*4822	494
*01105	496	494	*01185	496	5081	496	494	496
494	*01133	496	494	*01213	5111	*1304	496	74861
496	494	*01161	496	494	5118	494	*4823	*4951
*01106	496	494	*01186	496	5119	496	494	494
494	*01134	496	494	*01214	5130	*1363	496	496
496	494	*01162	496	494	515	494	*4824	74861
*01110	496	494	*01190	496	5160	496	494	*4952
494	*01135	496	494	*01215	5161	*1922	496	494
496	494	*01163	496	494	5162	1910	*4828	496
*01111	496	494	*01191	496	5163	1911	494	74861
494	*01136	496	494	*01216	5168	1912	496	*4953
496	494	*01164	496	494	5169	1913	*4829	494
*01112	496	494	*01192	496	5171	1914	494	496
494	*01140	496	494	*01236	5172	1915	496	74861
496	494	*01165	496	481	5178	1916	*483	*4954
*01113	496	494	*01193	4820	*01280	1917	494	494
494	*01141	496	494	4821	494	1918	496	496
496	494	*01166	496	4822	496	1919	*4841	74861
*01114	496	494	*01194	4823	*01281	*1923	494	*4955
494	*01142	496	494	4824	494	1910	496	494
496	494	*01170	496	4828	496	1911	*4843	496
*01115	496	494	*01195	4829	*01282	1912	494	74861
494	*01143	496	494	483	494	1913	496	*4956
496	494	*01171	496	4841	496	1914	*4845	494
*01116	496	494	*01196	4843	*01283	1915	494	496
494	*01144	496	494	4845	494	1916	496	74861
496	494	*01172	496	4846	496	1917	*4846	*4957
*01120	496	494	*01200	4847	*01284	1918	494	494
494	*01145	496	494	4848	494	1919	496	496
496	494	*01173	496	485	496	*20281	*4847	74861
*01121	496	494	*01201	486	*01285	20242	494	*4958
494	*01146	496	494	4870	494	*4800	496	494
496	494	*01174	496	494	496	494	*4848	496
*01122	496	494	*01202	4950	*01286	496	494	74861
494	*01150	496	494	4951	494	*4801	496	*4959
496	494	*01175	496	4952	496	494	*485	494
*01123	496	494	*01203	4953	*0212	496	494	496
494	*01151	496	494	4954	494	*4802	496	74861
496	494	*01176	496	4955	496	494	*486	*500
*01124	496	494	*01204	4956	*0310	496	494	494
494	*01152	496	494	4957	494	*4808	496	496

74861 74861 5846 5809 74191 *80516 *80606 83913 83912
*501 *5089 5847 5810 74192 86399 86399 83914 83913
494 494 5848 5811 74193 *80517 *80607 83915 83914
496 496 5849 5812 *7479 86399 86399 83916 83915
74861 74861 585 5813 74100 *80518 *80608 83917 83916
*502 *5171 59010 58181 74101 86399 86399 83918 83917
494 496 59011 58189 74102 *8058 *80609 *83950 83918
496 *5178 5902 5819 74103 83900 86399 83900 *83979
74861 4911 5903 5834 74190 83901 *80610 83901 83900
*503 4912 59080 5845 74191 83902 86399 83902 83901
494 4918 59081 5846 74192 83903 *80611 83903 83902
496 4919 5909 5847 74193 83904 86399 83904 83903
74861 4928 591 5848 *7484 83905 *80612 83905 83904
*504 496 5990 5849 74861 83906 86399 83906 83905
494 *5182 *5921 585 *7485 83907 *80613 83907 83906
496 4928 5800 59010 74861 83908 86399 83908 83907
74861 *5183 5804 59011 *74860 83910 *80614 83910 83908
*505 4928 58081 5902 74861 83911 86399 83911 83910
494 *51889 58089 5903 *74869 83912 *80615 83912 83911
496 4911 5809 59080 74861 83913 86399 83913 83912
74861 4912 5810 59081 *7488 83914 *80616 83914 83913
*5060 4918 5811 5909 74861 83915 86399 83915 83914
494 4919 5812 591 *7489 83916 *80617 83916 83915
496 4928 5813 5935 74861 83917 86399 83917 83916
74861 496 58181 5950 *7598 83918 *83940 83918 83917
*5062 *5198 58189 5951 7882 *8059 83900 *83959 83918
494 4911 5819 5952 *80500 83900 83901 83900 *8398
496 4912 5834 5954 86399 83901 83902 83901 83900
74861 4918 5845 59581 *80501 83902 83903 83902 83901
*5063 4919 5846 59582 86399 83903 83904 83903 83902
494 4928 5847 59589 *80502 83904 83905 83904 83903
496 494 5848 5959 86399 83905 83906 83905 83904
74861 496 5849 *74689 *80503 83906 83907 83906 83905
*5070 *5199 585 74100 86399 83907 83908 83907 83906
494 4911 59010 74101 *80504 83908 83910 83908 83907
496 4912 59011 74102 86399 83910 83911 83910 83908
74861 4918 5902 74103 *80505 83911 83912 83911 83910
*5071 4919 5903 74190 86399 83912 83913 83912 83911
494 4928 59080 74191 *80506 83913 83914 83913 83912
496 494 59081 74192 86399 83914 83915 83914 83913
74861 496 5909 74193 *80507 83915 83916 83915 83914
*5078 *5920 591 *7469 86399 83916 83917 83916 83915
494 5800 5935 74100 *80508 83917 83918 83917 83916
496 5804 5950 74101 86399 83918 *83949 83918 83917
74861 58081 5951 74102 *80510 *80600 83900 *83969 83918
*5080 58089 5952 74103 86399 86399 83901 83900 *8399
494 5809 5954 74190 *80511 *80601 83902 83901 83900
496 5810 59581 74191 86399 86399 83903 83902 83901
74861 5811 59582 74192 *80512 *80602 83904 83903 83902
*5081 5812 59589 74193 86399 86399 83905 83904 83903
494 5813 5959 *74789 *80513 *80603 83906 83905 83904
496 58181 *5929 74100 86399 86399 83907 83906 83905
74861 58189 5800 74101 *80514 *80604 83908 83907 83906
*5088 5819 5804 74102 86399 86399 83910 83908 83907
494 5834 58081 74103 *80515 *80605 83911 83910 83908
496 5845 58089 74190 86399 86399 83912 83911 83910

83911 83918 83905
83912 *92611 83906
83913 83900 83907
83914 83901 83908
83915 83902 83910
83916 83903 83911
83917 83904 83912
83918 83905 83913
*8479 83906 83914
83900 83907 83915
83901 83908 83916
83902 83910 83917
83903 83911 83918
83904 83912
83905 83913
83906 83914
83907 83915
83908 83916
83910 83917
83911 83918
83912 *95200
83913 8072
83914 8073
83915 *95201
83916 8072
83917 8073
83918 *95202
*86385 8072
86390 8073
86391 *95203
86392 8072
86393 8073
86394 *95204
*8739 8072
86122 8073
86130 *95205
86131 8072
86132 8073
*9051 *95206
83900 8072
83901 8073
83902 *95207
83903 8072
83904 8073
83905 *95208
83906 8072
83907 8073
83908 *95209
83910 8072
83911 8073
83912 *9591
83913 83900
83914 83901
83915 83902
83916 83903
83917 83904

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
001	24369	18.8864	6	9	14	23	37
002	4877	19.1411	4	8	13	23	40
003	5	24.0000	1	1	23	24	56
004	4411	16.7345	4	7	12	21	34
005	48360	8.1711	3	4	6	10	15
006	2332	2.8563	1	1	2	3	5
007	5113	22.1109	2	5	12	24	49
008	4561	5.4567	1	2	3	6	11
009	2026	11.3307	2	4	8	13	22
010	17237	11.6097	2	4	8	15	24
011	5304	7.5650	1	3	5	9	16
012	26725	10.5323	2	4	7	12	19
013	5380	9.9059	3	5	8	12	17
014	315112	10.7289	3	5	8	13	20
015	154306	5.6284	2	3	4	7	10
016	14160	9.2824	2	4	7	11	17
017	6780	6.4639	2	3	5	7	11
018	12033	9.3354	2	4	7	11	17
019	12203	6.0989	1	2	5	8	12
020	5825	11.7085	2	4	9	15	24
021	788	10.0152	3	4	7	13	19
022	13229	5.8546	2	3	5	7	11
023	4307	6.8825	1	2	5	8	14
024	44387	7.5910	2	3	5	9	15
025	29298	4.7518	1	2	4	6	9
026	44	5.2273	1	1	3	5	12
027	2322	9.4190	1	2	5	11	22
028	5974	9.4943	1	3	6	12	19
029	4674	5.2955	1	2	4	7	12
030	1	1.0000	1	1	1	1	1
031	4264	6.5016	1	2	4	8	12
032	5076	3.8424	1	2	3	5	8
034	11225	9.3354	2	4	6	11	19
035	5755	5.5626	1	2	4	7	11
036	20412	3.4272	1	2	3	4	6
037	3113	4.5895	1	2	3	5	9
038	1535	2.8697	1	1	2	3	5
039	35909	2.0561	1	1	2	2	3
040	5808	2.8874	1	1	2	3	6
041	1	1.0000	1	1	1	1	1
042	23381	3.1143	1	2	2	4	6
043	311	4.6592	1	2	4	5	8
044	2378	7.0135	3	4	6	9	13
045	3635	4.4209	1	2	3	6	8
046	3378	6.0580	1	2	4	8	12
047	3596	3.6076	1	1	2	5	7
049	5756	15.8822	4	8	13	19	30
050	5446	3.2595	1	2	3	4	6
051	799	3.0751	1	1	2	3	6
052	130	4.1077	1	2	3	5	7
053	9319	3.3595	1	1	2	3	7

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
054	3	5.6667	4	4	5	8	8
055	8665	2.5924	1	1	1	2	4
056	1578	2.4474	1	1	2	3	5
057	757	6.2563	1	2	3	7	14
059	351	2.0798	1	1	1	2	4
060	1	3.0000	3	3	3	3	3
061	358	5.7039	1	1	2	6	14
062	3	6.3333	1	1	3	15	15
063	4252	7.8789	1	2	5	9	17
064	6198	8.7417	1	2	5	11	20
065	31438	4.2275	2	2	3	5	8
066	10360	4.1519	1	2	3	5	7
067	450	6.4956	2	3	5	8	12
068	12217	6.4601	2	3	5	8	12
069	5891	4.8299	2	3	4	6	9
070	27	4.2222	1	2	3	6	7
071	118	6.4068	2	2	4	7	10
072	776	5.0103	1	2	3	6	9
073	9108	5.9657	1	2	4	7	12
074	1	1.0000	1	1	1	1	1
075	28505	15.1835	6	8	12	18	28
076	10563	13.2620	2	5	10	17	27
077	2510	6.5040	1	2	4	9	14
078	28342	10.7871	4	7	10	13	18
079	83548	12.9527	4	6	10	16	24
080	19909	9.6900	3	5	8	12	17
081	4	7.0000	1	1	4	7	16
082	88744	9.6385	2	4	7	12	20
083	6420	8.7301	2	4	7	11	16
084	2723	5.3907	2	3	4	7	10
085	14845	9.2525	2	4	7	12	18
086	3097	6.3839	2	3	5	8	12
087	46333	8.3131	2	4	6	10	16
088	123305	8.1437	3	4	6	10	15
089	258566	9.4736	3	5	8	12	17
090	95425	7.1748	3	4	6	9	12
091	43	5.1163	2	3	4	7	10
092	9763	9.2529	3	4	7	12	18
093	3221	6.8150	2	3	5	9	13
094	8025	9.9581	3	5	8	12	19
095	1851	6.3857	2	3	5	8	12
096	182286	7.4992	3	4	6	9	13
097	52495	5.7150	2	3	5	7	10
098	13	4.6154	1	2	4	6	7
099	23313	5.4147	2	2	4	7	10
100	12738	3.5265	1	2	3	4	6
101	17335	7.3671	2	3	6	9	14
102	7764	5.4557	1	2	4	7	10
103	29	48.8966	13	19	33	51	127
104	9145	21.8074	10	13	18	26	38
105	9784	16.6800	8	10	13	18	30

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
106	52273	16.7591	9	11	14	19	27
107	38184	13.0575	7	9	10	14	20
108	1698	16.5041	2	8	13	20	33
109	9610	12.0699	1	4	9	15	26
110	59893	16.6131	6	9	13	19	31
111	20515	10.2590	5	7	9	12	16
112	80142	7.9382	2	3	6	10	16
113	32028	19.0684	6	9	14	23	36
114	8502	14.0042	3	6	11	18	28
115	6753	15.3015	6	9	13	18	26
116	53384	8.1922	3	4	7	10	15
117	3768	6.5796	2	3	4	8	13
118	7700	3.9478	1	2	3	4	8
119	4321	6.4909	1	2	4	7	14
120	18954	17.3994	3	6	12	22	36
121	130168	11.0040	4	7	10	13	18
122	127305	8.1858	2	5	8	10	13
123	67374	5.5322	1	1	3	7	13
124	71876	6.3539	1	2	5	8	13
125	99782	3.2009	1	2	2	4	7
126	3349	22.3586	5	11	20	31	43
127	500931	8.1823	3	4	6	10	15
128	34515	9.1856	4	6	8	11	14
129	8098	5.7791	1	1	2	7	14
130	55497	8.1142	2	3	7	10	15
131	33500	5.8690	1	2	5	8	11
132	20573	6.0062	2	3	5	7	11
133	9066	4.5831	1	2	4	5	8
134	39410	5.6929	2	3	4	7	10
135	7223	7.1308	2	3	5	9	14
136	2386	4.5889	1	2	4	6	8
138	154780	6.3696	2	3	5	8	12
139	83446	4.4489	1	2	4	6	8
140	366458	4.9987	2	3	4	6	9
141	63525	5.9211	2	3	5	7	11
142	41366	4.3083	1	2	3	5	8
143	86124	3.7143	1	2	3	5	7
144	43551	8.0491	2	4	6	10	16
145	9230	4.8905	1	2	4	6	9
146	17264	18.3716	9	11	15	21	31
147	5582	12.2890	7	9	11	14	18
148	101332	17.5270	8	10	14	20	31
149	31250	11.2531	7	8	10	13	17
150	15071	15.3399	6	9	12	18	27
151	7407	9.8817	5	7	9	12	16
152	6501	10.2549	3	6	8	12	19
153	4388	7.7995	3	6	8	10	12
154	42243	17.5136	5	9	13	21	34
155	10807	10.2396	4	6	9	12	18
156	3	3.3333	1	1	1	8	8
157	22807	7.5280	2	3	6	9	14

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
158	24105	4.0261	1	2	3	5	8
159	11836	7.4155	2	4	6	9	14
160	16529	4.4594	2	2	4	6	8
161	30725	5.1466	1	2	4	6	10
162	54597	2.9834	1	2	3	4	5
163	15	6.4667	2	4	6	7	9
164	3775	13.2697	6	8	11	15	22
165	3022	8.6982	5	6	8	10	13
166	2222	8.8110	3	5	7	10	15
167	2909	5.0890	3	3	5	6	8
168	3942	9.5335	1	2	5	12	22
169	4759	3.7626	1	1	2	4	8
170	11165	16.0751	3	7	12	20	32
171	2901	8.9935	2	4	7	11	17
172	30309	10.4660	2	4	7	13	22
173	6871	6.3179	1	2	4	8	13
174	119641	7.3250	2	4	6	9	13
175	40862	5.1334	2	3	4	6	9
176	11472	8.0039	3	4	6	10	15
177	17460	6.6513	3	4	5	8	12
178	10457	4.9896	2	3	4	6	8
179	7168	9.5989	3	5	7	12	18
180	49799	7.9142	2	4	6	10	15
181	29014	5.1332	2	3	4	6	9
182	216101	6.4626	2	3	5	8	12
183	105599	4.6671	2	2	4	6	8
184	51	4.5882	1	2	3	5	8
185	4319	6.7151	1	2	5	8	14
186	3	9.3333	4	4	9	15	15
187	2044	2.9951	1	1	2	3	6
188	31996	7.4329	2	3	5	9	15
189	13893	4.2521	1	2	3	5	9
190	179	6.4134	2	3	4	7	11
191	5502	21.0931	8	11	17	26	39
192	2622	22.3436	6	10	15	27	46
193	8379	18.0822	8	11	15	22	32
194	2622	12.4886	5	8	11	16	21
195	23007	14.1979	7	9	12	16	23
196	4948	10.4159	6	7	9	12	16
197	53911	11.2095	5	7	9	13	19
198	43179	7.2058	4	5	6	8	11
199	3290	15.4894	5	8	13	20	29
200	2087	13.8955	2	6	11	18	28
201	4209	13.0772	2	5	10	16	27
202	14662	10.2349	2	5	8	13	20
203	30039	9.5991	2	4	7	12	20
204	32321	7.9953	3	4	6	10	15
205	18036	9.6092	2	4	7	12	19
206	4437	5.7142	1	2	4	7	12
207	33858	7.5022	2	4	6	9	14
208	19068	4.6561	1	2	4	6	9

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
209	181360	13.2831	8	9	12	15	20
210	77631	15.9807	7	10	13	18	26
211	51391	11.9955	6	8	11	14	18
212	11	10.3636	1	6	9	9	12
213	4940	13.9547	4	6	10	17	27
214	20693	14.7116	6	8	12	18	27
215	31492	9.7040	4	6	8	12	17
216	4647	13.4717	2	4	10	18	29
217	12149	21.8941	3	7	15	29	47
218	10032	11.5531	4	6	9	14	21
219	16795	6.8810	3	4	6	8	12
220	1	3.0000	3	3	3	3	3
221	3210	9.9919	2	3	7	13	21
222	8819	5.0836	1	2	4	7	11
223	12125	6.4435	2	3	5	8	12
224	8535	3.6667	1	2	3	4	7
225	16397	4.8567	1	2	3	5	10
226	3607	10.4439	2	4	7	13	22
227	8377	4.3925	1	2	3	5	9
228	5255	4.4799	1	2	3	5	9
229	4980	2.7773	1	1	2	3	5
230	3458	7.1186	1	2	4	8	14
231	7759	6.2111	1	2	3	7	13
232	845	6.3160	1	1	3	7	16
233	4951	12.4520	3	5	9	15	25
234	6358	6.2606	2	3	5	8	12
235	6187	13.9271	2	4	8	15	34
236	38469	10.0834	2	5	8	12	19
237	1982	6.2200	2	3	5	8	12
238	5289	14.6137	4	7	11	18	30
239	59823	10.1914	3	5	8	13	20
240	10520	9.8664	3	5	7	12	19
241	7118	6.5794	2	3	5	8	12
242	2398	11.4570	3	5	8	14	23
243	138344	6.9613	2	3	6	9	13
244	11612	7.5260	2	3	6	9	14
245	9368	5.6158	2	3	4	7	10
246	2374	6.0080	2	3	5	7	11
247	10363	5.1662	1	2	4	7	10
248	7052	6.0553	2	3	5	7	12
249	5219	6.8362	1	2	5	8	15
250	3449	6.8800	1	2	4	8	13
251	5873	3.5399	1	1	2	4	7
253	14391	8.7382	2	4	6	10	16
254	19169	5.2942	1	2	4	6	10
256	9501	5.6474	1	2	4	7	11
257	21745	7.1282	3	4	6	8	12
258	27285	5.3610	3	4	5	7	8
259	3549	7.3995	2	3	5	9	16
260	4781	3.6164	1	2	3	5	6
261	4250	3.3007	1	2	3	4	6

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM

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SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

ORG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
262	4129	2.6295	1	1	2	3	4
263	24462	21.6964	6	9	15	27	44
264	7661	14.4772	4	7	11	18	28
265	5004	11.2706	2	4	7	14	24
266	6612	4.9992	1	2	3	7	11
267	599	4.7329	1	2	3	6	10
268	1965	3.9720	1	1	2	4	8
269	8381	12.0199	2	4	9	15	25
270	7783	5.1126	1	2	3	6	11
271	17253	12.0825	3	6	9	14	22
272	6567	9.6930	3	5	7	12	19
273	3828	7.7153	2	4	6	9	16
274	4435	9.9565	2	3	7	12	21
275	940	5.7489	1	2	4	6	12
276	1159	4.5764	1	2	3	6	10
277	49522	9.1000	3	5	7	11	16
278	29122	6.9354	3	4	6	8	12
279	4	3.7500	2	2	4	4	5
280	12330	6.7262	2	3	5	8	13
281	11027	4.6232	1	2	3	6	9
282	1	6.0000	6	6	6	6	6
283	5850	7.6605	2	3	6	9	15
284	4045	5.1654	1	2	4	6	10
285	3072	23.4883	7	11	18	29	45
286	1370	14.7693	6	8	10	17	28
287	6468	19.3879	5	8	13	23	38
288	504	12.1885	3	5	7	13	23
289	3671	7.1632	2	3	5	7	15
290	8662	4.9008	2	3	4	5	9
291	212	2.9858	1	1	2	3	5
292	3857	17.4599	4	8	13	21	34
293	1018	10.2996	2	4	7	12	19
294	101670	7.7236	3	4	6	9	14
295	2849	6.2411	2	3	5	7	11
296	161461	8.5519	2	4	6	10	16
297	62155	5.7573	2	3	4	7	10
298	60	4.3167	1	2	3	5	7
299	970	7.2155	1	3	5	9	15
300	10446	9.8260	3	5	7	12	19
301	3550	6.1727	2	3	5	8	12
302	5626	18.6314	8	11	15	23	33
303	14648	15.2266	7	9	12	18	26
304	12505	14.5631	4	7	11	18	28
305	8352	8.2973	2	4	7	10	15
306	10301	10.6463	4	5	8	13	19
307	7327	6.2277	3	4	5	8	11
308	7383	10.6407	2	4	8	13	21
309	5157	5.6343	1	2	4	8	12
310	28703	6.4951	2	3	5	8	13
311	31458	3.5010	1	2	3	4	7
312	4071	6.1155	1	2	4	8	12

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SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
313	4052	3.5666	1	2	3	4	7
314	2	4.5000	4	4	5	5	5
315	24103	13.8619	2	4	9	18	30
316	38904	9.4292	2	4	7	12	19
317	1884	3.0058	1	1	2	3	6
318	7723	9.3304	2	3	6	12	20
319	1936	4.4597	1	1	3	6	10
320	128095	8.8528	3	5	7	10	15
321	46422	6.6280	3	4	6	8	11
322	54	6.5926	2	3	5	8	14
323	22778	4.2967	1	2	3	5	9
324	19874	3.0918	1	1	2	4	6
325	11267	6.2966	2	3	5	8	12
326	7162	3.9968	1	2	3	5	8
327	6	4.3333	1	1	3	6	6
328	2226	5.3068	1	2	4	7	10
329	935	3.3155	1	1	2	4	6
330	2	2.0000	2	2	2	2	2
331	22930	7.6868	2	3	6	9	15
332	10541	4.9663	1	2	3	6	10
333	80	6.6375	1	2	4	8	15
334	8101	12.5180	7	8	11	15	20
335	8116	9.5241	6	7	9	11	14
336	87557	7.4736	3	4	6	9	13
337	116367	5.0358	3	4	5	6	8
338	10575	5.4709	1	1	3	7	13
339	6466	4.0416	1	1	3	5	9
340	4	11.0000	1	1	2	16	25
341	16329	5.1311	2	3	4	6	9
342	1048	3.1708	1	1	2	3	7
344	3511	7.2865	2	4	6	8	13
345	2448	5.9759	1	2	4	7	12
346	10540	8.3132	2	3	6	10	17
347	3548	3.8636	1	1	2	5	8
348	6065	5.6079	1	2	4	7	11
349	5614	2.8669	1	1	2	3	6
350	9378	6.0094	2	4	5	7	10
351	3	1.0000	1	1	1	1	1
352	1265	4.3447	1	2	3	5	9
353	1721	15.1307	6	8	12	18	27
354	6218	10.3191	5	6	8	12	17
355	7441	6.6940	4	5	6	8	9
356	27242	5.9234	3	4	5	7	9
357	6156	13.5588	6	8	11	16	25
358	12607	8.8651	5	6	7	10	15
359	27272	6.1976	4	5	6	7	9
360	5102	5.8105	1	2	4	7	12
361	506	4.6719	1	2	2	5	10
362	30	2.0333	1	1	1	2	3
363	4225	5.4133	1	2	3	5	11
364	5338	3.1263	1	1	2	3	6

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY

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SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
365	3370	12.6656	4	6	9	15	25
366	5606	10.0121	2	3	7	13	22
367	1931	4.6194	1	2	3	5	10
368	1441	7.7189	3	4	6	9	14
369	3451	5.0519	1	2	3	6	10
370	400	7.7675	4	5	6	8	14
371	557	5.3034	3	4	5	6	7
372	236	3.9237	1	2	3	5	7
373	1476	2.7080	1	2	2	3	4
374	258	3.4884	2	2	3	4	4
375	2	3.5000	3	3	4	4	4
376	102	3.9902	1	2	3	4	8
377	34	4.9118	1	2	3	6	8
378	103	5.0000	3	3	4	5	7
379	195	3.0359	1	1	2	4	6
380	52	1.9808	1	1	1	2	5
381	274	2.4197	1	1	1	2	5
382	107	1.5514	1	1	1	2	3
383	605	5.2132	1	2	3	6	10
384	33	3.4458	1	1	2	4	8
385	7	10.0000	1	2	5	8	18
386	1	9.0000	9	9	9	9	9
389	46	14.1087	2	3	7	13	31
390	47	7.4255	1	3	5	10	15
392	2117	16.8573	6	8	12	21	33
393	1	6.0000	6	6	6	6	6
394	1963	8.1503	1	2	5	10	18
395	74329	6.4088	1	3	5	8	12
396	38	4.0789	1	1	1	2	10
397	9868	7.7354	2	3	6	10	15
398	10555	9.1184	2	4	7	11	17
399	3062	5.7531	1	2	4	7	11
400	7548	15.5862	4	7	11	19	32
401	5606	15.1687	3	6	11	19	31
402	4087	6.5165	1	2	4	8	14
403	23835	11.9269	2	5	8	15	25
404	8720	6.9547	1	3	5	9	15
405	2	2.5000	2	2	3	3	3
406	3617	17.1275	5	8	13	22	33
407	2035	9.2354	2	5	8	11	18
408	9767	6.6768	2	2	4	7	15
409	7830	10.4777	2	4	6	14	23
410	122243	3.4019	1	2	3	4	6
411	678	4.2552	1	2	3	5	8
412	580	3.2000	1	1	2	4	7
413	9859	10.6994	2	4	8	14	23
414	4788	7.4478	1	3	5	9	16
415	21496	20.6644	5	9	15	25	41
416	96711	10.6323	2	5	9	13	20
417	29	7.5517	2	4	7	10	13
418	11132	8.8876	3	4	7	11	17

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FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
419	13842	7.8229	2	4	6	9	15
420	4849	5.9008	2	3	5	7	11
421	11582	5.7146	2	3	4	7	10
422	92	5.2283	1	2	3	7	8
423	6316	11.6742	3	5	8	14	24
424	3248	21.5419	3	7	14	26	43
425	14861	6.3136	2	3	4	7	12
426	10866	8.1425	2	3	6	10	16
427	1989	7.8457	2	3	5	9	16
428	1232	10.2849	1	3	6	12	22
429	30809	11.6369	3	4	7	12	21
430	60147	12.8056	3	5	9	16	27
431	415	9.1639	2	3	6	11	19
432	624	6.8478	1	2	4	8	14
433	4843	5.0900	1	1	3	6	12
434	15446	8.7209	2	3	6	10	19
435	14268	7.6694	2	3	5	8	21
436	4670	15.4914	2	6	15	24	29
437	7635	18.0747	4	9	20	27	30
439	1100	12.7909	1	3	8	17	29
440	6822	16.9943	2	5	11	22	38
441	1084	4.2943	1	1	2	4	9
442	38345	10.0714	1	3	6	13	22
443	16933	6.6883	1	2	4	9	15
444	3374	7.1349	2	3	5	9	14
445	2965	5.1619	1	2	4	6	10
446	1	2.0000	2	2	2	2	2
447	2826	3.7155	1	1	3	5	7
448	1	4.0000	4	4	4	4	4
449	30045	6.3645	2	3	5	8	12
450	12811	4.0984	1	2	3	5	8
451	14	4.8571	1	2	3	4	9
452	24622	7.0679	1	3	5	9	15
453	11895	4.5470	1	2	3	6	9
454	3913	7.0787	1	2	4	8	14
455	1724	3.8794	1	2	3	5	8
456	227	10.4009	1	2	5	11	22
457	127	8.1969	1	1	3	12	21
458	1686	24.4852	5	10	19	32	50
459	906	15.4117	3	6	11	19	32
460	2363	9.5044	2	4	7	11	18
461	9039	4.7806	1	1	2	5	11
462	5159	18.1312	4	7	15	24	35
463	9493	7.2019	2	3	5	9	14
464	4113	4.6871	1	2	3	6	9
465	985	2.8589	1	1	2	3	5
466	4282	5.2494	1	1	2	6	11
467	7022	8.5144	1	1	3	6	14
468	119624	16.2511	2	6	12	20	33
471	3583	19.4689	10	12	16	23	31
472	178	33.6404	1	10	28	47	73

TABLE 7a - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V5.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
473	7562	15.7314	2	4	9	23	39
474	8339	44.3899	13	22	35	55	83
475	17370	13.0866	2	5	10	17	26

TECHNICAL NOTE: The V5.0 GROUPER software used to assign FY 1987 cases to DRGs is based on the DRG classifications in effect for discharges occurring in Federal FY 1988.

Each percentile length of stay (LOS) value was computed according to the following formula: Let n represent the number of discharges classified by DRG and let $x_1, x_2, \ldots, x_n$ represent the ordered LOS values for each DRG set of discharges. For the t_{th} percentile, where $p = t/100$, let $np = j + g$ where j is the integer part and g is the fractional part of np. The t_{th} percentile, y, is defined as the LOS value at x_{np}.

$$y = (1 - g)x_j + gx_{j+1}$$

(See SAS User's Guide: Basics, Version 5 Edition, Cary, NC: SAS Institute Inc., 1985, p. 1186.)

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
001	24369	18.8864	6	9	14	23	37
002	4877	19.1411	4	8	13	23	40
003	5	24.0000	1	1	23	24	56
004	4411	16.7345	4	7	12	21	34
005	48360	8.1711	3	4	6	10	15
006	2332	2.8563	1	1	2	3	5
007	5113	22.1109	2	6	12	24	49
008	4561	5.4567	1	2	3	6	11
009	2026	11.3307	2	4	8	13	22
010	17237	11.6097	2	4	8	15	24
011	5304	7.5650	1	3	5	9	16
012	26726	10.5323	2	4	7	12	19
013	5380	9.9059	3	5	8	12	17
014	315112	10.7289	3	5	8	13	20
015	154306	5.6284	2	3	4	7	10
016	14160	9.2824	2	4	7	11	17
017	6780	6.4639	2	3	5	7	11
018	12033	9.3354	2	4	7	11	17
019	12203	6.0989	1	2	5	8	12
020	5825	11.7085	2	4	9	15	24
021	788	10.0152	3	4	7	13	19
022	13229	5.8546	2	3	5	7	11
023	4307	6.8825	1	2	5	8	14
024	44387	7.5910	2	3	5	9	15
025	29298	4.7518	1	2	4	6	9
026	44	5.2273	1	1	3	5	12
027	2322	9.4190	1	2	5	11	22
028	5974	9.4943	1	3	6	12	19
029	4674	5.2955	1	2	4	7	12
030	1	1.0000	1	1	1	1	1
031	4264	6.5016	1	2	4	8	12
032	5076	3.8424	1	2	3	5	8
034	11225	9.3354	2	4	6	11	19
035	5755	5.5626	1	2	4	7	11
036	20412	3.4272	1	2	3	4	6
037	3113	4.5895	1	2	3	5	9
038	1535	2.8697	1	1	2	3	5
039	35909	2.0561	1	1	2	2	3
040	5808	2.8874	1	1	2	3	6
041	1	1.0000	1	1	1	1	1
042	23381	3.1143	1	2	2	4	6
043	311	4.6592	1	2	4	5	8
044	2378	7.0135	3	4	6	9	13
045	3635	4.4209	1	2	3	6	8
046	3378	6.0580	1	2	4	8	12
047	3596	3.6076	1	1	2	5	7
049	7159	15.5330	3	7	12	19	30
050	5594	3.2959	1	2	3	4	6
051	864	3.1435	1	1	2	4	6
052	231	4.7489	1	2	3	5	10
053	9404	3.3889	1	1	2	3	7

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
054	3	5.6667	4	4	5	8	8
055	8721	2.6278	1	1	1	2	5
056	1595	2.4821	1	1	2	3	5
057	810	6.2173	1	2	3	7	14
059	351	2.0798	1	1	1	2	4
060	1	3.0000	3	3	3	3	3
061	365	5.7425	1	1	2	7	14
062	3	6.3333	1	1	3	15	15
063	10211	6.0291	1	2	3	7	13
064	6974	8.7435	1	2	5	11	20
065	31438	4.2275	2	2	3	5	8
066	10360	4.1519	1	2	3	5	7
067	450	6.4956	2	3	5	8	12
068	12217	6.4601	2	3	5	8	12
069	5891	4.8299	2	3	4	6	9
070	27	4.2222	1	2	3	6	7
071	118	6.4068	2	2	4	7	10
072	776	5.0103	1	2	3	6	9
073	9100	5.9697	1	2	4	7	12
074	1	1.0000	1	1	1	1	1
075	28505	15.1835	6	8	12	18	28
076	10563	13.2620	2	5	10	17	27
077	2510	6.5040	1	2	4	9	14
078	28342	10.7871	4	7	10	13	18
079	83548	12.9527	4	6	10	16	24
080	19909	9.6900	3	5	8	12	17
081	4	7.0000	1	1	4	7	16
082	88744	9.6385	2	4	7	12	20
083	6420	8.7301	2	4	7	11	16
084	2723	5.3907	2	3	4	7	10
085	14845	9.2525	2	4	7	12	18
086	3097	6.3839	2	3	5	8	12
087	46333	8.3131	2	4	6	10	16
088	123305	8.1437	3	4	6	10	15
089	258566	9.4736	3	5	8	12	17
090	95425	7.1748	3	4	6	9	12
091	43	5.1163	2	3	4	7	10
092	9763	9.2529	3	4	7	12	18
093	3221	6.8150	2	3	5	9	13
094	8025	9.9581	3	5	8	12	19
095	1851	6.3857	2	3	5	8	12
096	182286	7.4992	3	4	6	9	13
097	52495	5.7150	2	3	5	7	10
098	13	4.6154	1	2	4	6	7
099	23313	5.4147	2	2	4	7	10
100	12738	3.5265	1	2	3	4	6
101	17835	7.3671	2	3	6	9	14
102	7764	5.4557	1	2	4	7	10
103	29	48.8966	13	19	33	51	127
104	9145	21.8074	10	13	18	26	38
105	9784	16.6800	8	10	13	18	30

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
106	52278	16.7591	9	11	14	19	27
107	38184	13.0575	7	9	10	14	20
108	1698	16.5041	2	8	13	20	33
109	9610	12.0699	1	4	9	15	26
110	59893	16.6131	6	9	13	19	31
111	20515	10.2590	5	7	9	12	16
112	80142	7.9382	2	3	6	10	16
113	32028	19.0684	6	9	14	23	36
114	8502	14.0042	3	6	11	18	28
115	6753	15.3015	6	9	13	18	26
116	53384	8.1922	3	4	7	10	15
117	3768	6.5796	2	3	4	8	13
118	7700	3.9478	1	2	3	4	8
119	4321	6.4909	1	2	4	7	14
120	18954	17.3994	3	6	12	22	36
121	130168	11.0040	4	7	10	13	18
122	127305	8.1858	2	5	8	10	13
123	67374	5.5322	1	1	3	7	13
124	71876	6.3539	1	2	5	8	13
125	99782	3.2009	1	2	2	4	7
126	3349	22.3586	5	11	20	31	43
127	500931	8.1823	3	4	6	10	15
128	34515	9.1856	4	6	8	11	14
129	8098	5.7791	1	1	2	7	14
130	55497	8.1142	2	3	7	10	15
131	33500	5.8690	1	2	5	8	11
132	20573	6.0062	2	3	5	7	11
133	9066	4.5831	1	2	4	5	8
134	39410	5.6929	2	3	4	7	10
135	7223	7.1308	2	3	5	9	14
136	2386	4.5889	1	2	4	6	8
138	154780	6.3696	2	3	5	8	12
139	83446	4.4489	1	2	4	6	8
140	366458	4.9987	2	3	4	6	9
141	63525	5.9211	2	3	5	7	11
142	41366	4.3083	1	2	3	5	8
143	86124	3.7143	1	2	3	5	7
144	43551	8.0491	2	4	6	10	16
145	9230	4.8905	1	2	4	6	9
146	17264	18.3716	9	11	15	21	31
147	5582	12.2890	7	9	11	14	18
148	101332	17.5270	8	10	14	20	31
149	31250	11.2531	7	8	10	13	17
150	15071	15.3399	6	9	12	18	27
151	7407	9.8817	5	7	9	12	16
152	6501	10.2549	3	6	8	12	19
153	4388	7.7995	3	6	8	10	12
154	42254	17.5114	5	9	13	21	34
155	10819	10.2333	4	6	9	12	18
156	3	3.3333	1	1	1	8	8
157	22807	7.5280	2	3	6	9	14

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
158	24105	4.0261	1	2	3	5	8
159	11836	7.4155	2	4	6	9	14
160	16529	4.4594	2	2	4	6	8
161	30725	5.1466	1	2	4	6	10
162	54597	2.9834	1	2	3	4	5
163	15	6.4667	2	4	6	7	9
164	3775	13.2697	6	8	11	15	22
165	3022	8.6982	5	6	8	10	13
166	2222	8.8110	3	5	7	10	15
167	2909	5.0890	3	3	5	6	8
168	333	8.4324	1	2	5	10	19
169	451	3.7827	1	1	2	4	8
170	11165	16.0751	3	7	12	20	32
171	2901	8.9935	2	4	7	11	17
172	30309	10.4660	2	4	7	13	22
173	6871	6.3179	1	2	4	8	13
174	119641	7.3250	2	4	6	9	13
175	40862	5.1334	2	3	4	6	9
176	11472	8.0039	3	4	6	10	15
177	17460	6.6513	3	4	5	8	12
178	10457	4.9896	2	3	4	6	8
179	7168	9.5989	3	5	7	12	18
180	49799	7.9142	2	4	6	10	15
181	29014	5.1332	2	3	4	6	9
182	216101	6.4626	2	3	5	8	12
183	105599	4.6671	2	2	4	6	8
184	51	4.5882	1	2	3	5	8
185	4084	6.3051	1	2	4	8	12
186	3	9.3333	4	4	9	15	15
187	2025	2.9556	1	1	2	3	6
188	31991	7.4336	2	3	5	9	15
189	13884	4.2532	1	2	3	5	9
190	179	6.4134	2	3	4	7	11
191 *	5502	21.0931	8	11	17	26	39
192 *	2622	22.3436	6	10	15	27	46
193	12289	17.6823	8	10	15	21	31
194	3361	12.3535	5	8	11	15	20
195	21012	14.0316	7	9	12	16	23
196	4638	10.3251	6	7	9	12	16
197	51996	10.9690	5	7	9	13	18
198	42750	7.1582	4	5	6	8	11
199	3290	15.4894	5	8	13	20	29
200	2087	13.8955	2	6	11	18	28
201	4209	13.0772	2	5	10	16	27
202	14662	10.2349	2	5	8	13	20
203	30039	9.5991	2	4	7	12	20
204	32321	7.9953	3	4	6	10	15
205	18036	9.6092	2	4	7	12	19
206	4437	5.7142	1	2	4	7	12
207	33858	7.5022	2	4	6	9	14
208	19068	4.6561	1	2	4	6	9

*Distribution does not reflect proposed changes to DRGs 191 and 192, which are described in section II.B.3. of the preamble.

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
209	181360	13.2831	8	9	12	15	20
210	77631	15.9807	7	10	13	18	26
211	51391	11.9955	6	8	11	14	18
212	11	10.3636	1	6	9	9	12
213	4940	13.9547	4	6	10	17	27
214	20693	14.7116	6	8	12	18	27
215	31492	9.7040	4	6	8	12	17
216	4647	13.4717	2	4	10	18	29
217	12149	21.8941	3	7	15	29	47
218	10032	11.5531	4	6	9	14	21
219	16795	6.8810	3	4	6	8	12
220	1	3.0000	3	3	3	3	3
221	3210	9.9919	2	3	7	13	21
222	8819	5.0836	1	2	4	7	11
223	12125	6.4435	2	3	5	8	12
224	8535	3.6667	1	2	3	4	7
225	16397	4.8567	1	2	3	5	10
226	3607	10.4439	2	4	7	13	22
227	8377	4.3925	1	2	3	5	9
228	5255	4.4799	1	2	3	5	9
229	4980	2.7773	1	1	2	3	5
230	3458	7.1186	1	2	4	8	14
231	7759	6.2111	1	2	3	7	13
232	845	6.3160	1	1	3	7	16
233	4951	12.4520	3	5	9	15	25
234	6358	6.2606	2	3	5	8	12
235	6187	13.9271	2	4	8	15	34
236	38469	10.0834	2	5	8	12	19
237	1982	6.2200	2	3	5	8	12
238	5289	14.6137	4	7	11	18	30
239	59823	10.1914	3	5	8	13	20
240	10520	9.8664	3	5	7	12	19
241	7118	6.5794	2	3	5	8	12
242	2398	11.4570	3	5	8	14	23
243	138344	6.9613	2	3	6	9	13
244	11612	7.5260	2	3	6	9	14
245	9368	5.6158	2	3	4	7	10
246	2374	6.0080	2	3	5	7	11
247	10363	5.1662	1	2	4	7	10
248	7052	6.0553	2	3	5	7	12
249	5219	6.8362	1	2	5	8	15
250	3449	6.8800	1	2	4	8	13
251	5873	3.5399	1	1	2	4	7
253	14391	8.7382	2	4	6	10	16
254	19169	5.2942	1	2	4	6	10
256	9501	5.6474	1	2	4	7	11
257	21745	7.1282	3	4	6	8	12
258	27285	5.3610	3	4	5	7	8
259	3549	7.3995	2	3	5	9	16
260	4781	3.6164	1	2	3	5	6
261	4250	3.3007	1	2	3	4	6

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
262	4129	2.6295	1	1	2	3	4
263	24462	21.6964	6	9	15	27	44
264	7661	14.4772	4	7	11	18	28
265	5004	11.2706	2	4	7	14	24
266	6612	4.9992	1	2	3	7	11
267	599	4.7329	1	2	3	6	10
268	1965	3.9720	1	1	2	4	8
269	8381	12.0199	2	4	9	15	25
270	7783	5.1126	1	2	3	6	11
271	17253	12.0825	3	6	9	14	22
272	6567	9.6930	3	5	7	12	19
273	3828	7.7153	2	4	6	9	16
274	4435	9.9565	2	3	7	12	21
275	940	5.7489	1	2	4	6	12
276	1159	4.5764	1	2	3	6	10
277	49522	9.1000	3	5	7	11	16
278	29122	6.9354	3	4	6	8	12
279	4	3.7500	2	2	4	4	5
280	12330	6.7262	2	3	5	8	13
281	11027	4.6232	1	2	3	6	9
282	1	6.0000	6	6	6	6	6
283	5850	7.6605	2	3	6	9	15
284	4045	5.1654	1	2	4	6	10
285	3072	23.4883	7	11	18	29	45
286	1370	14.7693	6	8	10	17	28
287	6468	19.3879	5	8	13	23	38
288	504	12.1885	3	5	7	13	23
289	3671	7.1632	2	3	5	7	15
290	8662	4.9008	2	3	4	5	9
291	212	2.9858	1	1	2	3	5
292	3857	17.4599	4	8	13	21	34
293	1018	10.2996	2	4	7	12	19
294	101670	7.7236	3	4	6	9	14
295	2849	6.2411	2	3	5	7	11
296	161461	8.5519	2	4	6	10	16
297	62155	5.7573	2	3	4	7	10
298	60	4.3167	1	2	3	5	7
299	970	7.2155	1	3	5	9	15
300	10446	9.8260	3	5	7	12	19
301	3550	6.1727	2	3	5	8	12
302	5626	18.6314	8	11	15	23	33
303	14648	15.2266	7	9	12	18	26
304	12505	14.5631	4	7	11	18	28
305	8352	8.2973	2	4	7	10	15
306	10301	10.6463	4	5	8	13	19
307	7326	6.2282	3	4	5	8	11
308	7568	10.5229	2	4	8	13	21
309	5500	5.5431	1	2	4	7	11
310	28699	6.4944	2	3	5	8	13
311	31456	3.5009	1	2	3	4	7
312	3890	6.1347	1	2	4	8	13

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
313	3712	3.5119	1	2	3	4	7
314	2	4.5000	4	4	5	5	5
315	24103	13.8619	2	4	9	18	30
316	38904	9.4292	2	4	7	12	19
317	1884	3.0058	1	1	2	3	6
318	7723	9.3304	2	3	6	12	20
319	1936	4.4597	1	1	3	6	10
320	128095	8.8528	3	5	7	10	15
321	46422	6.6280	3	4	6	8	11
322	54	6.5926	2	3	5	8	14
323	22778	4.2967	1	2	3	5	9
324	19874	3.0918	1	1	2	4	6
325	11267	6.2966	2	3	5	8	12
326	7162	3.9968	1	2	3	5	8
327	6	4.3333	1	1	3	6	6
328	2226	5.3068	1	2	4	7	10
329	935	3.3155	1	1	2	4	6
330	2	2.0000	2	2	2	2	2
331	22930	7.6868	2	3	6	9	15
332	10541	4.9663	1	2	3	6	10
333	80	6.6375	1	2	4	8	15
334	8101	12.5180	7	8	11	15	20
335	8116	9.5241	6	7	9	11	14
336	87557	7.4736	3	4	6	9	13
337	116367	5.0358	3	4	5	6	8
338	10575	5.4709	1	1	3	7	13
339	6466	4.0416	1	1	3	5	9
340	4	11.0000	1	1	2	16	25
341	16329	5.1311	2	3	4	6	9
342	1048	3.1708	1	1	2	3	7
344	3500	7.2946	2	4	6	8	13
345	2445	5.9710	1	2	4	7	12
346	10540	8.3132	2	3	6	10	17
347	3548	3.8636	1	1	2	5	8
348	6065	5.6079	1	2	4	7	11
349	5614	2.8669	1	1	2	3	6
350	9378	6.0094	2	4	5	7	10
351	3	1.0000	1	1	1	1	1
352	1265	4.3447	1	2	3	5	9
353	1721	15.1307	6	8	12	18	27
354	6218	10.3191	5	6	8	12	17
355	7441	6.6940	4	5	6	8	9
356	27242	5.9234	3	4	5	7	9
357	6156	13.5588	6	8	11	16	25
358	12607	8.8651	5	6	7	10	15
359	27272	6.1976	4	5	6	7	9
360	5102	5.8105	1	2	4	7	12
361	506	4.6719	1	2	2	5	10
362	30	2.0333	1	1	1	2	3
363	4225	5.4133	1	2	3	5	11
364	5338	3.1263	1	1	2	3	6

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
365	3359	12.6818	4	6	9	15	25
366	5606	10.0121	2	3	7	13	22
367	1931	4.6194	1	2	3	5	10
368	1441	7.7189	3	4	6	9	14
369	3451	5.0519	1	2	3	6	10
370	400	7.7675	4	5	6	8	14
371	557	5.3034	3	4	5	6	7
372	236	3.9237	1	2	3	5	7
373	1476	2.7080	1	2	2	3	4
374	258	3.4884	2	2	3	4	4
375	2	3.5000	3	3	4	4	4
376	102	3.9902	1	2	3	4	8
377	34	4.9118	1	2	3	6	8
378	103	5.0000	3	3	4	5	7
379	195	3.0359	1	1	2	4	6
380	52	1.9808	1	1	1	2	5
381	274	2.4197	1	1	1	2	5
382	107	1.5514	1	1	1	2	3
383	605	5.2132	1	2	3	6	10
384	83	3.4458	1	1	2	4	8
385	7	10.0000	1	2	5	8	18
386	1	9.0000	9	9	9	9	9
389	46	14.1087	2	3	7	13	31
390	47	7.4255	1	3	5	10	15
392	2117	16.8573	6	8	12	21	33
393	1	6.0000	6	6	6	6	6
394	1963	8.1503	1	2	5	10	18
395	74329	6.4088	1	3	5	8	12
396	38	4.0789	1	1	1	2	10
397	9868	7.7354	2	3	6	10	15
398	10555	9.1184	2	4	7	11	17
399	3062	5.7531	1	2	4	7	11
400	7548	15.5862	4	7	11	19	32
401	5606	15.1687	3	6	11	19	31
402	4087	6.5165	1	2	4	8	14
403	23835	11.9269	2	5	8	15	25
404	8720	6.9547	1	3	5	9	15
405	2	2.5000	2	2	3	3	3
406	3617	17.1275	5	8	13	22	33
407	2035	9.2354	2	5	8	11	18
408	9767	6.6768	2	2	4	7	15
409	7830	10.4777	2	4	6	14	23
410	122243	3.4019	1	2	3	4	6
411	678	4.2552	1	2	3	5	8
412	580	3.2000	1	1	2	4	7
413	9859	10.6994	2	4	8	14	23
414	4788	7.4478	1	3	5	9	16
415	21496	20.6644	5	9	15	25	41
416	96711	10.6323	2	5	9	13	20
417	29	7.5517	2	4	7	10	13
418	11132	8.8876	3	4	7	11	17

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
419	13842	7.8229	2	4	6	9	15
420	4849	5.9008	2	3	5	7	11
421	11582	5.7146	2	3	4	7	10
422	92	5.2283	1	2	3	7	8
423	6316	11.6742	3	5	8	14	24
424	3248	21.5419	3	7	14	26	43
425	14861	6.3136	2	3	4	7	12
426	10866	8.1425	2	3	6	10	16
427	1989	7.8457	2	3	5	9	16
428	1232	10.2849	1	3	6	12	22
429	30809	11.6369	3	4	7	12	21
430	60147	12.8056	3	5	9	16	27
431	415	9.1639	2	3	6	11	19
432	624	6.8478	1	2	4	8	14
433	4843	5.0900	1	1	3	6	12
434	15446	8.7209	2	3	6	10	19
435	14268	7.6694	2	3	5	8	21
436	4670	15.4914	2	6	15	24	29
437	7635	18.0747	4	9	20	27	30
439	1100	12.7909	1	3	8	17	29
440	6822	16.9943	2	5	11	22	38
441	1084	4.2943	1	1	2	4	9
442	38348	10.0708	1	3	6	13	22
443	16944	6.6863	1	2	4	9	15
444	3374	7.1349	2	3	5	9	14
445	2965	5.1619	1	2	4	6	10
446	1	2.0000	2	2	2	2	2
447	2826	3.7155	1	1	3	5	7
448	1	4.0000	4	4	4	4	4
449	30045	6.3645	2	3	5	8	12
450	12811	4.0984	1	2	3	5	8
451	14	4.8571	1	2	3	4	9
452	24622	7.0679	1	3	5	9	15
453	11895	4.5470	1	2	3	6	9
454	3913	7.0787	1	2	4	8	14
455	1724	3.8794	1	2	3	5	8
456	227	10.4009	1	2	5	11	22
457	127	8.1969	1	1	3	12	21
458	1686	24.4852	5	10	19	32	50
459	906	15.4117	3	6	11	19	32
460	2363	9.5044	2	4	7	11	18
461	9039	4.7806	1	1	2	5	11
462	5159	18.1312	4	7	15	24	35
463	9493	7.2019	2	3	5	9	14
464	4113	4.6871	1	2	3	6	9
465	985	2.8589	1	1	2	3	5
466	4282	5.2494	1	1	2	6	11
467	7022	8.5144	1	1	3	6	14
468	66945	18.9106	3	8	14	23	38
471	3583	19.4689	10	12	16	23	31
472	178	33.6404	1	10	28	47	73

TABLE 7b - MEDICARE PROSPECTIVE PAYMENT SYSTEM
SELECTED PERCENTILE LENGTHS OF STAY
FY87 MEDPAR UPDATE 12/87 GROUPER V6.0

DRG	NUMBER DISCHARGES	ARITHMETIC MEAN LOS	10TH PERCENTILE	25TH PERCENTILE	50TH PERCENTILE	75TH PERCENTILE	90TH PERCENTILE
473	7562	15.7314	2	4	9	23	39
474	8339	44.3899	13	22	35	55	83
475	17370	13.0866	2	5	10	17	26
476	11733	18.1959	8	11	15	21	31
477	40957	11.3455	1	3	8	14	23

TECHNICAL NOTE: The V6.0 GROUPER software used to assign FY 1987 cases to DRGs is based on the DRG classifications that will be in effect for discharges occurring in Federal FY 1989.

Each percentile length of stay (LOS) value was computed according to the following formula: Let n represent the number of discharges classified by DRG and let $x_1, x_2, \ldots, x_n$ represent the ordered LOS values for each DRG set of discharges. For the t_{th} percentile, where $p = t/100$, let $np = j + g$ where j is the integer part and g is the fractional part of np. The t_{th} percentile, y, is defined as the LOS value at x_{np}.

$$y = (1 - g)x_j + gx_{j+1}$$

(See SAS User's Guide: Basics, Version 5 Edition, Cary, NC: SAS Institute Inc., 1985, p. 1186.)

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TABLE 8.—STATEWIDE AVERAGE COST-TO-CHARGE RATIOS FOR URBAN AND RURAL HOSPITALS

[Case Weighted]

State	Urban	Rural
Alabama	0.5194	0.5815
Alaska	0.6731	0.8809
Arizona	0.6117	0.6523
Arkansas	0.6076	0.5922
California	0.6095	0.6023
Colorado	0.6747	0.7349
Connecticut	0.7262	0.8198
Delaware	0.6008	0.6079
District of Columbia	0.6429	.....
Florida	0.5455	0.5496
Georgia	0.6174	0.5996
Hawaii	0.6498	0.7848
Idaho	0.7100	0.7257
Illinois	0.6055	0.6643
Indiana	0.7174	0.7392
Iowa	0.7118	0.7290
Kansas	0.6590	0.7555
Kentucky	0.6030	0.5904
Louisiana	0.6001	0.6339
Maine	0.6815	0.6640
Maryland	0.7315	0.7333
Massachusetts	0.6993	0.7797
Michigan	0.6214	0.7019
Minnesota	0.7073	0.7762
Mississippi	0.6301	0.6376
Missouri	0.5989	0.6416
Montana	0.6694	0.7304
Nebraska	0.6232	0.7383
Nevada	0.5141	0.6392
New Hamshire	0.7298	0.7469
New Jersey	0.6823	.....
New Mexico	0.5939	0.6106
New York	0.6270	0.7102
North Carolina	0.6560	0.5987
North Dakota	0.7175	0.7089
Ohio	0.7129	0.7016
Oklahoma	0.6111	0.6355
Oregon	0.6747	0.6872
Pennsylvania	0.5684	0.6402
Puerto Rico	0.5959	0.7761
Rhode Island	0.7797	.....
South Carolina	0.5975	0.5795
South Dakota	0.6142	0.6991
Tennessee	0.5642	0.5681
Texas	0.6134	0.7097
Utah	0.6636	0.6854
Vermont	0.7698	0.7129
Virginia	0.6019	0.6018
Washington	0.6933	0.7362
West Virginia	0.6474	0.6071
Wisconsin	0.7769	0.7733
Wyoming	0.7400	0.7458

APPENDIX A—REGULATORY IMPACT ANALYSIS

I. Introduction

Executive Order (E.O.) 12291 requires us to prepare and publish an initial regulatory impact analysis for any proposed rule that meets one of the E.O. criteria for a "major rule"; that is, that would be likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In addition, we generally prepare an initial regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a proposed rule would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we treat all hospitals as small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare an initial regulatory impact analysis for any proposed rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 603 of the RFA. With the exception of hospitals located in certain rural counties adjacent to urban areas, for purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds located outside of a Metropolitan Statistical Area or New England County Metropolitan Area, as modified for purposes of the prospective payment system in accordance with the provisions of 601(g) of the Social Security Amendments of 1983 (Pub. L. 98–21). Section 4005(a) of the Pub. L. 100–203 (which revised section 1886(d) of the Act) specifies that hospitals located in certain rural counties adjacent to urban areas are deemed to be located in the adjacent urban area. We have identified 52 hospitals, some of which may be considered small, which we are classifying as urban hospitals.

It is clear that the changes proposed in this document would affect both a substantial number of small rural hospitals as well other classes of hospitals, and the effects on some would be significant. Therefore, the discussion below, in combination with the rest of this proposed rule, constitutes a combined regulatory impact analysis and regulatory flexibility analysis in accordance with E.O. 12291 and the RFA.

II. Objectives

We expect these proposed changes to further Congress' original objectives in establishing the prospective payment system. The prospective payment rates create incentives similar to the incentives a hospital faces in pricing and marketing its services in a conventional market. By paying similar hospitals the same rate for similar services, we let hospitals know in advance the amount they will be paid per discharge. We give them both an opportunity to receive this payment, regardless of their specific cost experience, and a strong incentive to operate more efficiently, thus minimizing unnecessary costs. Unlike a cost limitation approach, which achieves savings largely by disallowing Medicare payment for costs that are not reasonable or that are in excess of a specific limit, the prospective payment system achieves savings by intensifying hospitals' incentives to operate efficiently. Thus, our objectives include—

- Restructuring hospitals' economic incentives;
- Basing payment on a system that identifies the product being purchased more accurately than cost reimbursement;
- Reinforcing the role of the Federal government as a prudent buyer of services; and
- Restraining the rate of hospital cost increases, thus moderating the outflow of expenditures from the Medicare trust fund while maintaining high quality care.

In addition, we share national goals of deficit reduction and restraints on government spending in general. We believe these proposals would further all of our goals while maintaining the financial viability of the hospital industry and ensuring access to high quality care for beneficiaries.

We also expect these proposed changes to further these objectives while avoiding or minimizing unintended adverse consequences and ensuring that the outcomes of this payment system are, in general, reasonable and equitable. Thus, the intent is to refine further the prospective payment system without undercutting our objectives.

III. Limitations of Our Analysis

From the outset of the prospective payment system, we have developed increasingly sophisticated models of how the prospective payment system works. Nevertheless, at present, we still have no adequate way to model, and therefore to quantify, many of the potential behavioral changes in response to the prospective payment system on the part of hospitals, hospital managers and employees, physicians, suppliers, or beneficiaries. Further, changes in the private sector, related to both the supply of, and demand for, health care services, interact with the behavioral incentives created by the Medicare payment system. We do not have the capability to model such

behavioral changes or interactions among the various parties participating in the market place.

We continue to study many aspects of the prospective payment system with the intent of obtaining more adequate data to better assess behavioral changes in response to the incentives of the payment system. Examples of these initiatives include various reports to Congress, as required by section 603 of Pub. L. 98–21, sections 9113 and 9114 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272), and section 9305 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509). These reports examine many issues, including the need for and the feasibility of developing severity of illness measures and the quality of post-acute care. We are also required, under section 603(a)(2)(A) of Pub. L. 98–21, to study and report annually to the Congress on the impact of the prospective payment system.

In addition to these initiatives, we and others (such as ProPAC and the Office of the Inspector General) have undertaken a variety of studies on the effects of the prospective payment system, such as examining the effects of the payment system on different classes of hospitals. In spite of these efforts, our ability to attribute causability to particular regulations is still limited. The complexity of the prospective payment system itself, along with numerous other rapidly occurring changes in the hospital environment, make it virtually impossible for us to isolate the effects of any one change in our policy, much less the effects of the entire prospective payment system on the health care industry.

Therefore, as has been the case in previously published regulatory impact analyses, the following quantitative analysis is limited to presenting the projected effects of proposed policy and rate changes on current and projected payment rates. In the analysis that follows we examined the effects of both statutory and proposed policy changes on hospital payments by projecting estimated payments under each set of policy changes on to the current payment amounts. That is, we projected the effects of each policy change on payments while holding all other payment variables constant. Thus, we are not attempting to predict behavioral responses to our proposals, and we are not generally accounting for changes in such exogenous variables as admissions, lengths of stay, or case mix.

In view of the difficulty we have in quantifying impacts and attributing causality, we believe that the approach we are taking in the specific impact discussions below is the most feasible one. Wherever possible, we have included quantitative representations of proposed changes. As with previously published impact analyses, we are soliciting comments and information about the anticipated effects of these proposed changes on the prospective payment system.

IV. Hospitals Included in and Excluded From the Prospective Payment System

Hospitals began operating under the prospective payment system with the start of their cost reporting period beginning on or after October 1, 1983. Further, since September 1985, both Massachusetts and New York have terminated the waivers under which they were excluded from the Medicare prospective payment system, and hospitals in those States have entered that system. (Massachusetts hospitals came under the Medicare prospective payment system in October 1985, while New York hospitals began receiving Medicare prospective payments in January 1986.) As of March 15, 1988, about 5650 hospitals (85 percent of all Medicare-participating hospitals) were operating under the prospective payment system.

With the enactment of section 9304 of Pub. L. 99–509, which added section 1886(d)(9) to the Act, the 58 acute care hospitals located in Puerto Rico began receiving payments under the prospective payment system effective with discharges occurring on or after October 1, 1987. Also, effective with cost reporting periods that began on or after October 1, 1987, alcohol/drug hospitals and units that had been excluded from the prospective payment system under § 412.22(c) of the regulations began receiving Medicare prospective payments. Only 163 short term acute care hospitals remain excluded from the prospective payment system under sections 1814(b)(3) and 1886(c) of the Act (in Maryland and New Jersey, respectively) or demonstration projects (Rochester and Finger Lakes regions of New York State).

As of March 15, 1988, 864 Medicare hospitals were excluded from the prospective payment system and continue to be paid on the basis of reasonable cost reimbursement, subject to limits on the rate of their cost increases for FY 1989. These hospitals include psychiatric, rehabilitation, long-term care, and children's hospitals. Another 1,523 psychiatric and rehabilitation units in hospitals subject to the prospective payment systems are excluded from the prospective payment system as of the same date. These units, too, are paid on the basis of reasonable cost reimbursement subject to limits on the rate of their cost increases.

More than hospitals are being paid on various special bases under the prospective payment system, as required by statute. They include sole community hospitals, rural referral centers and cancer treatment and research hospitals that meet certain conditions. In addition, there are some 1,270 hospitals that are receiving additional payments on the basis of being classified as disproportionate share hospitals and about 1,090 hospitals receiving additional payments for the indirect cost of medical education. There are about 500 hospitals that qualify for additional payments under both categories.

V. Impact on Excluded Hospitals and Units

As noted above, 864 Medicare hospitals and 1,523 units in hospitals included in the prospective payment system currently are paid on a reasonable cost basis subject to the rate-of-increase ceiling requirement of § 413.40. For cost reporting periods beginning in FY 1989, these hospitals would have their individual target amounts increased by the hospital market basket percentage increase. We are projecting an increase in the hospital market basket of 4.8 percent.

The effect this would have on affected hospitals and units would vary depending on each one's existing relationship of costs per discharge to its target amount, and the relative gains in productivity (efficiency) the hospital or unit is able to achieve. For hospitals and units that incur per discharge costs lower than their target amounts, the primary impact would be to affect the level of incentive payments made under § 413.40(d). A hospital may receive incentive payments for incurring costs that are less than its target amount, but may not receive payments for costs that exceed the target amount. Although a lower update may be justified, we expect the increased ceiling on payments would maintain existing incentives for economy and efficiency experienced by excluded hospitals and units.

VI. Analysis of the Quantifiable Impact of Proposed Changes Affecting Rates and Payment Amounts

A. Basis and Methodology of Estimates

The data used in developing the quantitative estimates of changes in payments in Table I, below, are taken from FY 1987 billing data and hospital-specific data for FY 1985 and FY 1986.

As in previous analyses, we propose to compare the effects of changes being proposed in this document for FY 1989 to our estimate of the payment amounts in effect for FY 1988.

Although many of the FY 1988 payment parameters have been in effect only since April 1, 1988, for purposes of this impact analysis, we are assuming that all payment parameters have been in effect since October 1, 1987. Moreover, section 4002(e)(1)(B) of Pub. L. 100–203 specifies that the update factors applicable to rates for discharges occurring on or after April 1, 1988 are deemed to have been in effect since October 1, 1987 for purposes of determining updated payment rates for discharges occurring in FY 1989. Thus, in the following analysis, base year (FY 1988) payment amounts are based on the parameters that were in effect on April 1, 1988.

In addition, we have treated all hospitals in our database as if they had the same cost reporting period; that is, a cost reporting period coinciding with the Federal fiscal year. Our model does not take into account any prospective behavioral changes in response to these proposals.

The tables and the discussion that follow reflect our best effort to identify and quantify the effects of the changes being proposed in this document. It should be noted, however, that as a result of gaps in our data, we are unable to quantify some of the effects of the proposed rule. Also, we could not utilize all the hospitals in the recalibration or outlier data sets for modeling the impact analysis because in some cases the hospital-specific data necessary for constructing our impact model were missing. Data on hospital bed size and type of control were the data elements most frequently missing. The absent data prevented us from properly classifying and displaying these hospitals in the impact analysis. The missing data, however, did not prevent us from using the discharges from these hospitals in recalibrating the DRG weights or calculating the proposed outlier payments.

The analysis that follows examines each of the proposed major changes separately. That is, all variables except those associated with the provision under examination were held constant so as to display the effects of each provision compared to baseline provisions. In columns 1, 2, and 3, we are comparing estimated FY 1988 payments under current policy with the FY 1988 payments that would result if only the specified changes were made. To isolate the impact of the proposed changes in the outlier policy displayed in column 4, we compared FY 1989 payment amounts that we estimate would be paid under the proposed outlier policy (as described in section IV.E. of the preamble to this proposed rule) against FY 1989 estimated payments under current outlier policy with updated outlier thresholds.

Column 5 presents the combined effect of all changes being proposed in this rule. That is, column 5 displays the combined effects of the previous four columns as well as the FY 1989 update factor (which, given a weighted average of 2.7 percent increase, generally has the largest effect), and the provision to deem urban the hospitals located in certain rural counties adjacent to MSAs or NECMAs. As such, this last column is the only one in which the effects of the payment policy changes on simulated FY 1989 payments are reflected.

Consistent with the display of the impact presented in Table I, the following discussion is divided into three parts. The first part (columns 1 and 2) describes the effects of two major changes mandated by the statute: Annual changes to the DRG classification system and recalibration of the DRG weights required under section 1886(d)(4)(C) of the Act; and changes to payments for disproportionate share hospitals required under section 1886(d)(5)(F) of the Act and adjustments to the rates in accordance with section 1886(D)(3)(C)(ii) of the Act, all of which were amended by section 4003 of Pub. L. 100–203. The second part of the discussion (columns 3 and 4) deals with the effects of changes to the wage index and outlier payment policy we are proposing, while the final section discusses the combined effect of all provisions being proposed in this rule.

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TABLE I--ESTIMATED IMPACT OF THE PROPOSED CHANGES IN THE INPATIENT HOSPITAL PROSPECTIVE PAYMENT SYSTEM

	Number of Hospitals 1/	Reclassification and Recalibration 2/ (1)	Statutory Teaching and DSH Changes 3/ (2)	Proposed Wage Index Change 4/ (3)	Proposed Outlier Payment Changes 5/ (4)	Combined Effect of All Changes 6/ (5)
All Hospitals	5636	0.0	-0.5	0.1	0.0	1.7
Urban by Region						
New England	184	0.0	-0.7	0.8	-0.7	1.2
Middle Atlantic	369	0.0	-0.7	0.3	-1.8	-0.6
South Atlantic	432	0.1	-0.5	0.3	0.1	1.7
East North Central	511	0.1	-0.6	-0.5	0.3	1.2
East South Central	170	0.1	-0.6	0.2	-0.1	1.5
West North Central	198	0.0	-0.6	0.3	0.9	2.5
West South Central	379	0.1	-0.4	-0.6	1.1	2.2
Mountain	125	0.0	-0.3	0.3	1.0	3.1
Pacific	523	0.1	-0.2	0.4	0.7	2.9
Puerto Rico	52	0.0	0.5	0.1	-0.7	1.7
Rural by Region						
New England	61	-0.2	-0.5	0.8	0.5	3.4
Middle Atlantic	102	-0.2	-0.4	-0.2	-0.5	2.6
South Atlantic	356	0.0	-0.3	0.5	-0.2	3.4
East North Central	365	-0.2	-0.3	0.1	0.2	4.2
East South Central	323	0.1	-0.2	0.6	-0.1	3.2
West North Central	592	-0.3	-0.2	0.1	0.2	3.0
West South Central	444	0.0	-0.2	-0.7	0.0	1.9
Mountain	271	-0.2	-0.3	-0.9	0.5	2.3
Pacific	171	-0.3	-0.2	-0.3	0.2	2.3
Puerto Rico	8	-0.2	0.1	-0.0	-0.1	1.4
Large Urban Areas (populations over 1 million)	1470	0.1	-0.4	0.0	-0.2	1.4
Other Urban Areas (populations with 1 million or smaller)	1473	0.0	-0.7	0.2	0.3	1.7
Urban Hospitals	2943	0.1	-0.5	0.1	0.0	1.5
0-99 Beds	668	-0.1	-0.4	0.4	0.2	2.2
100-199 Beds	749	-0.1	-0.3	0.2	-0.3	1.5
200-299 Beds	574	0.0	-0.3	0.1	0.0	1.7
300-399 Beds	611	0.1	-0.5	0.1	0.0	1.5
400 + Beds	267	0.2	-0.9	-0.1	0.1	1.2
Rural Hospitals	2693	-0.1	-0.3	0.1	0.0	3.1
0-49 Beds	1079	0.0	-0.1	0.0	0.2	3.6
50-99. Beds	857	-0.1	-0.1	0.0	0.1	3.7
100-149 Beds	382	-0.2	-0.1	0.0	0.0	3.5
150-199 Beds	154	-0.2	-0.3	-0.1	0.1	2.6
200 + Beds	158	-0.1	-0.6	0.3	-0.2	2.1

Table I - continued

	Number of Hospitals 1/	Reclassification and Recalibration 2/ (1)	Statutory Teaching and DSH Changes 3/ (2)	Proposed Wage Index Change 4/ (3)	Proposed Outlier Payment Changes 5/ (4)	Combined Effect of All Changes 6/ (5)
Teaching Status						
Non-Teaching	4542	-0.1	-0.2	0.2	0.1	2.3
Resident/Bed Ratio						
Less than 0.25	894	0.1	-0.6	0.0	0.1	1.4
Resident/Bed Ratio						
0.25 or Greater	200	0.5	-1.1	0.1	-0.4	0.7
Disproportionate Share Hospitals (DSH)						
Non-DSH	4378	-0.1	-0.5	0.1	0.3	2.1
Urban DSH 100						
Beds or More	913	0.2	-0.6	0.1	-0.5	1.1
Urban DSH fewer than 100						
Beds	95	0.3	-0.5	0.5	-0.7	1.2
Rural DSH	250	0.2	0.2	0.1	-0.3	2.9
Urban Teaching and DSH						
Both Teaching and DSH	498	0.3	-0.8	0.2	-0.6	0.8
Teaching only	519	0.0	-0.7	-0.1	0.4	1.5
DSH only	510	0.0	-0.1	0.1	-0.3	1.6
Nonteaching and Non-DSH	1416	-0.1	-0.3	0.3	0.2	2.0
Other Special Status (rural)						
Sole Community Hospitals (SCHs)	300	-0.1	-0.3	0.0	0.1	3.2
Rural Referral Centers (RRCs)	200	-0.2	-0.7	0.2	-0.1	1.8
Both SCH & RRC	21	-0.4	-0.7	0.1	0.2	3.3
Type of Ownership						
Voluntary	3025	0.0	-0.5	0.1	0.0	1.6
Proprietary	913	0.0	-0.2	0.2	-0.3	1.8
Government	1556	0.2	-0.4	0.2	0.2	2.4

1/ Because data necessary to classify some hospitals by category were missing, these hospitals were omitted from the analysis. Therefore the total number of hospitals in each category may not equal the national total.

2/ Recalibration of the DRG weights and classification changes are based on FY 1987 billing data and charges and are performed annually in accordance with section 1886(d)(4)(C) of the Act.

3/ This column reflects the combined effects of adjustments to the indirect medical education cost factor required under section 1886(d)(5)(B)(ii) of the Act, and changes to payments for disproportionate share hospitals required under section 1886(d)(5)(F) of the Act, and adjustments to the rates in accordance with section 1886(d)(3)(C)(ii) of the Act, all of which were amended by section 4003 of Pub. L. 100-203.

4/ The proposed wage index constructed entirely from 1984 hourly wage data was compared to the current wage index which is based on a blend of 1982 and 1984 data.

5/ Outlier payments under the proposed outlier policy changes were compared to payments under the present outlier payment policies. In both cases, FY 1987 data and updated thresholds were used.

6/ This column shows the combined effects of all the previous columns as well as the effects of the update factors mandated under section 4002(a) of Pub. L. 100-203 which amended section 1886(b)(3)(B)(i) of the Act, and the effects of section 4005(a) of Pub. L. 100-203 which amended section 1886(d)(8) of the Act, to require that the hospitals located in certain rural counties adjacent to MSAs or NECMAs be deemed urban. Also FY 1988 baseline payments reflect an estimate of outlier payments at 5.5 percent in contrast to the 5.1 percent set for the outlier pool. Because our total FY 1989 estiamted payments do not perpetuate this 0.4 percent excess of outlier payments relative to the outlier pool, this column reflects the 0.4 percent reduction in total prospective payments necessary to ensure equality between projected outlier payments and the outlier offsets. In addition, this column captures certain interactive effects which we are not able to quantify.

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B. Statutory Changes

Columns 1 through 3 of Table I display the estimated percentage change in payments that would result from each of the statutory changes that become effective on October 1, 1988 as mandated by Pub. L. 100–203: That is, changes in the amounts paid to hospitals qualifying as disproportionate share hospitals and in the factor used to calculate the amount paid to hospitals for the indirect cost of graduate medical education; and the reclassification of hospitals in certain rural counties adjacent to urban areas. We also include among the statutory changes the required annual recalibration of DRG weights. The combined effects of all changes mandated by statute are shown in column 3.

In Column 1, we present the combined effects of revising the current DRG definitions and recalibrating the weights to reflect changes in practice patterns, modes of treatment and new technologies as required each year by section 1886(d)(4)(C) of the Act. These changes are described in section II of the preamble to this proposed rule. (The DRGs that have been recalibrated for this analysis also reflect, insofar as possible, the proposed changes to the DRG classification system also set forth in section II of the preamble of this proposed rule.) That is, we compared estimated FY 1988 payments to hospitals using an estimate of each hospital's case-mix index based on the current DRG classifications and weighting factors with simulated payments using an estimate of each hospital's case-mix index based on the proposed DRG classifications and recalibrated weighting factors.

Overall, the effect of reclassification and recalibration, applied to estimated FY 1988 payments, would be negligible. Analyzing the effects geographically, however, column 1 shows that urban hospitals would benefit by about 0.1 percent and rural hospitals would experience payment reductions of the same amount. Teaching hospitals with large teaching programs would receive a 0.5 percent increase. Small rural hospitals (under 50 beds) would experience no significant change as a result of these changes.

Column 2 displays the combined effects of the changes mandated under section 4003 (a) and (c) of Pub. L. 100–203. Section 4003(a) of Pub. L. 100–203 (which revised section 1886(d)(B)(ii) of the Act) reduces the education adjustment factor used to determine the indirect medical education payment from approximately 8.1 percent to approximately 7.7 percent for discharges occurring on or after October 1, 1988 and before October 1, 1990.

Section 4003(c) of Pub. L. 100–203 amended section 1886(d) of the Act to provide the following changes to the disproportionate share adjustment:

- The adjustment is extended to discharges occurring before October 1, 1990.
- For hospitals that qualify for a disproportionate share adjustment because they receive more than 30 percent of net patient revenues from State and local governmental sources for the care of indigent patients, the payment adjustment factor is increased from 15 percent to 25 percent.
- For hospitals that have 100 or more beds and are located in an urban area and for hospitals that have 500 or more beds and are located in a rural area, the 15 percent cap on the amount of the payment adjustment is eliminated.

The values in column 2 also reflect the effects of restandardization of the rates for the revised indirect medical education factor and, using the latest available data, estimated payments to hospitals serving a disproportionate share of low income patients in accordance with the revised payment formula. Also, we had to adjust the rates in order to generate program savings consistent with the reduction in the indirect medical education factor pursuant to section 1886(d)(3)(C)(ii) of the Act (see section II.A.4.c of the Addendum to this proposed rule).

The overall effect of changing the indirect teaching adjustment factor and payments to disproportionate share hospitals would be to reduce payments, nationally, by about 0.5 percent. By far, the greatest burden of the payment reductions would fall on urban area hospitals. On average, these hospitals could expect a 0.5 percent reduction while rural area hospitals would experience only a 0.3 percent payment reduction. Urban hospitals in New England and Middle Atlantic regions would receive the largest reductions in payments of about 0.7 percent while rural hospitals in several regions would experience reductions averaging around 0.2 percent. Among the various types of hospitals, those urban hospitals that qualify for both disproportionate share and indirect medical payments would sustain a nearly 0.8 percent reduction in payments. Urban hospitals with 400 beds or more are projected to receive a nearly 0.9 percent reduction in payments.

Small rural hospitals would experience a slight decline in payments of about 0.1 percent. Rural hospitals with 200 or more beds, however, could expect a decrease of about 0.6 percent.

C. Other Proposed Changes

Columns 3 and 4 of Table I show the estimated effects of changes to the wage index and outlier payments that we are proposing in this document.

We are proposing to base the wage index required under section 1886(d)(3)(E) and 1886(d)(9)(B)(vi) of the Act entirely on 1984 gross hourly wage data rather than on a blend of an index based on 1982 gross hourly wage data and one based on 1984 data (as described in section III of the preamble to this proposed rule). The overall effect of the proposed changes to the wage index would be to increase payments, nationally, by about 0.1 percent. Both urban and rural hospitals in the New England region are expected to receive the highest increase under the proposed wage index. We estimate that these hospitals would gain, on average, about 0.8 percent.

Among hospital categories, urban disproportionate share hospitals with fewer than 100 beds would experience an increase of about 0.5 percent. The largest decline in payments resulting from the proposed wage index among types of hospitals would occur among teaching hospitals that do not receive disproportionate share payments. The projected effect of the proposed wage index on these hospitals is a reduction of about 0.1 percent in prospective payments. Small rural hospitals would see no appreciable difference in their payments as a result of this proposed change.

As a result of the changes to outlier payments that we are proposing in §§ 412.80, 412.82, 412.84 and in the new § 412.86 of the regulations, many day outlier cases whose adjusted charges exceed the cost outlier threshold would be paid using the cost outlier methodology. Also, because we are proposing to increase the marginal cost factor from 60 percent to 80 percent for cost outlier cases (with the exception of cases falling into the six burn-related DRGs described in section IV.E.3 of the preamble to this proposed rule), hospitals would generally receive higher payments for these types of cases. For both day and cost burn outlier cases that occur between April 1, 1988 and September 30, 1989, section 4008(d)(1)(A) of Pub. L. 100–203 specifies the use of a 90 percent marginal cost factor in computing payment. Because we are required, under section 1886(d)(5)(A)(iii) of the Act, to ensure that outlier payments are between five and six percent of total payments, the necessary corollary of improving payment for outlier cases is that the total number of cases for which we may make outlier payments would have to be decreased.

As discussed in section IV.E. of the preamble to this rule, we have proposed several changes in the methodology to be used to indentify and pay for outlier cases in FY 1989—an increase to 80 percent in the marginal cost factor for cost outliers, the greater of the day or cost outlier payment amounts to determine payment for the most expensive day outliers (that is, those whose charges adjusted to cost exceed the cost outlier threshold); and the use of hospital-specific cost-to-charge ratios to adjust charges to cost for discharges from each hospital.

The reasons for these changes were also discussed in section IV.E. of the preamble. Based on our research findings that the average discrepancy between cost and payment is larger for cost outliers than for day outliers ($9,600 for cost outliers versus $7,700 for day outliers, we concluded that the current marginal cost factor for cost outliers is too low. In light of the extremely large losses, $13,300 per case, represented by day outliers that also meet the cost outlier criteria and our desire to avoid potentially sharp drops in payment when outlier cases exceed a second threshold, we believe that payment of the greater of the day or cost outlier amount is appropriate. Finally, as suggested by comments on the outlier changes we proposed in June 1987 and supported by our own further analysis, the use of a national cost-to-charge ration results in an inappropriate transfer of outlier monies from hosptials with above average cost-to-charge ratios to hospitals with below average cost-to-charge ratios. In order to avoid this

effect, which would be more pronounced in the context of a policy under which there is greater emphasis on cost as a criterion to identify and pay for outliers, we have proposed hospital-specific cost-to-charge ratios so as to reflect the charge practices of each individual hospital.

The essential objectives of these proposed changes are to improve the identification of outlier cases—that is, to direct outlier payment toward those cases that are truly exceptional and, therefore, in need of special treatment under the prospective payment system—and to improve the payment of these cases—that is, to direct more payment per case toward these exceptional cases. In order to minimize the reduction in the basic rates necessary to finance outlier payments, we have proposed not to increase the outlier pool above the current five percent of total DRG payments (including outlier payments).

The following table shows the effects of alternative outlier payment options on the day and cost outlier thresholds and outlier payments per outlier case for cases paid under the day and cost outlier formulas, respectively. Under the current policy, the day threshold for FY 1989 would be the lesser of 21 days or 2 standard deviations, while the cost threshold would be the greater of $19,000 or 2 times the Federal rate—substantially higher thresholds than are currently in effect. The estimated outlier payment per case would be $5,367 for day outliers and $4,682 for cost outliers. As the table shows, paying the greater of the day or cost outlier amounts and raising the marginal cost factor for cost outliers would result in substantially higher thresholds (and thus fewer outlier cases), but substantially greater payments to the most costly cases. The third line in the table, which represents our proposed outlier policy, shows that raising the number of standard deviations used in computing the day threshold allows for a substantial reduction in the fixed number of days, while substantially increasing the outlier payment per day outlier case and slightly increasing effect on cost outlier payments per case. The increase in average day outlier payments suggests that, despite the reduction from 30 to 24 days, which would increase the number of day outliers, the shift to 3.0 standard deviations eliminates a substantial number of relatively inexpensive cases from the day outlier category.

For purposes of comparison, we have also shown the estimated effects on outlier payments per case of paying all outliers that meet the cost threshold using the cost outlier methodology. The reduction in both day and cost outlier payments reflects the shift in payment of about a quarter of the day outlier cases (those whose costs exceed the cost outlier threshold) from the day outlier methodology under the proposed "greater of" policy to the cost outlier methodology. Beause payment of such cases is lower using the cost outlier methodology, it is necessary to increase the number of outliers (by reducing the thresholds) in order to ensure that estimated outlier payments would be equal to the amount by which the rates are reduced.

These estimates lend further support to our belief that changes to outlier payment policy that we have proposed for FY 1989 are appropriate means of achieving our goals of targeting outlier payments to the most costly cases and improving payments for those cases, without reducing payments to cases that meet both day and cost outlier thresholds.

TABLE II—THE EFFECTS ON DAY AND COST OUTLIER PAYMENTS OF ALTERNATIVE OUTLIER PAYMENT POLICIES AND DAY AND COST OUTLIER THRESHOLDS

Outlier policy	Outlier thresholds		Fiscal year 1989 Outlier payment per Outlier case [1]	
	Day (lesser of)	Cost (greater of)	Day outlier methodology	Cost outlier methodology
(1) Current policy	21 days or 2. S.D.[2]	$19,000 or 2x [3]	$5,367	$4,682
(2) Greater of day or cost outlier payment; marginal cost factor=.60 (day), .80 (cost)	30 days or 2 S.D.	$27,000 or 2x	4,546	15,819
(3) Same policy as (2), with alternative thresholds	24 days or 3 S.D.	$27,000 or 2x	6,064	15,989
(4) Cost outlier methodology for all day outliers that meet cost outlier threshold; marginal cost factor = .60 (day), .80 (cost).	24 days or 3 S.D.	$23,000 or 2x	4,025	12,765

[1] For purposes of this table, day outliers that also meet the cost threshold are classified as day or cost outliers on the basis of the methodology under which they would be paid.
[2] S.D.=Standard deviations above the mean of the log distribution of lengthts of stay for each DRG.
[3] 2x=2 times the adjusted Federal rate for the DRG.

Column 4 of Table I presents the impact these proposed changes would have on estimated FY 1989 payments. Because we are assuming, for purposes of this analysis, the same base payment amount for outlier payments under current and proposed policies, there is no national effect resulting from the proposed changes in outlier payment policies. The distributive effects of the proposed changes, however, are significant.

Payment to urban hospitals in the Middle Atlantic region are projected to decline by 1.8 percent while payments to urban hospitals in the West South Central region are projected to increase by about 1.1 percent over current levels. Those hospitals that have graduate medical education programs and serve a disproportionate share of the poor would see a reduction in payments of about 0.6 percent, while those hospitals with graduate medical education programs, but which do not serve a disproportionate share of the poor could expect to gain about 0.4 percent in prospective payments. Also, the proposed outlier policy change would benefit small rural hospitals by increasing their payments by about 0.2 percent.

E. Combined Effects

Column 5 shows the FY 1989 rates that incorporate the combined effects of all changes. In addition to the changes described in columns 1–4, column 5 also reflects the update factors mandated under section 4002(a) of Pub. L. 100–203 which amended section 1886(b)(3)(B)(i) of the Act. Based on a projected 4.8 percent increase in the hospital market basket, the update factor is——

• 3.3 percent for hospitals located in rural areas;

• 2.8 percent for hospitals located in large urban areas (populations of over 1 million); and

• 2.3 percent for hospitals located in other urban areas.

This column also shows the effects of section 4005(a) of Pub. L. 100–203 which amended section 1886(d) of the Act. The provision requires that hospitals in certain rural counties adjacent to urban areas be deemed urban if the rural county meets criteria specified in the statute.

Because Column 5 combines FY 1989 payment rates and all statutory changes, the effects displayed also include the payment offset for outlier payments required under section 1886(d)(5)(A)(iv) of the Act. This provision requires that total outlier payments should not be less than five percent nor more than six percent of total prospective payments. In our analysis, similar to FY 1988, we have set outlier thresholds and offset urban and rural rates for outliers so as to yield outlier payments for FY 1989 equal to five percent of total DRG payments. In addition, the statute requires that the urban and rural rates be offset by the same percentage of total payments that are outlier payments for urban and rural hospitals, respectively. Based on the most recent discharge data available, however, we anticipate that total outlier payments for FY 1988 will equal 5.5 percent of total prospective payments, instead of the 5.1 percent accounted for by the offsets to the current rates. Therefore, column 5 also reflects a reduction of 0.4 percent in payments compared to FY 1988 payments because the FY 1988 baseline payments are overstated by the 0.4 percent outlier payments in excess of the outlier offsets reflected in the FY 1988 standardized amounts.

Nationally, the effects of all changes we are proposing are expected to result in a 1.7 percent payment increase. As one might expect, hospitals located in rural areas would benefit the most because of the comparatively large update factor granted these providers and the smaller effect of the indirect medical education and disproportionate share changes on hospitals located in rural areas. Hospitals located in urban areas with populations of over 1 million would receive the smallest increase largely because of the negative effects of the reduction in the indirect medical education factor mandated by statute, and reductions in outlier payments as a result of the proposed policy for outlier payments. Their increase would be only 1.4 percent compared to the increase projected for hospitals located in other urban areas of 1.7 percent.

Among hospital grouped by category, hospitals that are both sole community hospitals and rural referral centers and hospitals that are only sole community hospitals are projected to receive the largest increases in payments of about 3.2 percent and 3.1 percent, respectively. Teaching hospitals with heavy teaching program (intern-to-bed ratios of greater than 0.25) would receive the smallest increase of 0.7 percent. Small rural hospitals could expect to receive an average increase in their per case payments of 3.4 percent.

We must point out that there are interactions that result from the combining of the various separate provisions analyzed in the previous columns that we are unable to isolate. Thus, the values appearing in column 5 do not represent merely the additive effects of the previous columns plus the update factors.

Table III presents the projected FY 1989 average payments per case for urban and rural hospitals and for the different categories of hospitals shown in Table I, and compares them with the average estimated per case payments for FY 1988. As such, this table presents in terms of the average dollar amounts paid per discharge the combined effects of the proposed changes presented in Table I. That is, the percentage change in average payments from FY 1988 to FY 1989 equals the percentage changes shown in the last column of Table I.

TABLE III.—COMPARISON OF PAYMENT PER CASE FISCAL YEAR 1989 COMPARED TO FISCAL YEAR 1988

	Number of hospitals	Average fiscal year 1988 payment per case	Average fiscal year 1989 payment per case	Average percentage change [1]
All hospitals	5,636	$4,267	$4,341	1.7
Urban by region:				
New England	184	4,847	4,904	1.2
Middle Atlantic	369	5,347	5,314	−0.6
South Atlantic	432	4,267	4,340	1.7
East North Central	511	4,739	4,798	1.2
East South Central	170	4,059	4,118	1.4
West North Central	198	4,692	4,810	2.5
West South Central	379	4,265	4,357	2.1
Mountain	125	4,601	4,743	3.0
Pacific	523	5,317	5,470	2.8
Puerto Rico	52	1,806	1,837	1.7
Rural by region:				
New England	61	3,401	3,517	3.3
Middle Atlantic	102	3,111	3,190	2.5
South Atlantic	356	2,840	2,936	3.3
East North Central	365	2,882	3,004	4.1
East South Central	325	2,440	2,519	3.1
West North Central	592	2,666	2,745	2.9
West South Central	444	2,555	2,603	1.8
Mountain	271	2,980	3,050	2.3
Pacific	171	3,459	3,537	2.2
Puerto Rico	8	1,281	1,298	1.3
Large urban areas (populations over 1 million)	1,470	5,130	5,200	1.3
Other urban areas (populations with 1 million or smaller)	1,473	4,299	4,370	1.6
Urban hospitals	2,943	4,721	4,792	1.5
0-99 Beds	668	3,683	3,765	2.2

TABLE III.—COMPARISON OF PAYMENT PER CASE FISCAL YEAR 1989 COMPARED TO FISCAL YEAR 1988—Continued

	Number of hospitals	Average fiscal year 1988 payment per case	Average fiscal year 1989 payment per case	Average percentage change [1]
100–199 Beds	749	4,092	4,152	1.4
200–299 Beds	574	4,414	4,491	1.7
300–399 Beds	611	4,776	4,850	1.5
400 + Beds	267	5,591	5,655	1.1
Rural hospitals	2,693	2,793	2,878	3.0
0–49 Beds	1,079	2,370	2,456	3.5
50–99 Beds	857	2,534	2,627	3.5
100–149 Beds	382	2,746	2,842	3.4
150–199 Beds	154	2,977	3,055	2.6
200 + Beds	158	3,297	3,367	2.1
Teaching status:				
Nonteaching	4,542	3,590	3,672	2.2
Resident/bed ratio:				
Less than 0.25	894	4,812	4,877	1.3
0.25 or Greater	200	7,115	7,165	0.7
Disproportionate share hospitals (DSH):				
Non-DSH	4,378	3,921	4,003	2.1
Urban DSH 100 beds or more	913	5,258	5,313	1.0
Urban DSH fewer than 100 beds	95	4,638	4,693	1.2
Rural DSH	250	2,484	2,556	2.9
Urban teaching and DSH:				
Both teaching and DSH	498	5,829	5,876	0.8
Teaching only	519	4,918	4,993	1.5
DSH only	510	4,261	4,330	1.6
Nonteaching and non-DSH	1,416	4,029	4,111	2.0
Other special status (rural):				
Sole community hospitals	300	2,787	2,876	3.1
Rural referral centers (RRCs)	200	3,415	3,476	1.8
Both SCH & RRC	21	3,542	3,658	3.2
Type of ownership:				
Voluntary	3,025	4,436	4,506	1.6
Proprietary	913	3,807	3,874	1.7
Government	1,556	3,860	3,954	2.4

[1] Discrepancies between the percentage changes shown in this column and those in column 5 of table I are due to rounding.

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APPENDIX B

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON D.C. 20201

MAR 1 1988

The Honorable Jim Wright
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Section 1886(b)(3)(B)(i) of the Social Security Act, as amended by section 4002 of P.L. 100-203 (the Omnibus Budget Reconciliation Act of 1987 (OBRA)), sets the FY 1989 applicable percentage increases for the Medicare prospective payment system (PPS) at the market basket rate of increase (MB) minus 1.5 percentage points for hospitals in rural areas, MB minus 2.0 percentage points for hospitals in urban areas with population greater than one million, and MB minus 2.5 percentage points for hospitals in other urban areas. OBRA also amends section 1886(b)(3)(B) for the purpose of establishing the target rate of increase for hospitals excluded from PPS, setting the rate of increase for these hospitals for FY 1989 at the market basket rate of increase.

Section 1886(e)(3)(B) requires that the Secretary, not later than March 1, 1988, report to the Congress his initial estimate of the applicable percentage increase that he will recommend for FY 1989. This submission constitutes the required report.

The President's FY 1989 budget was developed using applicable percentage increases consistent with current law and an assumed market basket rate of increase of 4.6 percent. Using a market basket of 4.6 percent, current law would produce updates equal to 3.1 percent for hospitals in rural areas, 2.6 percent for hospitals in large urban areas, 2.1 percent for hospitals in other urban areas, and 4.6 percent for PPS-exempt hospitals. For the PPS hospitals, the differential updates are equivalent to a general update of 2.45 percent. Based on preliminary analysis of data available at this time, I recommend that we use the PPS update factors as defined by current law.

The Bipartisan Budget Summit Agreement established the current law PPS updates only a few months ago. We have no new data that would indicate that a change from these levels is appropriate for the broad hospital classes defined -- hospitals in large urban areas, hospitals in other urban areas and hospitals in rural areas. Preliminary HHS Inspector General analyses indicate that,

while hospitals continued to have substantial operating margins on average in the third year of PPS, these levels have fallen from the high operating margins experienced in the first and second years of PPS. For that reason, we believe a PPS update somewhat higher than the updates in past years is appropriate. However, we also believe that an update factor lower than the market basket rate of increase, as contained in current law, is needed to encourage the hospital industry to better control its costs.

At this time, on the basis of available data, we do not believe that it is appropriate to use the FY 1989 PPS update as a vehicle for further reductions in hospital payments. However, there are classes of hospitals, such as teaching hospitals, for which historical Medicare operating margins have been -- and would otherwise continue to be -- appreciably higher than average. To reduce these excessive payments, the President's Budget includes a proposal to reduce the indirect medical education add-on.

Our recommendation is contingent on current projections of relevant data, such as the hospital market basket, and comes more than six months before promulgating the final percentage increase and before we have full understanding of the recommendations of the Prospective Payment Assessment Commission (ProPAC). We will make our final recommendation on the appropriate percentage increases for FY 1989 nearer the beginning of the new Federal fiscal year, based on the latest estimates of all relevant factors, including ProPAC's recommendations.

My staff and I look forward to discussing this recommendation with you in the coming weeks.

Sincerely,

Otis R. Bowen, M.D.
Secretary

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR 1 1988

The Honorable George H.W. Bush
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

Section 1886(b)(3)(B)(i) of the Social Security Act, as amended by section 4002 of P.L. 100-203 (the Omnibus Budget Reconciliation Act of 1987 (OBRA)), sets the FY 1989 applicable percentage increases for the Medicare prospective payment system (PPS) at the market basket rate of increase (MB) minus 1.5 percentage points for hospitals in rural areas, MB minus 2.0 percentage points for hospitals in urban areas with population greater than one million, and MB minus 2.5 percentage points for hospitals in other urban areas. OBRA also amends section 1886(b)(3)(B) for the purpose of establishing the target rate of increase for hospitals excluded from PPS, setting the rate of increase for these hospitals for FY 1989 at the market basket rate of increase.

Section 1886(e)(3)(B) requires that the Secretary, not later than March 1, 1988, report to the Congress his initial estimate of the applicable percentage increase that he will recommend for FY 1989. This submission constitutes the required report.

The President's FY 1989 budget was developed using applicable percentage increases consistent with current law and an assumed market basket rate of increase of 4.6 percent. Using a market basket of 4.6 percent, current law would produce updates equal to 3.1 percent for hospitals in rural areas, 2.6 percent for hospitals in large urban areas, 2.1 percent for hospitals in other urban areas, and 4.6 percent for PPS-exempt hospitals. For the PPS hospitals, the differential updates are equivalent to a general update of 2.45 percent. Based on preliminary analysis of data available at this time, I recommend that we use the PPS update factors as defined by current law.

The Bipartisan Budget Summit Agreement established the current law PPS updates only a few months ago. We have no new data that would indicate that a change from these levels is appropriate for the broad hospital classes defined -- hospitals in large urban areas, hospitals in other urban areas and hospitals in rural areas. Preliminary HHS Inspector General analyses indicate that,

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while hospitals continued to have substantial operating margins on average in the third year of PPS, these levels have fallen from the high operating margins experienced in the first and second years of PPS. For that reason, we believe a PPS update somewhat higher than the updates in past years is appropriate. However, we also believe that an update factor lower than the market basket rate of increase, as contained in current law, is needed to encourage the hospital industry to better control its costs.

At this time, on the basis of available data, we do not believe that it is appropriate to use the FY 1989 PPS update as a vehicle for further reductions in hospital payments. However, there are classes of hospitals, such as teaching hospitals, for which historical Medicare operating margins have been -- and would otherwise continue to be -- appreciably higher than average. To reduce these excessive payments, the President's Budget includes a proposal to reduce the indirect medical education add-on.

Our recommendation is contingent on current projections of relevant data, such as the hospital market basket, and comes more than six months before promulgating the final percentage increase and before we have full understanding of the recommendations of the Prospective Payment Assessment Commission (ProPAC). We will make our final recommendation on the appropriate percentage increases for FY 1989 nearer the beginning of the new Federal fiscal year, based on the latest estimates of all relevant factors, including ProPAC's recommendations.

My staff and I look forward to discussing this recommendation with you in the coming weeks.

Sincerely,

Otis R. Bowen, M.D.
Secretary

APPENDIX C—RECOMMENDATION OF UPDATE FACTORS FOR RATES OF PAYMENT FOR INPATIENT HOSPITAL SERVICES

I. Background

Several provisions of the Social Security Act (the Act) impose requirements concerning procedures for setting update factors for Medicare payment for inpatient hospital services furnished during FY 1989. The provisions apply to update factors for hospitals subject to the prospective payment system and for those excluded from the prospective payment system.

Section 1886(b)(3)(B)(i) of the Act, as amended by section 4002(a) of Pub. L. 100–203, sets the FY 1989 applicable percentage increases for prospective payment hospitals for FY 1989 as—

- The market basket percentage increase minus 1.5 percentage points for hospitals located in rural areas;
- The market basket percentage increase minus 2.0 percentage points for hospitals located in large urban areas; and
- The market basket percentage increase minus 2.5 percentage points for hospitals in other urban areas.

Section 1886(b)(3)(B) of the Act also governs the target rate-of-increase limits for hospitals excluded from the prospective payment system. Section 4002(e) of Pub. L. 100–203 amended section 1886(b)(3)(B)(ii) of the Act to provide that for FY 1989 the target rate of increase for hospitals excluded from the prospective payment system is the market basket percentage increase.

Therefore, in accordance with section 1886(d)(3)(B) of the Act, as amended by section 4002 of Pub. L. 100–203, we are prosposing to update the average standardized amounts and the target rate-of-increase limits for hospitals exlcuded from the prospective payment system as provided for in section 1866(b)(3)(B) of the Act, as set forth above.

Section 1886(e)(3)(A) of the Act requires that the Prospective Payment Assessment Commission have recommended to the Secretary by March 1, 1988 an update factor that takes into account changes in the market basket index, hospital productivity, technological and scientific advances, the quality of health care provided in hospitals, and long-term cost effectiveness in the provision of inpatient hospital services.

In its March 1, 1988 report, ProPAC recommended that a prospective payment update factor estimated to be 4.6 percent for rural hospitals and 3.8 percent for urban hospitals be approved. ProPAC did not recommend a separate update factor for hospitals in large urban areas with a population greater than one million. The components of these factors are described in detail in the ProPAC report, which is published as Appendix D in this document. We discuss ProPAC's recommendations concerning the update factors and our responses to those recommendations below.

Section 1886(e)(4) of the Act, as amended by section 4002(f) of Pub. L. 100–203, requires that the Secretary, taking into consideration the recommendations of ProPAC, recommend update factors for FY 1989 that take into account the amounts necessary for the efficient and effective delivery of medically appropriate and necessary care of high quality. Under section 1886(e)(5) of the Act, we are required to publish the recommended FY 1989 update factors that are provided for under section 1886(e)(4) of the Act. Accordingly, the purpose of this Appendix is to provide our recommendations of appropriate update factors, our analysis of the derivation of the amount of the update factors, and our responses to the ProPAC recommendations concerning the update factors.

II. Secretary's Recommendations

Under section 1886(e)(4) of the Act, we are recommending that we use the update factors determined by Congress and set forth in section 1886(b)(3)(B)(i) of the Act. (The target rate-of-increase update factor is set forth in section 1886(b)(3)(B)(ii) of the Act.) Based on the currently forecasted hospital market basket increase of 4.8 percent, the updates established by Congress would be 3.3 percent for hospitals in rural areas, 2.8 percent for hospitals in large urban areas, 2.3 percent for hospitals in other urban areas, and 4.8 percent for hospitals excluded from the prospective payment system. In recommending these increases, we have taken into account the requirement in section 1886(e)(4) of the Act that the amounts be high enough to ensure the efficient and effective delivery of medically appropriate and necessary care of high quality. In addition, as required by section 1886(e)(4) of the Act, we have taken into consideration the recommendations of ProPAC. Our responses to the ProPAC recommendations concerning the update factor are discussed below.

III. ProPAC Recommendations for Updating Prospective Payment System Payments and Our Response

ProPAC recommends that for FY 1989, the standardized amounts should be updated by the following factors:

- An average 1.1 percent reduction to reflect first-year prospective payment system cost information, with separate reductions for urban and rural hospitals of 1.2 and 0.4 percent, respectively.
- The projected increase in the hospital market basket (estimated to be 5.1 percent at the time ProPAC's report was printed).
- A discretionary adjustment factor of 1.4 percent composed of the following two allowances:

—A positive allowance for scientific and technological advancement, offset by an equal negative allowance for productivity improvement, with no adjustment for site-of-care substitution.

—A positive allowance for real case-mix change (estimated by ProPAC at 1.4 percent).

In addition, the DRG weights should be adjusted to remove any increase in the average DRG weight occurring during FY 1988 (estimated by ProPAC at 1.5 percent).

For excluded hospitals and excluded units, ProPAC recommends that an update factor separate from the prospective payment system update factor should be used to update for FY 1989 the target rate-of-increase limits applicable to the group of psychiatric, rehabilitation, and long-term care hospitals, and distinct part units excluded from the prospective payment system. The update factor should reflect the projected increase in the hospital market basket for rehabilitation, psychiatric and long-term hospitals corrected for forecast error, with no further adjustment for productivity or scientific and technological advancement. The update factor for the FY 1989 target rate-of-increase for children's hospitals should equal the market basket increase for prospective payment hospitals.

Response: HCFA is recommending for FY 1989 a prospective payment system update that is consistent with the Bipartisan Budget Summit Agreement. That update would be the market basket increase minus 1.5 percent for hospitals in rural areas, market basket increase minus 2.0 percent for hospitals in large urban areas, and market basket increase minus 2.5 percent for hospitals in other urban areas. Based on our projection of a 4.8 percent market basket increase, our recommendation would result in updates of 2.8 percent for hospitals in large urban areas, 2.3 percent for hospitals in other urban areas, and 3.3 percent for hospitals in rural areas. (If the market basket increase were 5.1 percent, as estimated by ProPAC at the time its report was prepared, then each

update factor would increase accordingly by 0.3 percent.) In additon to reflecting the Bipartisan Budget Summit Agreement, our update recommendation for FY 1989 reflects payment amounts that we believe are sufficient to ensure the continued provision of high quality care to Medicare beneficiaries.

The analysis by the Department concerning hospital profitability in the third year of the prospective payment system indicates that in FY 1986 Medicare operating margins of hospitals declined somewhat from the high operating margins experienced in the first two years of the prospective payment system. Nevertheless, we believe that an update factor that is lower than the market basket increase, as provided for in section 1886(b)(3)(B)(i)(IV) of the Act as amended by section 4002(a) of Pub. L. 100–203, is needed both to encourage the hospital industry to better control its costs and to permit the Medicare program to share in the benefits of changes in hospital operations since the inception of the prospective payment system.

We agree that the standardized amounts should be increased by less than the market basket increase to take into account the overall cost reductions realized by the hospital industry in the first two years of the prospective payment system. We also concur with ProPAC's approach of phasing in a reduction over time in order to minimize the impact on hospitals' cash flows.

We have commented previously on these matters (52 FR 22389, June 11, 1987). We refer the reader to that discussion regarding our views on incorporation of a reduction in the standardized amounts.

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APPENDIX D

PROSPECTIVE PAYMENT ASSESSMENT COMMISSION

REPORT AND RECOMMENDATIONS TO THE SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

MARCH 1, 1988

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March 1, 1988

The Honorable Otis Bowen, M.D.
Secretary
Department of Health and Human Services
Washington, D.C. 20101

Dear Mr. Secretary:

I am pleased to transmit to you the annual report of the Prospective Payment Assessment Commission as required by Section 1886 (e)(4) of the Social Security Act as amended by Public Law 98-21. This report contains 18 recommendations updating the Medicare prospective payments and modifying the diagnosis-related group (DRG) classification and weighting factors.

The report also provides information on the Commission's priorities, the status of the Medicare Prospective Payment System to date, and a description of ProPAC's agenda for coming years.

Sincerely,

Stuart H. Altman, Ph.D.
Chairman

Enclosure

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Executive Summary

In this report, the Prospective Payment Assessment Commission (ProPAC) presents recommendations to the Secretary of the Department of Health and Human Services (HHS) on ways to update and improve the Medicare prospective payment system (PPS) for fiscal year 1989. The 18 recommendations in the report reflect the collective judgment of ProPAC's 17 Commissioners regarding issues of substantial importance to beneficiaries, hospitals, and the Medicare program.

The Commission presents these recommendations to comply with its statutory mandate and to contribute to an informed and open debate about hospital payment policy under PPS. The recommendations were produced through a process of agenda setting, information collection, analysis, and deliberation that has continued since the publication of the Commission's report to the Secretary in April 1987. The proposed changes are necessary, in the Commission's view, to maintain access to high-quality health care, to encourage hospital productivity and cost-effectiveness, and to permit the adoption of innovative and appropriate technological change. The following major areas are addressed in this year's recommendations.

Updating PPS Payments—The Commission recommends an average increase in the level of PPS prices of 3.9 percent for fiscal year 1989. This would provide an increase of 3.8 percent for urban hospitals and 4.6 percent for rural hospitals.

The update factor recommendations combine several components. The largest is the PPS market basket, which is used to estimate inflation in the prices of goods and services purchased by hospitals. At the time the Commission developed its recommendation, the market basket was forecast to increase 5.1 percent in fiscal year 1989. The Commission also recommends a net negative adjustment of 0.1 percent, which takes into account scientific and technological advancement, improvements in hospital productivity, and changes in hospital case mix. The market basket and case-mix components of the update factor may change as more recent data and forecasts become available.

In addition, the Commission's recommendation includes an average 1.1 percent reduction to the standardized amounts for fiscal year 1989. This reduction is the average of a 1.2 percent reduction for urban hospitals and a 0.4 percent reduction for rural hospitals. It is the second-year portion of a reduction that the Commission recommended phasing in over three years beginning in fiscal year 1988. The three-year reduction is intended to adjust PPS payments to account for part of the difference between actual first-year PPS costs and the cost projections underlying the payment rates for that year.

Adjustments to the PPS Payment Formula—The Commission recommends several technical improvements in the calculation of PPS payments. These recommendations address: additional payments to hospitals for inpatient-related capital costs incurred at other facilities; continued assessment of indirect teaching and disproportionate share adjustments; improvements in hospital labor market areas; and revisions to and further study of Sole Community Hospital (SCH) policies.

Quality of Care—The Commission is concerned about the impact of PPS and the Peer Review Organization (PRO) program on quality of care. The Commission urges a comprehensive synthesis, analysis, and evaluation of the findings from PRO review activities.

Patient Classification and Case-Mix Measurement—The Commission continues to believe that diagnosis-related groups (DRGs) are the most appropriate available measure of hospital case mix for PPS. ProPAC reiterates its conclusion that available data can and should be used to refine and improve the DRGs. The Commission also stresses the necessity and feasibility of improving the International Classification of Disease (ICD-9-CM) coding system and its use in DRG assignment.

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DRG Classification and Weighting Factors—The Commission offers several recommendations to improve the ability of the DRGs to reflect relative resource use of hospitalized Medicare patients. It calls for recalibrating the DRG weights on the basis of charges adjusted to estimate costs rather than charges alone. ProPAC also recommends changes in the DRG assignment for cases with surgical procedures unrelated to the principal diagnosis (DRG 468), and in outlier payments for burn DRGs.

Outlier Payment Policy—The Commission believes that current outlier payment policy needs substantial reform. ProPAC recommends movement to hospital-specific cost-to-charge ratios for calculation of cost outlier payments. The Commission also prefers outlier payments that are more closely related to the actual costs of treating extraordinarily expensive cases. In addition, the Commission believes that once a more optimal payment strategy is developed, allocating a higher proportion of PPS payments to outlier cases should be considered.

AGENDA FOR THE FUTURE

The Commission's mandate requires it to recommend appropriate updates and improvements to PPS. ProPAC also assesses the impact of PPS on health care delivery and financing. In the early years of PPS, the Commission's attention was focused on achieving technical improvements in the system. Continued refinements of PPS, however, are increasingly dependent on broader-based evaluations of the program and determination of its impact.

The major Medicare and PPS issues the Commission believes require further analysis and public policy attention are:

- The level of PPS payments—refining the empirical foundation for the annual update in PPS prices;
- The distribution of PPS payments across types of hospitals—increasing the understanding of the extent to which payment differences correspond with underlying variations in resource use, and the implications this relationship may have for interhospital equity;
- The data used for analyzing PPS payments—improving the accuracy, timeliness, and comprehensiveness of data used to inform PPS payment decisions;
- Hospital behavioral responses to PPS—identifying ways in which PPS has brought about changes in the organization and management of hospital services;
- The shift of patient care services to settings outside the hospital—establishing ways to examine the full range of services provided in and outside the hospital during an episode of illness; and
- Beneficiary access and quality of care—identifying the effects of PPS on beneficiaries, including both inpatient and out-of-hospital care.

The Commission continues to be concerned about how PPS and other changes in health care delivery and financing affect the health care system. In June 1988, ProPAC's report to the Congress, *Medicare Prospective Payment and the American Health Care System*, will address these issues.

REPORT ORGANIZATION

Chapter 1 discusses the Commission's role and priorities, as well as recent changes in health care financing and public policy. This chapter also summarizes changes in the Medicare prospective payment system since its inception. Chapter 2 presents ProPAC's 18 recommendations for improving PPS. These recommendations fall into six broad areas for fiscal year 1989:

- Updating PPS payments,
- Adjustments to the PPS payment formula,
- Quality of care,
- Patient classification and case-mix measurement,
- DRG classification and weighting factors, and
- Payment for outlier cases.

Chapter 3 outlines the Commission's proposed analytic agenda. It describes the issues that ProPAC intends to study in the near future.

The Technical Appendixes, a separate volume accompanying this report, contain the descriptive and analytical studies conducted by staff and outside experts that were the basis for the Commission's recommendations.

RECOMMENDATIONS FOR FISCAL YEAR 1989

Updating PPS Payments

Recommendation 1: Amount of the Update Factor for PPS Hospitals

For fiscal year 1989, the standardized amounts should be updated by the following factors:

- An average 1.1 percent reduction to reflect first-year PPS cost information. This reduction entails separate adjustments for urban and rural hospitals of 1.2 and 0.4 percent, respectively;
- The projected increase in the hospital market basket (currently estimated to be 5.1 percent);
- A discretionary adjustment factor of 1.4 percentage points composed of the following:
  - — A positive allowance for scientific and technological advancement, offset by an equal negative allowance for productivity improvement, with no adjustment for site-of-care substitution; and
  - — A positive allowance for real case-mix change (currently estimated to be 1.4 percent).

In addition, the DRG weights should be adjusted to remove any increase in the average DRG weight occurring during fiscal year 1988 (currently estimated to be 1.5 percent).

This recommendation reflects the Commission's judgment about the appropriate increase in the level of PPS prices for fiscal year 1989. It assumes that the Commission's other concerns regarding the payment formula and the DRG weighting factors are also addressed in the fiscal year 1989 payment rates.

Recommendation 2: Adjustment to the Level of the Standardized Amounts

The update factor for fiscal years 1989 and 1990 should include an adjustment to lower the standardized amounts an average of 1.1 percent each year. The urban standardized amount should be reduced by 1.2 percent, and the rural amount by 0.4 percent. The adjustments are based on the Commission's judgment of how information on average Medicare costs per case from the first year of PPS should be incorporated into the update factor.

Recommendation 3: Allowance for Scientific and Technological Advancement and Productivity Improvement Goals, and Site-of-Care Substitution

For fiscal year 1989, the net allowance for scientific and technological advancement, productivity improvement, and site-of-care substitution in the discretionary adjustment factor should be zero.

Recommendation 4: Adjustments for Case-Mix Change

For fiscal year 1989, the update of PPS standardized amounts should be adjusted for case-mix change in the following manner:

- A positive allowance in the DAF of 0.5 percent for within-DRG case-complexity change;
- A positive allowance in the DAF of 0.9 percent for across-DRG patient-distribution change; and
- An across-the-board reduction in the DRG weights for increases in the case-mix index during fiscal year 1988, currently estimated to be 1.5 percent.

Recommendation 5: Update Factor for Excluded Hospitals and Distinct-Part Units

For fiscal year 1989, a target rate-of-increase factor, separate from the PPS update factor, should be used to update payment rates for the group of psychiatric, rehabilitation, and long-term care hospitals and hospital distinct-part units excluded from PPS. The target rate-of-increase factor should

reflect the projected increase in the hospital market basket for these hospitals, corrected for forecast error. The net allowance for scientific and technological advancement and productivity should be zero, consistent with the targets established for PPS hospitals.

For fiscal year 1989, the target rate-of-increase factor for children's hospitals and distinct-part units should reflect the projected increase in the hospital market basket for PPS hospitals, corrected for forecast error. The net allowance for scientific and technological advancement and productivity should be zero.

Recommendation 6: Timely and Accurate Medicare Cost Data

Availability of reliable and timely data is a critical priority for decision making. While significant improvements have been made in Medicare cost data timeliness, the Commission is concerned about the quality of these data for use in policy development. Therefore, the Secretary should consider improvements to the data to better reflect the costs of treating Medicare beneficiaries and to ensure comparability of data over time.

Adjustments to the PPS Payment Formula

Recommendation 7: Capital Institutional Neutrality

The Secretary should provide supplemental payments to hospitals for inpatient-related capital costs incurred at other facilities. Such supplemental payments should continue until capital is incorporated into the PPS payment rate.

Recommendation 8: Indirect Teaching and Disproportionate Share Adjustments

The indirect costs of teaching and the costs of serving a disproportionate share of low-income patients should be recognized through the use of data-based adjustments to hospital PPS payments. These adjustments should be reestimated annually using the most recent cost data available. The Secretary should support further research efforts to improve measurement of the sources of hospital cost variation. Results of this research could be employed to improve the overall structure of PPS payments.

Recommendation 9: Labor Market Area Definitions

The Commission continues to believe that the current hospital labor market area definitions are seriously flawed. These definitions can be improved substantially with currently available data. Therefore, the Secretary should adopt the following definitions of hospital labor market areas:

- For urban areas, the Secretary should modify the current Metropolitan Statistical Areas (MSAs) to distinguish between central and outlying areas. The central area should be defined using urbanized areas as designated by the Census Bureau.

- For rural areas, the Secretary should distinguish between urbanized rural counties and other rural counties within each state. Urbanized rural counties should be defined as counties with a city or town having a population of 25,000 or greater.

The implementation of improved definitions should not result in any change in aggregate hospital payments. Furthermore, these definitions should not affect the assignment of hospitals to urban or rural areas for purposes of determining standardized amounts.

Recommendation 10: Evaluation of Sole Community Hospital Policies

Using the most recent data available, the Secretary should immediately initiate an evaluation of the adequacy of current Sole Community Hospital policies for protecting isolated rural hospitals. Based on this evaluation, the Secretary should develop policies to ensure that PPS payment policy does not jeopardize Medicare beneficiaries' access to inpatient hospital care in isolated rural areas.

Recommendation 11: Clarification of Sole Community Hospital Designation Criteria

Before fiscal year 1989 begins, the Secretary should issue guidelines for interpreting the criteria used by HCFA regional offices to designate Sole Community Hospitals. The guidelines should be structured to provide greater uniformity in the standards used to designate SCHs. The Secretary should also assess whether the criteria themselves

can be improved to better define sole hospital providers of care to isolated populations.

Quality of Care

Recommendation 12: Evaluation of PRO Review and Quality of Care

The Secretary should review and synthesize the findings of Peer Review Organizations over the past four years. A major, comprehensive evaluation of PROs and their impact on quality of care should follow. The evaluation should focus on issues of access to and use of services, patterns of denials, and instances of poor quality care. Issues related to expenditure control and efficient administration of PRO contract requirements should be secondary to broader quality of care evaluative goals. The assessment should evaluate and compare criteria used to make judgments about when care is appropriate. Finally, this major study should assist the Secretary in developing and implementing mechanisms for expanded PRO review of episodes of care that are patient-oriented rather than institution-oriented.

Patient Classification and Case-Mix Measurement

Recommendation 13: Improvements to Case-Mix Measurement

The Commission continues to believe that the DRG system is the best available measure of hospital case mix for the Medicare PPS. The Secretary should continue, however, to refine the DRGs to improve the equity of hospital payments and update the DRGs to account for changing technology. The Secretary should focus on generic improvements through the use of patient data currently available from the discharge abstract. The Secretary should also consider the use of temporary, technology-specific DRGs whenever assignment to existing DRGs is not appropriate.

Recommendation 14: Coding Improvements

The Secretary should formalize a more timely, systematic, and consultative approach to consider ICD-9-CM codes for new diagnoses, procedures, devices, and other treatments. When new codes are considered and created, both coding and clinical specialists should be involved. The Commission continues to support its previous recommendations that the Secretary review Chapter 16 codes and coding procedures.

DRG Classification and Weighting Factors

Recommendation 15: Method of Recalibrating the DRG Weights

The DRG weights should be annually recalibrated on the basis of costs rather than charges. The Secretary should implement cost-based weights starting with the fiscal year 1989 recalibration. The Commission is concerned, however, about the current Medicare cost-finding methods for estimating costs. The limitations of the Medicare cost report data may, in some cases, produce imprecise DRG weights. Thus, the Secretary should verify the accuracy of the cost report data and implement changes as necessary.

Recommendation 16: Improvements to DRG 468

The Secretary should reassign cases from DRG 468 to existing surgical DRGs. These cases should be reassigned using secondary, rather than principal, diagnoses. Cases that can be reassigned to more than one DRG should be assigned to the DRG with the highest relative weight.

Recommendation 17: Burn Hospitals and Units

The Commission supports the intent of current legislation temporarily increasing outlier payments for burn DRGs. However, the Commission's preliminary analysis indicates that the increase in outlier payments is appropriate only for those cases treated in specialized burn centers and units. The Commission will examine this topic further and submit additional recommendations to the Congress and the Secretary of Health and Human Services as required by Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203.

Payment for Outlier Cases

Recommendation 18: Outlier Payment Policy

The Secretary should modify outlier payment policy to protect hospitals more adequately from the risk of extremely costly cases. Hospital-specific cost-to-charge ratios should replace a national cost-to-charge ratio for calculating cost outlier payments. Greater emphasis should be placed on costs rather than length of stay for determining outlier

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payments. As an interim step toward emphasizing costs, the Secretary should move from day outlier precedence to paying the greater of day or cost outlier payments. Furthermore, the Secretary should adjust threshold levels so that 40 to 50 percent of outlier payments are paid as cost outliers.

The Commission urges the Secretary to increase outlier contributions to the maximum of 6 percent of total projected payments allowed under the statute. A correction should be made in the following year's payments if the amount paid for outliers is different from the amount set aside. If necessary, the Secretary should seek statutory change for these initial improvements while continuing analysis to refine outlier payment policy. Further analysis should also include consideration of an increase above the 6 percent set-aside amount allowed under the statute.

Chapter 1

Introduction and Commission Priorities

Between 1965 and 1983, the nation experienced unprecedented growth in health care spending. In the early 1980s this growth was particularly rapid. Faced with rising Medicare expenditures, the Congress sought a means for controlling the rate of increase in hospital costs while maintaining access for Medicare beneficiaries. In 1983, it enacted the Medicare prospective payment system (PPS) for payment of inpatient hospital services.

PPS constituted a major reform in Medicare payment policy, moving from a retrospective, cost-based payment methodology to a fixed-price payment system. Prospective payment offered hospitals incentives for increased efficiency and productivity in the delivery of health care services. The system did this by placing hospitals at risk for operating losses while allowing them to retain revenue surpluses from prospective payments.

When it enacted PPS in Pub. L. 98-21, Congress also established the Prospective Payment Assessment Commission (ProPAC) with responsibilities related to maintaining and updating the payment system. The Commission is an independent panel providing analysis and advice on PPS issues to the executive and legislative branches of the Federal government. Its 17 members, selected by the congressional Office of Technology Assessment (OTA), have expertise in health care delivery, financing, and research. Biographies of the Commission members appear in this report's appendix.

ProPAC's analysis and decision making are guided by a set of interrelated priorities. These priorities provide the underlying basis for the Commission's recommendations on updating the payment rates and improving PPS. They include:

- Maintaining beneficiary access to high-quality health care;
- Encouraging hospital productivity and long-term cost-effectiveness;
- Facilitating innovation and appropriate technological change;
- Maintaining stability for providers, consumers, and other payers; and
- Making decisions based on reliable, timely data and information.

The Commission has developed a process and guidelines for identifying and analyzing issues related to its responsibilities. Once the Commission establishes its policy agenda, ProPAC staff provides analyses that enable the Commissioners to make informed judgments about appropriate changes to PPS. Since 1983, ProPAC has examined a number of important policy issues and has made recommendations in numerous areas. In many instances, the Secretary of the Department of Health and Human Services (HHS) has made adjustments to the system or Congress has legislated necessary changes. Other adjustments will be needed, however, to respond to a health care delivery system undergoing constant change.

Chapter 1 summarizes issues that ProPAC has addressed in the early years of PPS. It describes technical improvements to the payment system as well as activities to assess how PPS has affected American health care. It also includes a summary of recent changes in health financing and public policy related to PPS. Chapter 2 contains the Commission's recommendations for additional improvements to PPS in fiscal year 1989. Chapter 3 describes issues for further analysis and consideration.

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ASSESSING THE MEDICARE PROSPECTIVE PAYMENT SYSTEM

The Commission's work falls into two broad areas. The first includes activities directed toward developing recommendations for technical improvements in the PPS payment structure. By law, ProPAC is required to recommend annually to the Secretary of HHS an appropriate percentage change in Medicare payments for inpatient services delivered in PPS hospitals. This requirement includes a recommendation on the target rate-of-increase limits in cost reimbursement for hospitals and units excluded from PPS. The Commission also recommends changes in the diagnosis-related groups (DRGs) and their relative weights, along with other technical improvements to PPS.

The second area includes activities directed toward informing the Congress about how PPS has affected the American health care system. Among these activities are assessing the effect of PPS on the organization, delivery, and financing of patient care inside and outside the hospital. During 1987, the Commission reexamined its allocation of resources and began to devote more effort to examining these areas and determining how PPS affects hospitals and those who work in them, the Medicare program, and its beneficiaries.

These two areas, which have been important to the Commission during the past four years, are described below. Technical payment issues at both the hosptial and patient level are addressed first. Key findings on the impacts of PPS are also summarized. In June 1988, ProPAC will submit an extensive report on this subject to Congress.

Hospital-Level Payment Issues

One of the Commission's chief concerns is whether the PPS payment levels are appropriate and offer incentives that encourage hospitals to provide high-quality, cost-effective care to Medicare beneficiaries. A major focus of ProPAC's work is updating the standardized amounts— the foundation of PPS payments. The Commission also recognizes problems in other components of the payment calculation and has devoted resources to study them. The following section describes previous updates to other PPS payments as well as improvements in hospital-level payment adjustments.

Update Factor—The Commission's mandate includes developing recommendations on an appropriate annual percentage change in the Medicare payments for inpatient hospital care, called the update factor. The Commission is required to consider a number of variables, including the quality and long-term cost-effectiveness of inpatient services provided.

Given this charge, ProPAC first developed a conceptual approach for determining an appropriate update factor. It divided the update factor into two major components: changes in the hospital market basket, and changes in all other variables related to updating payments. A major portion of the latter component is referred to as the discretionary adjustment factor (DAF). The DAF was defined to include an allowance for changes in hospital productivity, scientific and technological advances, site-of-care substitution, and real case-mix change. A similar approach has also been adopted by HHS in its proposed regulations on the annual update of PPS payments.

The Commission then turned to developing empirical bases for annually determining the update factor components. ProPAC continues to refine methods for deriving empirical findings. Such methods provide a consistent basis for public discussion and Commission judgment regarding the appropriate update for PPS payments. The Commission's judgment has provided another perspective for the Congress, which has legislated the update factor for payments beginning with fiscal year 1986. Although ProPAC's recommendation is not intended to be a ceiling, hospital payment updates have fallen between its recommendation update and the Secretary's proposed update.

The rest of this section describes ProPAC analyses that have provided supporting information for determining the update factor.

Market Basket—The hospital market basket is the component of the update factor that reflects inflation in the prices hospitals pay for goods and services, or inputs. The Commission has made numerous recommendations in this area, most notably on the treatment of wages in the market basket and correction of market basket forecast errors. Analysis of the market basket led the

Commission to conclude that it appropriately reflects the impact of inflation on hospital costs.

The Secretary has implemented several technical improvements to the market basket to reflect more accurately inflation in prices of inputs. The Commission will continue to examine other market basket issues, including those related to changes in the skill mix of hospital employees.

Discretionary Adjustment Factor—The DAF component of the update relies heavily on Commission judgment regarding appropriate additions to and subtractions from the market basket. Over the past four years, ProPAC has devoted significant resources to developing an empirical foundation for its judgment on the DAF components.

In developing an adjustment for hospital productivity, the Commission has attempted to adapt basic economic concepts. That is, productivity is the ratio of outputs per unit of resource input. Further, ProPAC has defined two levels of hospital output, or product. The discharge is the final hospital product, while individual hospital department services are intermediate products. Productivity analyses have attempted to adjust for changes in the complexity of the hospital product. In addition, Commission efforts have focused on overcoming limitations in the definition and measurement of discharge and intermediate-level productivity. This information has supported ProPAC's judgment on an appropriate productivity target for hospitals.

The Commission has also developed a method for assessing the incremental inpatient operating costs related to the use of new, cost-increasing, quality-enhancing technologies and scientific advances. Continued refinement of this approach allows the Commission to reach more precise judgments about the rate at which payments should increase to reflect advances in technology and the services furnished to Medicare patients.

When PPS was implemented, policy makers recognized that hospitals had strong incentives to substitute outpatient services for those previously furnished on an inpatient basis. In many cases, this substitution is desirable and appropriate. The Commission believes, however, that the costs for such services provided in other settings and reimbursed by Medicare should be removed from the payment base. In its first three reports to the Secretary, the Commission recommended an adjustment in the update factor to account for site substitution.

The Commission considers changes in the characteristics of patients and treatments to develop its recommendation for updating hospital payments. In earlier deliberations, ProPAC distinguished these real case-mix changes from changes in medical record coding practices. The Commission's update factor recommendation ensures that coding changes are not built into future PPS payments. Real case-mix changes are separated into two components—changes in case complexity within DRGs and changes across DRGs. Both of these components affect resources used in patient care and are also considered in the Commission's update factor recommendation.

Adjustments to the Standardized Amounts—In 1986, the Commission received data on hospital costs for the first year of PPS. From these data, ProPAC determined that actual hospital costs for the first year of PPS were substantially lower than the projected costs used to set the standardized amounts in place at the time. The Commission considered these findings on cost differences in its deliberations on the update factor for fiscal year 1988. This information also contributed to the debate over PPS payment increases.

Medicare cost data provide valuable information for improving PPS and for assessing the effects of PPS on hospitals. Timely, reliable data are essential to determine changes in hospital costs. The Commission, therefore, proposed alternative strategies for sampling cost report data to obtain these data sooner. The Secretary has taken steps to make cost data for the third year of PPS available earlier. These more timely data have been considered in the Commission's update recommendation for fiscal year 1989.

Excluded Hospitals—Psychiatric, rehabilitation, pediatric, and long-term care facilities are excluded from PPS by statute. As with the PPS standardized amounts, the cost reimbursement limits for excluded hospitals are updated annually. The Commission recognizes that the types of patients seen and the treatment provided vary significantly between PPS and excluded hospitals. In addition, the incentives for excluded hospitals are far different from those for PPS hospitals. Therefore, ProPAC has annually recommended a different update

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factor for both groups of hospitals. The Congress has passed legislation establishing the authority to determine a separate update factor for excluded hospitals.

Other Hospital-Level Payment Issues—The Congress included payment adjustments when it enacted PPS to recognize certain cost differences across hospitals. The Commission has recommended changes to the policies affecting the level and distribution of payments to hospitals and has examined PPS capital payment policy. A summary of issues addressed follows.

Disproportionate Share Adjustment—When PPS was enacted, the Congress was concerned about adjusting for the higher Medicare costs per case associated with treating a disproportionately large share of low-income patients. The Commission shared this concern and initiated efforts to determine an appropriate payment adjustment for these hospitals. ProPAC worked closely with the Congressional Budget Office (CBO) and others to provide empirical analyses for identifying low-income patients. Studies were designed to determine the relationship between treating a high number of low-income patients and Medicare costs per case. On the basis of CBO analysis, Congress ultimately enacted a disproportionate share adjustment that was consistent with ProPAC's recommendations.

Rural Hospitals—The Commission believes that some PPS policies may place rural hospitals and the beneficiaries they serve at a disadvantage. Between 1981 and the first year of PPS, costs per case increased faster for rural hospitals than for their urban counterparts. For fiscal year 1988, the Commission recommended, and Congress legislated, separate urban and rural payment amount updates.

Most of the Commission's work has focused on the problems of isolated rural hospitals. In 1987, it recommended expanding protection offered to some isolated hospitals against the financial problems associated with volume fluctuation. Congress has enacted legislation making small, isolated rural hospitals eligible for payment adjustments if they experience a significant reduction in the number of Medicare patients they serve.

Labor Market Areas—PPS payments are adjusted to reflect differences in hospital wage levels across geographic areas. ProPAC has been concerned that the definitions used for labor market areas are inadequate and thus do not accurately reflect wage variations. Based on extensive analysis, the Commission has made several recommendations to refine these definitions for both urban and rural areas. Subsequently, the Secretary and CBO conducted other studies, which verified that this area needs improvement. ProPAC continues to encourage the Secretary to make changes to definitions of the labor market areas.

Capital—In developing PPS, the Congress recognized that additional study was required to include capital payments in the new system. Congress excluded capital-related costs from PPS and continued payment for these costs on a pass-through basis. Although this exclusion was intended to be temporary, capital is still reimbursed on this basis.

ProPAC has extensively analyzed capital payment issues and has made numerous recommendations for including capital in PPS. Although initially different, the Secretary's 1987 proposal was similar to the Commission's. ProPAC also conducted a study to identify hospitals that would be potentially vulnerable to new capital payment policy. This analysis indicated the need for an exceptions process, which was also later adopted in the Secretary's proposal. Meanwhile, Congress has delayed incorporating capital into PPS until 1992.

Patient-Level Payment Issues

The DRG patient classification system describes and measures hospital case mix and serves as an important basis for per-case payment under PPS. In the broadest sense, ProPAC has examined both DRGs and alternative case-mix measurement systems for potential use in PPS. The Commission's work has also focused on improving and updating the existing DRG system to better reflect relative resource consumption and to incorporate new and changing technologies and practice patterns. Significant changes in these areas follow.

Improving the Measurement of Case Mix—In the past, ProPAC has considered three general approaches to improving case-mix measurement. These include retaining the current system and

revising it incrementally; retaining the current system, but reconstructing it using more complete data; and implementing an alternative system. In its 1986 report, the Commission recommended retaining the current DRG system and outlined several incremental improvements.

Although the Commission believes that the current system is the best alternative at present, it is still concerned about significant resource use variations within DRGs. Therefore, in 1986, ProPAC initiated a systematic evaluation of the DRGs and other studies to improve case-mix measurement. These studies produced findings to support several generic improvements to the DRGs, which have since been implemented. These are described below.

Patient Age—When the DRGs were developed, patient age, typically used in combination with the presence of a complication or comorbidity (CC), was an important factor in DRG assignment. The Commission became concerned that, for the Medicare population, age was not an appropriate determinant of resource use. After further study, ProPAC concluded that defining DRGs only on the basis of the presence of CCs is more appropriate in grouping Medicare cases for PPS payment purposes. The Secretary eliminated age as a criterion for DRG classification in 1987.

Complications and Comorbidities—The Commission has undertaken several studies to evaluate the CC variable in DRG classification. Results led ProPAC to recommend revising the current list of CCs to ensure more appropriate grouping of Medicare cases for payment under PPS. HHS currently has major research under way to examine all CCs for all DRGs. Analysis includes examining those DRGs that do not currently include CCs as a basis for classification.

Hospital-Level Effects of Changes to the DRGs—ProPAC analysis indicates that refinements that reduce the variation in resource use of cases within DRGs do not necessarily have important effects on aggregate hospital payments. The Commission continues to believe, however, that improvements at both the patient level and the hospital level are essential to provide incentives that promote equity in payments. ProPAC's hospital-level analysis has provided a model for measuring and evaluating the aggregate effects of case-mix improvements. Furthermore, the analysis provides evidence regarding the respective roles of case-mix measurement deficiencies and practice pattern variations to explain hospital-level variation in resource use.

Recalibration of the DRG Weights—Recalibration is a method for periodically adjusting PPS payments to reflect changes in hospital technologies and practice patterns. The Commission's recalibration recommendations fall into two broad areas: the frequency of recalibration and the data to be used.

In 1986, the Commission recommended recalibrating the DRG weights annually to reflect the use of new technologies and other changes in practice patterns. Congress subsequently enacted legislation requiring annual recalibration beginning in fiscal year 1988.

ProPAC also initially recommended that the DRG weights be recalibrated using charge data alone. This recommendation was partly based on the fact that PPS cost data were not available in a timely fashion. Further, analysis indicated little difference between weights based on charges adjusted by costs and those based on charges alone. The recalibration process subsequently adopted by the Secretary was consistent with this approach. Because Medicare cost data are available much sooner, however, the Commission this year reevaluated its recommendation on data to be used in recalibration. The Commission decided to recommend implementation of weights based on charges adjusted by costs beginning with the next recalibration.

Coding Changes and Grouper Logic—In case-by-case analyses, the Commission has identified a significant degree of dissimilarity among cases within many of the DRGs. Much of this variation can be linked to inadequacies in the DRG system's assignment criteria.

Initial partitioning of the DRGs is based on ICD-9-CM codes for principal diagnosis and operating room procedure. The Commission has made several recommendations related to improving the use of these codes in DRG construction and assignment. For example, to describe changing technologies or practice patterns such as those associated

with cardiac pacemakers, the Commission recommended the use of new codes. ProPAC also recommended implementing administrative mechanisms to identify specific procedures or conditions when a new code cannot be developed in a timely manner. The Secretary shares ProPAC's concerns about issues related to coding and Grouper logic, and continues to devote resources toward needed improvements.

DRG Classifications and Relative Weights—The Commission has made several recommendations to address problems related to individual technologies and changing medical practice patterns. It has also examined problems of certain hospitals that provide specialized care and services. ProPAC staff as well as concerned individuals and organizations have brought issues to the Commissioners' attention. Many of the problems can be corrected incrementally, leaving the basic construction, classification, and weighting scheme of the DRG system intact.

ProPAC has conducted numerous analyses that have resulted in recommendations for technical modifications to the DRGs; other analyses have failed to substantiate the need for such changes. Efforts have also been directed toward monitoring modifications to the DRGs. An important component of these ProPAC analyses is assessing how cases involving specific technologies or practice patterns are distributed across hospitals. As new data become available, ProPAC continues to monitor and update prior analyses and recommendations.

Impact of PPS

Implementation of PPS increased pressure for substantial change in the nation's health care system. ProPAC has examined the potential consequences of new Medicare payment policy on access to, as well as the quality, delivery, and financing of, inpatient services. Key findings are described below. The Commission's June 1988 report to the Congress, *Medicare Prospective Payment and the American Health Care System*, will cover these and other topics in greater detail.

Quality—Concern for the welfare of Medicare beneficiaries is paramount in virtually all the Commission's deliberations. In 1985, ProPAC systematically reviewed anecdotal evidence and perceptions related to quality of care. The study was reassuring in that it did not support public concerns regarding significant problems related to quality of care. So far there is no evidence that quality has been compromised under PPS. The Commission and others, however, are continuing research on measuring health outcomes and assessing the effect of PPS on quality of care.

Besides the findings regarding quality of care, the perceptions study indicated that beneficiaries needed more information about PPS and rights of appeal within the system. This finding led the Commission to recommended that the Secretary and others develop and disseminate to beneficiaries and providers of care more and better-written information about PPS. In 1987, the Secretary published and made available a beneficiary information pamphlet.

Changing practice patterns have resulted in less frequent use of the inpatient facilities of the acute care hospital. Hospital incentives to decrease length of stay have contributed to this shift in the site of care. Care is being provided more frequently in outpatient centers, skilled nursing facilities (SNFs), other community facilities, and the patient's home. The care that beneficiaries receive in these alternative settings can be a primary factor in the overall quality of care during an episode of illness. For this reason, the Commission has recommended extending the focus of Peer Review Organization (PRO) activities to the entire episode of care, including post-discharge services. In addition, the Commission has recommended that PROs be required to review and monitor the quality of care for selected outpatient surgery cases.

Beneficiary Cost Sharing—The Commission's concern for the effects of PPS on beneficiaries goes beyond quality of care issues. ProPAC recommended, and the Congress enacted, changes in the formula for setting the inpatient hospital deductible to make it more consistent with the per-case orientation of PPS. Additional improvements are addressed in the catastrophic benefit package currently under congressional review.

Use, Cost, and Provision of Health Care Services—Significant changes in health care delivery have influenced the use of inpatient hospital care and total health spending. Despite

cost-containment efforts at many levels, the nation's total health care expenditures continue to comprise an increasing share of the gross national product. Substitution of outpatient services for inpatient services has contributed to varying increases in the components of health care spending, however. For several years, Medicare expenditure increases for ambulatory care have exceeded those for inpatient hospital and SNF care.

The shift in services has also led to a decline in hospital admissions since 1981, although the rate of decline has recently diminished. In addition, patient length of stay (LOS) has declined in recent years and now appears to be leveling off. Lower admission rates and shorter LOS continue to contribute to reduced hospital occupancy.

The numbers and mix of workers in the hospital industry continue to change as well. The shift in services has led to a decline in inpatient full-time equivalent (FTE) personnel, although total hospital employment increased during the first eight months of 1986. Hospitals have also changed the skill mix of personnel over time. Commission analysis of various categories of medical personnel indicates that, for most occupational categories studied, hospitals have shifted to higher skilled workers. In the nursing category, for example, RNs made up almost 50 percent of nursing personnel in 1980. By 1985, RNs had grown to 63 percent of the nursing work force. The percentage of LPNs, on the other hand, decreased in 1984 and 1985.

Distributional Effects of PPS on Hospitals—ProPAC believes that the distribution of payments to hospitals influences quality of care as much as the overall level of payment. Therefore, the Commission has devoted significant resources to examining this issue.

Past efforts include studying how the transition to national rates has affected the distribution of payments across hospitals. Results from its first-year modeling effort led ProPAC to propose a one-year delay in the transition to national rates because of possible consequences for hospitals. The Congress subsequently adopted such a delay which, when implemented, resulted in payment savings to the Federal government.

The Commission has also studied and reported on distributional differences in hospital case-mix index change and outlier cases and payments. Finally, like many others, ProPAC examined hospital financial condition, including PPS operating margins. ProPAC analysis differed, however, in that the Commission focused on the distribution rather than on the overall level of PPS margins. Further, ProPAC compared PPS margins with total and patient margins. Total margins include revenues and expenses from all sources. Patient margins exclude nonpatient sources of revenue. The information was useful in the debate over financial performance of hospitals under PPS.

This report reflects the Commission's analysis of how changes in the payment components of PPS might contribute to the objectives of the system. Despite efforts to encourage cost-effective, quality-enhancing care, Medicare inpatient costs per case and total expenditures both continue to rise at unexpected rates. While the Commission believes that PPS needs further improvement, it is also concerned about achieving the goals of cost containment and improved hospital productivity. ProPAC will examine this broader question of the overall impact of PPS in its June 1988 report to the Congress.

RECENT CHANGES IN HEALTH FINANCING AND PUBLIC POLICY

During the past year, the Federal health policy debate has been dominated by pressure to reduce the large national budget deficit. The Omnibus Budget Reconciliation Act of 1987 (OBRA 1987) contained numerous changes to the Medicare program. Some of these changes have been discussed previously, and others are highlighted below.

Concern about significant cost differences and cost changes among hospitals led the Congress to enact separate payment updates for urban and rural hospitals as well as for hospitals in large metropolitan areas. In addition, Congress instituted a regional payment adjustment under PPS. Hospitals will be paid the greater of full national rates or a blend of 85 percent national and 15 percent regional rates.

The Congress continued to defer the implementation of a new capital payment policy by prohibiting

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the Secretary from incorporating capital into PPS until fiscal year 1992. Congress reduced the capital cost pass-through, however, by discounting payments to hospitals by 12 percent for most of 1988 and 15 percent in fiscal year 1989.

OBRA 1987 also contained modifications to the disproportionate share and indirect teaching payment adjustments. Starting in fiscal year 1989, additional payments for certain hospitals serving large numbers of low-income patients are no longer limited to 15 percent. The indirect teaching allowance was reduced from 8.1 percent to 7.7 percent. ProPAC will study the disproportionate share and indirect teaching adjustments in the coming year to determine whether they appropriately account for hospital cost differences related to teaching and service to the poor. (For further discussion of this issue, see Chapter 3.)

Congress devoted significant effort to expanding the Medicare program to include catastrophic illness coverage in 1987. It has not passed legislation on this issue, however. Catastrophic coverage will likely dominate the Federal health policy debate during the second session of the Congress. ProPAC will continue to monitor congressional action on this and other major health financing policies.

In the four years since PPS implementation, numerous improvements have been made in payment policies and case-mix measurement. Additional improvements are necessary to refine the system as well as to keep pace with medical advances and changes in the organization and delivery of health care services.

Chapter 2

Recommendations

The Commission's recommendations for fiscal year 1989 are the result of an ongoing process of agenda setting, information collection, analysis, and deliberation. ProPAC selects issues for consideration to conform with its statutory mission and to contribute to an open policy debate on matters of substantial importance to beneficiaries, hospitals, and the Medicare program.

The recommendations reflect the collective judgment of the 17 Commissioners. In certain cases, however, individual Commissioners did not agree with the majority opinion.

Some recommendations, such as those pertaining to the annual update of payment rates, will be repeated in similar format every year. In other instances, the Commission has reconsidered and amplified or modified past recommendations on the basis of new evidence. In addition, certain issues were examined for which no recommendations were developed. Because these issues receive little or no attention elsewhere in the report, they are briefly discussed later in this chapter.

Concern for reducing the Federal deficit and attaining a balanced budget continued to dominate public policy debates while these recommendations were being developed. Although ProPAC did not explicitly take budgetary concerns into account, the recommendations were developed in recognition of a constrained fiscal environment. Furthermore, the Commission believes that budgetary pressures intensify the need to address distributional and technical payment issues that may bear on the quality of care furnished to Medicare beneficiaries.

The following discussion presents an overview of the Commission's 18 recommendations for fiscal year 1989. The full text and discussion of each recommendation follow the overview. Background information, statistical analyses, and alternative options considered are in the Technical Appendixes. The issue areas addressed by the Commission this year are:

- Updating PPS payments,
- Adjustments to the PPS payment formula,
- Quality of care,
- Patient classification and case-mix measurement,
- DRG classification and weighting factors, and
- Payment for outlier cases.

OVERVIEW OF THE COMMISSION'S RECOMMENDATIONS FOR FISCAL YEAR 1989

Updating PPS Payments

In making recommendations on the update factor, the Commission is required by the PPS statute to:

> . . . take into account changes in the hospital market basket . . ., hospital productivity, technological and scientific advances, the quality of care provided in hospitals (including the quality and skill level of professional nursing required to maintain quality care), and long-term cost-effectiveness in the provision of inpatient services.

The Commission must report its recommendations on the update factor to the Secretary of Health and Human Services no later than March 1 of each year, and

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. . . taking into consideration the recommendations of the Commission, the Secretary shall recommend . . . an appropriate change factor . . . which will take into account amounts necessary for the efficient and effective delivery of medically appropriate and necessary care of high quality.

Since fiscal year 1986, the Congress has set the update factor through legislation. Both ProPAC and HHS are thus advisers to the Congress on aggregate payment increases under PPS. Nevertheless, the Secretary has an opportunity to evaluate ProPAC's recommendations before the HHS proposed update is developed.

Recommendation 1 reflects the Commission's overall judgment of the appropriate change in the level of PPS prices for fiscal year 1989 based on currently available data. The Commission recommends a 3.8 increase in PPS prices for urban hospitals and 4.6 percent for rural hospitals. Several of the components of the update factor may change as new data are received before the final rules for fiscal year 1989 are published. The Commission will publicize any revisions to its recommendation on the update factor during the rulemaking period.

Recommendation 2 modifies an update factor component introduced in 1987. At that time, the Commission recommended a 5.4 percent average reduction in the standardized amounts, to be phased in over a three-year period. The recommended reduction was based on an examination of first-year PPS cost data, which showed that actual costs were substantially below the projected costs on which first-year payments were based.

The Commission lowered the annual average reduction for fiscal year 1989 from 1.8 percent to 1.1 percent. The updates hospitals received in fiscal year 1988 suggest that more than one-third of the recommended 5.4 percent average reduction to the standardized amounts was taken away. Therefore, smaller reductions for the next two fiscal years are appropriate.

Recommendation 3 consists of a combined allowance for scientific and technological advancement and productivity improvement goals and for changes in the site of services delivered to Medicare hospital inpatients. The Commission decided that the net effect of these three factors on the update should be zero.

Recommendation 4 is an allowance for changes in patient mix and complexity that are not otherwise provided for in the PPS payment structure. It also includes a recommended adjustment to offset expected change in the average DRG weight. The Commission has preliminarily estimated that these factors nearly offset one another. The net effect on the update is -0.1 percent. These estimates may be revised when more recent data become available.

Recommendation 5 satisfies the Commission's statutory obligation to recommend an update factor for hospitals and distinct-part units of hospitals excluded from PPS. These hospitals and units continue to be paid on a reasonable cost basis, subject to limits on increases in reimbursement per case. The Commission recommends a 5.1 percent update in the limit for children's hospitals and units, and a 5.2 percent update in the limit for psychiatric, rehabilitation, and long-term care hospitals and units.

Recommendation 6 underscores the Commission's conviction that Medicare cost report data should continue to be available for the update recommendation and other purposes. The Commission is impressed with the improved timeliness of the data since last year. Nevertheless, further improvements in timeliness should be sought, and measures should be taken to enhance and verify the accuracy of the data.

Adjustments to the PPS Payment Formula

The Commission continues to be concerned with technical improvements to the calculation of PPS payments. Such improvements will distribute payments more equitably among hospitals and lower the risk of access and quality problems for beneficiaries. Recommendations 7 through 11 address several potential adjustments to the methods of calculating PPS payments.

In its 1986 and 1987 reports to the Secretary, the Commission presented detailed recommendations related to paying for capital under PPS. The Congress has decided to continue to defer prospective payment for capital and has instituted reductions in capital costs reimbursed on a pass-through

basis. The Commission is concerned about the adverse incentives that this dual payment system may create over time. In Recommendation 7, the Commission advises making supplemental payments to hospitals for inpatient-related capital costs incurred at other facilities. This adjustment is intended to reduce hospitals' incentives to develop the capacity to provide all services in-house.

The indirect teaching and disproportionate share adjustments were designed to compensate hospitals for costs that are not otherwise recognized in PPS payments. In Recommendation 8, ProPAC expresses its belief that these adjustments should regularly be assessed with current data to monitor the relationship between teaching and service to the poor and Medicare costs.

In its 1985, 1986, and 1987 reports to the Secretary, the Commission recommended improving the way that hospital labor market areas are defined under PPS These definitions substantially affect the distribution of hospital payments because they are used to apply the area wage index adjustment to PPS prices for every hospital. The Commission remains convinced that the current definitions are seriously flawed and can be substantially improved with existing data Because the Secretary has not yet modified these definitions, ProPAC reiterates its proposed improvements in Recommendation 9

The welfare of beneficiaries who rely on small, isolated rural hospitals for Medicare services continues to concern the Commission. In Recommendation 10, ProPAC proposes assessing whether Sole Community Hospital (SCH) policies adequately protect beneficiary welfare in isolated rural areas. In Recommendation 11, the Commission also advises making the criteria used to designate SCHs more specific and uniform, and proposes assessing whether the criteria themselves can be improved.

Quality of Care

Concern for beneficiary welfare enters into virtually all the Commission's deliberations and resultant recommendations. In addition, many of ProPAC's resources are expended on assessing the consequences of PPS for beneficiaries, such as researching the effects of PPS on quality and beneficiary financial impact

In Recommendation 12 and its discussion, the Commission reiterates points made in previous reports. Once again, it urges the Secretary to initiate a comprehensive evaluation of PRO quality of care review activities. Information from such an evaluation would be extremely helpful in assessing the quality of care Medicare beneficiaries receive under PPS and in identifying potential problem areas for further investigation

Patient Classification and Case-Mix Measurement

The Commission continues to believe that DRGs are the most appropriate available measure of hospital case mix for PPS In Recommendation 13, ProPAC restates its conclusion that available data can be used to refine and improve the DRG system In addition, temporary, technology-specific DRGs should be used when existing DRGs do not adequately reflect changing medical technology

In Recommendation 14, ProPAC stresses again the necessity and feasibility of improving the International Classification of Disease (ICD-9-CM) coding system and its use in DRG assignment In particular, the Commission believes that a more structured and consultative process involving advice from clinical specialists should be used in adapting ICD-9-CM codes to new diagnoses and technologies.

DRG Classification and Weighting Factors

The PPS statute requires the Commission to

> consult with and make recommendations to the Secretary with respect to the need for adjustments [in classification and weighting factors] . based on its evaluation of scientific evidence with respect to new practices, including the use of new technologies and treatment modalities

These adjustments refer to the system for

> . . . classification of inpatient hospital discharges by diagnosis-related groups and a methodology

for classifying specific hospital discharges within these groups.

They also relate to the assignment of:

. . . an appropriate weighting factor [to each diagnosis-related group] which reflects the relative hospital resources used with respect to discharges classified within that group compared to discharges classified within other groups.

Recommendations 15 through 17 provide advice to improve the ability of the DRGs to reflect relative resource use of hospitalized Medicare beneficiaries. The Commission believes that the DRG weights should be based on costs, but it questions the accuracy of DRG-level estimates derived from Medicare billing and cost report data. In Recommendation 15, the Commission advises the Secretary to implement cost-based weights in fiscal year 1989. At the same time, the Secretary should take steps to verify and improve the accuracy of the cost report data and methods of adjusting charges to estimate costs.

Recommendation 16 proposes a change in the principles used to assign cases to DRG 468, which contains all cases with surgical procedures unrelated to the principal diagnosis The Commission believes that most cases should be reassigned to existing DRGs on the basis of secondary diagnosis

Recommendation 17 is concerned with burn DRGs, in which the sickest cases tend to be concentrated in burn hospitals and units. ProPAC is aware that the Congress addressed this problem in recent legislation by increasing outlier payments for the burn DRGs. The Commission will examine this issue further and will report its recommendations to the Congress and to the Secretary as required by OBRA 1987.

Payment for Outlier Cases

In Recommendation 18, the Commission states its belief that outlier payment policy is inadequate and ought to be substantially reformed ProPAC specifically recommends movement to hospital-specific cost-to-charge ratios for calculation of cost outlier payments. The Commission also believes that greater emphasis should be placed on costs rather than on length of stay, as is now the case. As an interim measure, the Commission recommends a modest shift toward greater emphasis on costs in the way outlier payments are calculated in fiscal year 1989.

In addition, ProPAC believes that consideration should be given to devoting a higher proportion of total PPS payments to outliers than current law allows, once a more optimal payment strategy is developed. The Commission recommends paying the maximum 6 percent allowed under the statute in fiscal year 1989, and adjusting payment in the future if the amount paid for outliers differs from the amount set aside.

The Commission realizes that the Secretary is contemplating a reform of outlier payment policy, and that such reform may require legislation Needed improvements in this area must be supported by thorough analysis. The Secretary should proceed with this analysis as quickly as possible so that improvements are not unnecessarily delayed In this effort, ProPAC will confer with and assist the Secretary in any way possible.

OTHER ISSUES CONSIDERED BY THE COMMISSION

The Commission addressed several issues that did not lead to recommendations These were related to new and changing technologies and practice patterns, specialty centers and units, mechanical ventilation, multiple major joint replacements, thrombolytic therapy, adjustments to the labor and nonlabor portions of the standardized amounts, Acquired Immune Deficiency Syndrome (AIDS), and hospital-specific mortality statistics.

New and Changing Technologies and Practice Patterns

In previous reports, the Commission recommended making adjustments in DRG assignment or payment for cases involving cardiac pacemakers, penile prostheses, implantable defibrillators, cochlear implants, and magnetic resonance imaging. The Secretary has made some adjustments related to implantable defibrillators, but no others

ProPAC remains convinced that payment considerations should not lead hospitals to deny patients access to quality-enhancing technologies. The Commission will therefore continue to monitor the

use of these technologies and to recommend payment adjustments where appropriate.

Specialty Centers and Units

The Commission conducted several analyses comparing the average costs that specialty centers and units incur with the PPS payments they receive. Designed to examine the relationship between costs and payments for a select group of DRGs, the analyses included the following types of specialty centers and units: burn, cancer, cystic fibrosis, dermatology, epilepsy, hemophilia, spinal cord injury, and trauma.

The Commission supports the intent of the provision in OBRA 1987 that temporarily increases outlier payments for burn DRGs. To develop a more adequate long-term solution, ProPAC will continue its analysis of burn centers and units (Recommendation 17). In addition, the Commission will continue its analyses of cancer, epilepsy, dermatology, hemophilia, and trauma centers and units.

In general, the Commission believes that improvements in outlier payment policy will ameliorate some of the financial difficulties facing certain specialty centers. For instance, the Commission is concerned about the high percentage of outlier cases treated at spinal cord injury centers. Although there were few Medicare discharges from these centers, costs were substantially higher than payments. This difference may result from the higher percentage of outlier cases treated at such centers.

In addition, the Commission is concerned about the use of Medicare DRGs by other payers whose patient populations may differ from Medicare's. ProPAC is particularly concerned that PPS may not adequately compensate hospitals for treating patients with cystic fibrosis. However, payment for other patients in the same DRGs as those with cystic fibrosis appears appropriate. While relatively few Medicare beneficiaries have cystic fibrosis, people with this disease may constitute a larger percentage of other payers' patient populations. It may thus be inappropriate for other payers to use Medicare DRGs, as currently constructed, for payment purposes. The Commission therefore hopes that other payers will carefully evaluate the use of Medicare DRGs for their beneficiaries.

The Commission is also concerned about the adequacy of payment for dermatology DRGs. ProPAC's preliminary findings indicate that, on average, payments were substantially less than costs for several of the DRGs and subgroups within the DRGs examined. The difference was greater for hospitals with specialized dermatology departments compared with other PPS hospitals. The analysis also indicates that in some DRGs part of the difference results from payments that were less than costs for both inlier and outlier cases. However, the Commission was unable to determine exactly what caused this difference. Therefore, ProPAC will continue studying this issue in the coming year. The analysis will assess the adequacy of codes and the current classification of dermatology cases. In addition, the Commission will examine the effect of potential improvements in outlier payment policy.

Finally, the Commission questions the appropriateness of PPS payment for patients with hemophilia The analyses indicate that, for these patients, some DRGs' costs exceeded payments. Part of the difference between costs and payments may result from the clotting factor concentrate required by these patients. The Commission will continue analysis of this issue in the upcoming year. (For more information on these analyses refer to Technical Appendix B.)

Mechanical Ventilation

In its April 1987 report, the Commission recommended a review of ICD-9-CM coding rules to better identify and classify patients with respiratory failure, many of whom require mechanical ventilation. Beginning with fiscal year 1988, the Health Care Financing Administration (HCFA) introduced a new diagnosis code (518.81) for the classification of respiratory failure. In addition, HCFA recognized the higher costs of care furnished patients requiring mechanical ventilation by creating DRGs 474 and 475. Patients can be assigned to these DRGs only if they have a principal diagnosis in Major Diagnostic Category (MDC) 4 and also receive a tracheostomy or require both endotracheal intubation and mechanical ventilation

The new DRGs relieve the significant previous payment inequities for most cases in MDC 4, although problems remain for some surgical patients in MDC 4 and for cases in other MDCs. The

Commission is concerned, however, with the decision to use procedure codes rather than diagnostic codes to categorize patients with respiratory failure. ProPAC will continue to monitor the experience with the new DRG and assess the appropriateness of the classification and payment amounts.

Multiple Major Joint Replacements

At the beginning of PPS, all patients undergoing one or more major joint replacement or limb reattachment procedures were assigned to DRG 209. In response to concerns that the single DRG did not recognize the significantly higher costs of patients undergoing multiple joint procedures, HCFA created DRG 471 (Bilateral or Multiple Major Joint Procedures) in fiscal year 1986. Cases having certain combinations of major lower joint replacement procedures performed within a single hospitalization are classified in this new DRG. The payment weight for cases in DRG 471 is about 50 percent higher than the weight for DRG 209.

The Commission has examined the experience to date with DRGs 209 and 471 and has concluded that the new DRG results in more appropriate clinical classification and payment amounts.

Thrombolytic Therapy

Thrombolytic therapy—using tissue plasminogen activator (TPA), streptokinase, and other thrombolytic agents—is indicated for certain patients with acute myocardial infarction (MI). While TPA is considerably more costly than other thrombolytic agents, clinical data have not fully identified the short- and long-term relative benefits and risks of the different agents. Moreover, there is a great deal of uncertainty about the effect of alternative agents on the use of other hospital resources, such as cardiac catheterization.

The Commission considered a number of payment options to reflect the increased costs of thrombolytic therapy. Among them are: paying for the costs of agents on a pass-through basis, creating a special additional payment for the care of patients receiving thrombolytic therapy, and creating one or more new temporary DRGs.

ProPAC decided to include the costs of thrombolytic therapy in the science and technology component of the discretionary adjustment factor (Recommendation 3). The Commission assumes that thrombolytics will diffuse evenly through hospital groups, as myocardial infarction is common to many demographically varied patient groups. Ultimately, recalibration will result in more appropriate DRG relative weights as the technology diffuses.

Adjustment of the Standardized Amounts for Expensive Device DRGs

In its April 1986 report, the Commission recommended adjusting the portions of the standardized amounts attributed to labor and nonlabor costs for certain DRGs that frequently involve the use of expensive devices. This recommendation was based on ProPAC analysis showing that, for these DRGs, payments relative to costs are greater for hospitals in high-wage areas than for those in low-wage areas.

ProPAC has examined the findings from research funded by HCFA on this subject. The Commission has concluded that payment problems for most DRGs involving expensive medical devices are not as substantial as it thought in early 1986. Therefore, the Commission no longer recommends an adjustment.

Acquired Immune Deficiency Syndrome

The Commission considered a number of topics related to patients with AIDS. Currently, only a small number of AIDS patients are covered by Medicare. The number may increase due to advances in therapy or changes in Medicare disability or entitlement rules. Information about inpatient hospital costs and DRG payments for Medicare AIDS patients is sparse, but recent improvements in ICD-9-CM coding should soon improve this situation.

The Commission simulated DRG assignment and examined average costs for AIDS patients. The analysis suggested that current DRG assignment and payment rules may not be appropriate for AIDS cases. The Commission will monitor changes in Medicare eligibility of AIDS patients and advances in treatment that may affect the number of Medicare-eligible patients. ProPAC will also examine the appropriateness of DRG assignment and payment as additional information becomes available.

Preliminary analysis indicates that the presence of AIDS patients has altered routine hospital infection control procedures in ways that increase the costs of caring for all patients in hospitals. The Commission decided to include an estimate of the Medicare share of such costs in the science and technology portion of the discretionary adjustment factor (Recommendation 3).

Hospital-Specific Mortality Statistics

In December 1987, HCFA released hospital-specific mortality data. Before doing so, HCFA asked ProPAC to comment. The Commission responded by letter and also sponsored additional research on this topic

The Commission supports the effort to provide more information on health outcomes through the release of hospital-specific mortality information However, the Commission encourages the Secretary to increase efforts to educate providers, beneficiaries, and others concerning appropriate use of the information ProPAC anticipates that the Secretary will continue to refine and improve the methods for calculating hospital-specific mortality statistics and will examine and develop other measures for evaluating health outcomes

The Commission believes that mortality statistics must be interpreted carefully and should serve as a screen to indicate whether additional quality review should be undertaken One of the major benefits of such data is that poor mortality experience may encourage some hospitals to examine their procedures carefully to discover whether they have overlooked ways of improving quality

RECOMMENDATIONS FOR FISCAL YEAR 1989

Updating PPS Payments

Recommendation 1: Amount of the Update Factor for PPS Hospitals

For fiscal year 1989, the standardized amounts should be updated by the following factors:

- **An average 1.1 percent reduction to reflect first-year PPS cost information. This reduction entails separate adjustments for urban and rural hospitals of 1.2 and 0.4 percent, respectively;**
- **The projected increase in the hospital market basket (currently estimated to be 5.1 percent);**
- **A discretionary adjustment factor of 1.4 percentage points composed of the following:**
  - **— A positive allowance for scientific and technological advancement, offset by an equal negative allowance for productivity improvement, with no adjustment for site-of-care substitution; and**
  - **— A positive allowance for real case-mix change (currently estimated to be 1.4 percent).**

In addition, the DRG weights should be adjusted to remove any increase in the average DRG weight occurring during fiscal year 1988 (currently estimated to be 1.5 percent).

This recommendation reflects the Commission's judgment about the appropriate increase in the level of PPS prices for fiscal year 1989. It assumes that the Commission's other concerns regarding the payment formula and the DRG weighting factors are also addressed in the fiscal year 1989 payment rates.

The Commission's recommendation would result in an estimated 3 9 percent increase in the average level of PPS prices for fiscal year 1989 This represents an estimated increase of 3 8 percent for urban hospitals and 4.6 percent for rural hospitals The recommendation includes a separate adjustment for urban and rural hospitals to account for different cost experiences reflected by the first-year PPS cost data The table below summarizes the components of the Commission's update factor recommendation.

The numerical amount of the Commission's update factor recommendation is likely to be modified as more current market basket forecasts and

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additional information regarding changes in hospital case mix become available. In particular, the Commission is concerned that current national hospital wage data and forecasts do not yet reflect a recent trend in relatively high wage increases for nurses.

Current law requires that the fiscal year 1989 PPS prices increase by the market basket minus 2.0 percent for hospitals in urban areas with a population of 1 million or more, market basket minus 2.5 percent for other urban hospitals, and market basket minus 1.5 percent for rural hospitals. These updates average to about 3.0 percent based on the current market basket forecast of 5.1 percent. Adoption of the Commission's update recommendation would thus require legislative action.

The rationale for the Commission's proposed update factor is presented in Recommendations 2 through 4 and accompanying discussions. In addition, Technical Appendix A contains background information and analysis on issues related to the update of PPS payments.

The Commission's recommended 3.9 percent update factor will lead to a larger increase in the average payment per case between fiscal years 1988 and 1989. The update factor is applied to the standardized amounts in place at the end of fiscal year 1988. Because these amounts do not take effect until April 1988—halfway through the Federal fiscal year—the average fiscal year 1988 payment will be lower than end-of-the-year rates. The Commission's recommendation assumes that the

Estimated Increase in PPS Prices For Fiscal Year 1989 Under Commission Recommendations[a]

Adjustment to level of standardized amounts			
Urban		-1.2%	
Rural		-0.4	
Average adjustment to standardized amounts			-1.1
FY89 Update Factor			
FY89 market basket forecast			5.1
Correction for FY88 forecast error			0.0
Components of discretionary adjustment factor			
Scientific and technological advancement		0.5[b]	
Productivity		-0.5[b]	
Site substitution		0.0[b]	
Real case-mix change in FY88		1.4	
DRG case-mix index	0.9		
Within DRG patient complexity	0.5		
Total discretionary adjustment factor			1.4
Estimated total change in case-mix index for FY88 (DRG weights adjusted after recalibration)			-1.5
Subtotal: Update and case-mix adjustment			5.0
Total change in PPS prices			
Urban		3.8	
Rural		4.6	
Average total change in PPS prices			3.9

a Market basket and case-mix change estimates are likely to be modified as more recent data and forecasts become available.

b In the Commission's judgment, the scientific and technological advancement, productivity, and site substitution components of the DAF should sum to zero. The individual estimates here represent only one point in a reasonable range for each component.

Congress intended that the end-of-year rates should be used as the base for applying the update factor.

In its deliberations, the Commission reviewed sample Medicare cost report data for the first three years of PPS. These preliminary data show increases in Medicare operating cost per case of about 10 percent annually during the second and third years of PPS. The increase is roughly 6 percentage points higher than inflation in the hospital market basket. American Hospital Association data suggest that this rate of increase has continued. This trend is partly related to the substantial decline in Medicare admissions during the early years of PPS. But market basket inflation and volume decline do not explain the cost increase entirely.

Revenue increases matched the 10 percent figure in the second year of PPS, but fell to about 3 percent in the third year. Consequently, the overall PPS operating margin fell from about 14 percent during the first two years of PPS to about 8 percent in the third year. Margins have probably continued to decline since then. Although this information was not used to develop a specific component of the update factor, it provided a context for the Commission's deliberations on the appropriate level of PPS payments. Trends in hospital costs, revenues, and operating margins will be examined in ProPAC's June 1988 report to the Congress, *Medicare Prospective Payment and the American Health Care System.*

Recommendation 2: Adjustment to the Level of the Standardized Amounts

> **The update factor for fiscal years 1989 and 1990 should include an adjustment to lower the standardized amounts an average of 1.1 percent each year. The urban standardized amount should be reduced by 1.2 percent, and the rural amount by 0.4 percent. The adjustments are based on the Commission's judgment of how information on average Medicare costs per case from the first year of PPS should be incorporated into the update factor.**

This recommendation reflects a judgment made by the Commission in 1987 that the update factor should include a reduction to the standardized amounts. At that time, ProPAC also recommended phasing in the reduction over a three-year period, beginning in fiscal year 1988. The Commission continues to believe the reduction is appropriate. Due to recent congressional action, however, this year's recommendation modifies the amount of the adjustment for the remaining two years of the phase-in period.

The Commission's original recommendation stemmed from a review of data from the first year of PPS. ProPAC recalculated the standardized amounts by replacing updated 1981 costs per case with first-year PPS costs per case. The newly recalculated amounts were, on average, 12.3 percent lower: 13.0 percent for urban hospitals and 7.6 percent for rural hospitals.

In developing its 1987 recommendation for a negative adjustment to the standardized amounts, the Commission considered several factors. First, part of the differential represents the costs of preadmission or post-discharge services that formerly were provided during the inpatient stay but now are delivered at other sites. Inasmuch as the costs of these services are covered elsewhere in the Medicare program, ProPAC thinks that this part of the differential should be removed from the payment rates rather than shared with the hospital industry. Moreover, errors in projecting costs and changes in hospital accounting practices may account for part of the differential.

The treatment of productivity gains was the second factor considered by the Commission. As with its previous update recommendations, ProPAC maintained that the portion of the differential attributed to productivity gains should be shared between the hospital industry and the Medicare program. Finally, the Commission considered the extent to which relatively low update factors in fiscal years 1986 and 1987 already accounted for part of Medicare's share of the cost differential. After considering these factors, the Commission recommended that 5.4 percent of the 12 percent cost differential be removed over a three-year period.

The Commission's April 1987 recommendation advised that the 5.4 percent average reduction be applied in three 1.8 percent annual increments in fiscal years 1988 through 1990. Although this year's recommendation upholds the original

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reduction, it revises the level of the adjustment for fiscal years 1989 and 1990 by taking into account the update factor hospitals received for fiscal year 1988.

ProPAC believes that in legislating the updates for fiscal year 1988, the Congress implicitly adjusted for more than one-third of the Commission's recommended reduction. That Congress set the update factor substantially below the market basket partly reflects its response to first-year PPS cost data. This year's modification of the balance of the adjustment simply incorporates another year of relatively low updates.

This modification is computed as follows. The average 1.4 percent difference between the Commission's recommended total update factor for fiscal year 1988 (2.3 percent) and the approximate average update hospitals actually will have received (0.9 percent) is applied to the balance of the Commission's adjustment. Thus, the remaining average adjustment for fiscal years 1989 and 1990 is 2.2 percent: the 3.6 percent the Commission anticipated in its original recommendation less 1.4 percent. The 2.2 percent figure averages a remaining adjustment of 2.4 percent for urban hospitals and 0.8 percent for rural hospitals. The Commission believes these amounts should be phased in over two years. Thus, the recommended average reduction for fiscal year 1989 is 1.1 percent: 1.2 percent for urban hospitals and 0.4 percent for rural hospitals.

The disparate effects that recommendations like this have across hospitals continue to concern the Commission. An across-the-board adjustment may have a detrimental effect on some hospitals, while others could absorb a larger reduction. Distributional concerns have become even more important as operating margins are falling for all hospitals. The Commission will continue to recommend improvements in the PPS payment formula and examine other factors that might cause financial difficulties for particular types of hospitals.

Recommendation 3: Allowance for Scientific and Technological Advancement and Productivity Improvement Goals, and Site-of-Care Substitution

For fiscal year 1989, the net allowance for scientific and technological advancement, productivity improvement, and site-of-care substitution in the discretionary adjustment factor should be zero.

The discretionary adjustment factor is the quantitative expression of the Commission's judgment regarding the rate at which the Medicare standardized amounts should increase or decrease beyond inflation in the hospital market basket. It incorporates particular considerations outlined in the statute establishing PPS. This adjustment also takes into consideration other factors that ProPAC determines are important. Together with the market basket inflation factor, the correction for market basket forecast error, and the adjustment to the standardized amounts, the DAF updates the payment rates from fiscal year 1988 to fiscal year 1989.

In constructing the DAF, the Commission considered four specific factors: (1) scientific and technological advancement, (2) hospital productivity improvement, (3) site-of-care substitution, and (4) real case-mix change. Each factor became a component in the Commission's overall DAF judgment.

The Commission did not attempt to quantify each component precisely. The data led the Commission to conclude that the reasonable ranges of the positive scientific and technological advancement adjustment and the negative productivity improvement adjustment are roughly equal. ProPAC set these adjustments at 0.5 percent, recognizing that other levels could also be supported. The Commission further decided that the evidence supporting the negative site substitution allowance had diminished substantially.

Based on these considerations, the Commission arrived at a judgment that the net of the first three components should be zero. ProPAC concluded that any additional expenditures for quality-enhancing, cost-increasing technologies and practice pattern changes should be balanced by

reductions in resource use associated with productivity gains and shifts in the site of care to non-inpatient settings.

When the recommended increase for real case-mix change is added into the DAF, the total fiscal year 1989 DAF recommendation represents a 1.4 percent increase to the standardized amounts. Consistent with its treatment of quality and long-term cost-effectiveness in previous recommendations, the Commission considered these factors when it set the level of the DAF and examined each of the DAF components.

The individual adjustments for scientific and technological advancement, hospital productivity, and site-of-care substitution are discussed below. The adjustment for real case-mix change is addressed in Recommendation 4.

Scientific and Technological Advancement—The scientific and technological advancement allowance is a future-oriented policy target. It provides additional funds for the hospitals to improve services by adopting quality-enhancing, cost-increasing health care advances.

As stated in previous reports, the Commission believes that advances resulting in greater hospital efficiency do not require a special allowance since they should lower hospital costs. The effects of cost-decreasing technologies are considered implicity in the productivity target.

The policy target must ultimately be based on judgment since it is impossible to enumerate all the technologies that meet this definition and to define their costs precisely. In order to develop a more informed judgment, however, the Commission examines a representative set of important new technologies and scientific developments.

Based on this examination, the Commission estimates that the standardized amounts would need to be increased by 0.3 percent. This estimate includes the effects of substituting new for existing technologies. The Commission's recommendation, however, is for a 0.5 percent increase to include technologies and changes in practice patterns not considered in its study. In the Commission's judgment, this amount represents only one point in a reasonable range for this component.

The Commission's recommendation presumes that, during fiscal year 1989, hospitals will be able to finance part of their expenditures for new technologies from productivity gains. It further presumes that Medicare capital payments will be sufficient to accommodate capital expenses associated with the implementation of cost-effective new technologies and treatments. Finally, the allowance for real case-mix change finances part of the expense associated with cost-increasing, patient-related practice pattern changes.

Hospital Productivity—The productivity allowance in the DAF is a future-oriented target. The Commission believes it is appropriate to expect hospitals to achieve modest productivity gains during the coming year.

The Commission adopted the position that it is both desirable and appropriate to translate productivity gains into price reductions. Such price reductions should be shared by the Medicare program, the Medicare beneficiaries, and the hospital industry. The Commission also determined that the Medicare program should not subsidize decreases in productivity.

The Commission's recommendation includes a minus 0.5 percent productivity allowance in the fiscal 1989 update factor for PPS hospitals. This allowance is associated with a target productivity gain of 1.0 percent, since the Commission's approach is to share the productivity gains roughly equally with the hospital industry.

Site-of-Care Substitution—This DAF allowance reflects the decrease in average inpatient costs per case associated with reductions in inpatient resources used to care for patients admitted to the hospital. Resource reductions result from the provision of non-inpatient services to patients who formerly received such services during the inpatient stay. The Commission believes that the Medicare program and the Medicare beneficiary may be overpaying for these services since the cost base used to calculate DRG payment rates includes the costs of services that are now being provided in other settings.

The allowance is not meant to reflect how the diversion of entire admissions to other settings affects average Medicare costs per case. The

impact of this type of shift is considered under the real case-mix change adjustment.

The Commission recommends no offset to the standardized amounts to accommodate site-of-care substitution in the fiscal year 1989 update factor. The lack of an adjustment reflects the Commission's belief that the potential for site-of-care substitution has diminished substantially over time.

Given the increases in both case-mix adjusted length of stay and intensity, the Commission believes that the potential for a further site substitution will largely disappear by fiscal year 1989 unless technology or the Medicare benefit structure undergo a major change. For example, if nursing home supply and benefits expand significantly, patients may be discharged earlier to these settings. It is difficult, however, to project the likelihood of these changes in fiscal year 1989. If new evidence indicates continued or renewed site-of-care substitution, the Commission will factor this information back into its DAF recommendation. (For background information supporting this recommendation, see Technical Appendix A.)

Recommendation 4: Adjustments for Case-Mix Change

For fiscal year 1989, the update of PPS standardized amounts should be adjusted for case-mix change in the following manner:

- **A positive allowance in the DAF of 0.5 percent for within-DRG case-complexity change;**
- **A positive allowance in the DAF of 0.9 percent for across-DRG patient-distributional change; and**
- **An across-the-board reduction in the DRG weights for increases in the case-mix index during fiscal year 1988, currently estimated to be 1.5 percent.**

The Commission believes that prospective payments to hospitals should reflect real case-mix changes associated with increases in resources used by patients. Increases in payments should not systematically result from upcoding, however, which is associated with improved medical record coding practices but not with increased patient resource use.

The Commission separates case-mix change into three components. Within-DRG case-complexity change does not affect hospital payments, but it does reflect increases in patient-care resources. By contrast, across-DRG change in the distribution of patients affects both payments and resource use. Both components constitute real case-mix change. Changes in case mix resulting from upcoding, however, increase payments even though they do not reflect increased patient resource use.

The hospital case-mix index (CMI) measures the distribution of cases across DRGs. In patient billing data, which is used to compute the CMI, across-DRG patient-distributional change and change due to upcoding are indistinguishable. Thus, differentiating real case-mix change from upcoding in the CMI is an extremely important but difficult empirical problem.

The Commission's recommendation incorporates three adjustments. These are needed to allow payments to increase due to real case-mix change and to remove the effects of upcoding from the payment base. ProPAC includes an allowance for both components of real case-mix change as part of its discretionary adjustment factor. To account for upcoding, the Commission recommends offsetting all expected change in the case-mix index by an appropriate percentage reduction in the DRG weights. The combined effect of the allowances and the reduction is to allow payments to increase only for real case-mix change.

Case-mix index change in fiscal year 1988 is estimated to be 1.5 percent. Of this amount, 0.9 percent is attributable to changes in the distribution of patients across DRGs and 0.6 percent to upcoding. The Commission thus assumes that three-fifths of the total CMI increase is real. This assumption is consistent with past estimates that the proportion of real case-mix change increases as the total CMI change declines.

In the early years of PPS, the CMI increase attributable to upcoding was estimated to be quite large. The medical record data used to calculate the original CMIs contained inaccurately and

incompletely coded information. Hospitals have improved their coding practices since the implementation of PPS. In addition, hospitals now have the incentive to assign codes legitimately that will yield the greatest payment. Both of these practices shift patients into higher-weighted DRGs, thus raising CMIs. The Commission believes, however, that opportunities for hospitals to change their coding practices are declining. Changes in coding rules and DRG assignment strategies will continue to make upcoding possible, although at a slower rate than in the early years of PPS.

Across-DRG changes in patient distributions reflect increases in the resources used in patient care. New technologies may encourage more aggressive and resource-intensive treatments, like lithotripsy, that sometimes result in patients being placed in higher-weighted DRGs. Substituting outpatient treatments for inpatient stays is another source of this type of case-mix change. Such shifts reduce the frequency of cases in the lower-weighted DRGs relative to the higher-weighted DRGs, causing increases in the CMI. This is likely to diminish as the opportunities for outpatient shifts subside.

The Commission used data from the Commission on Professional and Hospital Activities (CPHA) to estimate a long-term trend of within-DRG case-complexity increases for the elderly. Based on this trend, within-DRG case-complexity change was estimated to increase average costs per case by 0.7 percent in 1986. One indicator of increases in this component of real case-mix change—declining admission rates—is less important now than in the early years of PPS. Stabilized admission rates indicate that cases that would have been assigned to low-weighted DRGs have already been shifted to outpatient settings. The estimate based on the long-term trend, therefore, was reduced to 0.5 percent in 1987.

The Commission uses data from HCFA on case-mix index change as the basis for the across-the-board reduction in the DRG weights. Because the estimate for CMI change in fiscal year 1988 is not yet available, the Commission is basing its 1988 figure on the final estimate of change during fiscal year 1987. Thus, the reduction and allowances are preliminary and may be modified when more current data are available. The Commission will report any modifications in the case-mix change recommendation during the rulemaking period prior to the establishment of the fiscal year 1989 payment rates.

Recommendation 5: Update Factor for Excluded Hospitals and Distinct-Part Units

> **For fiscal year 1989, a target rate-of-increase factor, separate from the PPS update factor, should be used to update payment rates for the group of psychiatric, rehabilitation, and long-term care hospitals and hospital distinct-part units excluded from PPS. The target rate-of-increase factor should reflect the projected increase in the hospital market basket for these hospitals, corrected for forecast error. The net allowance for scientific and technological advancement and productivity should be zero, consistent with the targets established for PPS hospitals.**
>
> **For fiscal year 1989, the target rate-of-increase factor for children's hospitals and distinct-part units should reflect the projected increase in the hospital market basket for PPS hospitals, corrected for forecast error. The net allowance for scientific and technological advancement and productivity should be zero.**

Besides inflation and the correction for market basket forecast error, the Commission's update factor recommendation for excluded facilities includes two allowances: one for scientific and technological advancement, and another for productivity improvement. The Commission did not attempt to quantify each allowance precisely. Instead, it determined that the net of the individual DAF allowances should be zero.

Based on currently projected market basket inflation rates, ProPAC estimates that this recommendation results in a 5.2 percent target rate-of-increase for psychiatric, rehabilitation, and long-term care facilities. For children's hospitals, the target rate-of-increase is 5.1 percent. These estimates are subject to revision as more current forecasts of inflation become available.

The Commission's approach to developing the update factor for excluded hospitals is discussed in

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the following sections. Its recommendations for excluded facilities are summarized in the table following this discussion.

Excluded Hospitals—The PPS statute created two broad classes of hospitals: those that are paid on the basis of DRGs and those that are not. Excluded hospitals—psychiatric, rehabilitation, children's, and long-term care hospitals (hospitals with unusually long average lengths of stay)—continue under cost-reimbursement rules, which limit increases in reimbursement per discharge. Both the PPS standardized amounts and the reimbursement limits for excluded facilities are to be updated each year.

The types of patients seen and the treatments they receive vary significantly between PPS and excluded facilities. In this report, the Commission adopts the same approach used in its previous update recommendations for excluded facilities. That is, it recommends that separate update factors be developed for children's hospitals and for the group of psychiatric, rehabilitation, and long-term care facilities excluded from PPS.

Market Basket—As in previous reports, the Commission recommends using the PPS market basket inflation factor for children's facilities. It recommends calculating a separate inflation factor for the group of rehabilitation, psychiatric, and long-term care facilities. The labor share of expenses in the latter group of excluded facilities is substantially higher than in PPS hospitals. Children's hospitals, however, have been shown to have a mix of labor and nonlabor expenses similar to PPS hospitals. The differences in the use of labor and nonlabor resources have substantially affected calculations of the hospital market basket inflation factor in certain years.

The current forecasts of the fiscal year 1989 market basket increase for PPS and excluded facilities are extremely close: 5.1 percent and 5.2 percent, respectively. This may not be the case in the future. It is important to continue to calculate separate market basket inflation factors so that future differences in inflationary pressures can be detected and appropriately reflected in the target rate-of-increase factor. In addition, calculation of the individual inflation factors should be refined to account for differences in the skill mix of employees in PPS and excluded facilities.

Scientific and Technological Advancement—The scientific and technological advancement allowance is a future-oriented policy target. It reflects the Commission's judgment of the financial requirements for hospitals to implement cost-increasing but quality-enhancing technologies used to treat Medicare inpatients.

In developing this allowance, the Commission applied the same approach as that used for PPS hospitals. It attempted to estimate the potential effect of newly introduced devices or treatments on Medicare costs by examining a select group of technologies.

Analyses led the Commission to conclude that it is reasonable to incorporate the PPS allowance for scientific and technological advancement in the update factor for excluded facilities. Until more specific measures of case-mix change are developed, ProPAC believes the scientific and technological advancement allowance should accommodate treatment modality changes in response to

Estimated Percent Increase in Excluded Hospital Payment Limits for Fiscal Year 1989 Under Commission Recommendations

	Children's	Psychiatric, Rehabilitation, Long-Term Care
FY89 market basket increase[a]	5.1%	5.2%
Correction for market basket errors in FY88	0.0	0.0
Discretionary adjustment factor[b]		
Scientific and technological advancement	0.5	0.5
Productivity	-0.5	-0.5
Total change	5.1	5.2

a Market basket estimate is likely to be modified as more recent data and forecasts become available.

b In the Commission's judgment, the scientific and technological advancement and productivity components of the DAF should sum to zero. The individual estimates here represent only one point in a reasonable range for each component.

changing case mix Therefore, the Commission set the allowance slightly higher than if it had been based solely on the emergence of new technologies.

Productivity—The productivity allowance is a future-oriented target that reflects potential changes in both efficiency and productivity resulting from implementation of constrained target rate-of-increase limits.

Wide annual fluctuations in the excluded facilities' admissions and limitations in the available data restrict any decisive conclusions concerning productivity trends. Given this uncertainty, the Commission determined that the productivity target for both excluded and PPS hospitals should be equally stringent.

Case-Mix and Site-of-Care Substitution Adjustments—The Commission reaffirms its previous recommendation that no adjustments should be made for case-mix change, real or otherwise, in the target rate-of-increase for excluded facilities. Excluded facilities are not paid on a DRG basis, and coding change does not influence their payments. Therefore, any PPS adjustment for coding change is inappropriate for these hospitals.

On the other hand, excluded hospitals may be experiencing increases in the medical care needs of patients due to earlier transfer of sicker patients from PPS hospitals. Suitable data for estimating the degree of case-mix change in excluded facilities are unavailable, however. The Commission has attempted to account for some of this case-mix change in the scientific and technological advancement allowance. (For background information supporting this recommendation, see Technical Appendix A.)

Recommendation 6: Timely and Accurate Medicare Cost Data

Availability of reliable and timely data is a critical priority for decision making. While significant improvements have been made in Medicare cost data timeliness, the Commission is concerned about the quality of these data for use in policy development. Therefore, the Secretary should consider improvements to the data to better reflect the costs of treating Medicare beneficiaries and to ensure comparability of data over time.

Accurate and timely cost data are essential to the development of informed PPS payment policy. These data are used by the Commission in determining the update factor recommendation, assessing the impact of PPS, and in other analytical activities. Furthermore, cost report data are widely used by HCFA and other organizations for both PPS and non-PPS analytic purposes.

Concerns about timely and accurate cost data have arisen often in the Commission's deliberations. In its April 1987 report, the Commission recommended that the Secretary routinely collect "early returns" Medicare cost report data from a subset of hospitals with accounting years beginning during the first four months of the Federal fiscal year. The Commission is pleased that the timeliness of cost report data has improved significantly since last year. In 1987, ProPAC received an early returns sample from the third year of PPS. Additional ProPAC analysis indicates that this approach is feasible and desirable for obtaining more timely data for hospitals excluded from PPS. (See Technical Appendix A.)

Although data have become available more quickly, the Commission hopes that the Secretary will explore additional methods to further improve the timeliness of cost report data. ProPAC also advises careful consideration of future changes to the cost report. Such changes could potentially delay the availability of data and inhibit the comparability of data across years. If changes to the cost report are necessary, any resulting delays or comparability problems should be minimized.

The Commission is concerned about the accuracy of Medicare cost report data for making policy decisions and assessing the impact of PPS on hospitals. Whether these data adequately reflect the costs associated with treating Medicare beneficiaries should be carefully examined. The extent of changes in cost reporting practices and the potential effect of these changes on cost measurement should be emphasized. ProPAC has completed an initial study of cost report data accuracy and plans to undertake additional work in this area. (See Chapter 3 and Technical Appendix A.) The Commission welcomes the opportunity to work with the Secretary to assess cost report data quality and identify areas for improvement.

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Now more than ever, policy makers require reliable, timely, and consistent data to understand changes in hospital costs under PPS. The Commission recognizes that collecting and verifying these data can be costly for both hospitals and the Medicare program. Furthermore, the costs associated with changing the Medicare Cost Report (MCR) can be significant. Thus, funding must be sufficient to promote the development and maintenance of high-quality data. The Commission believes, however, that investments in cost data should be undertaken only if the benefits in improved timeliness and accuracy outweigh the added expense.

Adjustments to the PPS Payment Formula

Recommendation 7: Capital Institutional Neutrality

The Secretary should provide supplemental payments to hospitals for inpatient-related capital costs incurred at other facilities. Such supplemental payments should continue until capital is incorporated into the PPS payment rate.

The Congress has delayed implementation of prospective payment for capital until fiscal year 1992. Capital costs thus will continue to be paid on a reduced-cost basis while operating costs are paid prospectively on a fixed-price basis. This dual payment system introduces distorted incentives for hospital investment behavior. Until capital payments are incorporated into PPS, hospitals will continue having incentives that inappropriately substitute capital for labor and other operating costs. These incentives remain even though capital payments are reduced below full capital costs.

Under this dual payment system, capital payments are not neutral as to site of service delivery. Medicare does not pay the capital-related costs of services that a hospital purchases from other institutions for its inpatients. If the hospital provides those services in-house, however, it is reimbursed for Medicare's share of the associated capital costs. Thus, Medicare provides hospital managers with an incentive to develop the capacity to provide all services in-house. The Commission, therefore, reaffirms its recommendation for an institutional neutrality adjustment to reduce the effect of these incentives.

The 1981 data used to develop the standardized amounts incorporated payments to outside facilities that had provided services to Medicare inpatients. These payments did not distinguish between operating and capital costs. The standardized amounts, therefore, reflect an estimate of the full costs of those purchased services.

There have been several changes in the delivery of health care services, however, since the standardized amounts were developed. The introduction of new capital-intensive technologies and procedures and increased use of free-standing diagnostic and therapeutic centers have increased hospitals' opportunities to purchase services for inpatients. The capital costs of the new purchased services are not reflected in the standardized amounts. The institutional neutrality adjustment, therefore, is needed to account for these costs.

The institutional neutrality adjustment should incorporate the legislated reductions to capital pass-through payments. This would equalize the incentives to offer a service in-house or to purchase it from another provider. (Technical Appendix A provides additional information on how the institutional neutrality adjustment might be implemented.)

The Commission continues to be concerned about the distorted investment incentives introduced by the dual capital-operating cost payment mechanisms. ProPAC believes Medicare capital payment policy should not provide hospitals with incentives to favor investing in capital instead of labor or other operating inputs. ProPAC is investigating trends in capital and total expenditures and will present this information in *Medicare Prospective Payment and the American Health Care System.*

Recommendation 8: Indirect Teaching and Disproportionate Share Adjustments

The indirect costs of teaching and the costs of serving a disproportionate share of low-income patients should be recognized through the use of data-based adjustments to hospital PPS payments. These adjustments should be reestimated annually using the most recent cost data available. The Secretary should support further research efforts to improve measurement of the sources of hospital cost variation. Results

of this research could be employed to improve the overall structure of PPS payments.

Under PPS, hospital payments are based on national and regional average urban and rural rates. Payments are subsequently adjusted to account for hospital cost variation due to area wage rates, the costs of outlier cases, the costs of teaching hospitals, and the costs of serving a disproportionate share of low-income cases. As questions regarding the equity of PPS payments become increasingly important, the Commission intends to devote even greater attention to this vital policy area. In this recommendation, the Commission addresses the indirect teaching and disproportionate share adjustments.

For fiscal years 1984 and 1985, teaching hospitals received an 11.59 percent per case add-on to their PPS payments for every 0.1 percentage point in the hospital's ratio of interns and residents per bed. Beginning during fiscal year 1986 and continuing into fiscal years 1987 and 1988, the adjustment was lowered to 8.1 percent. The adjustment has been lowered again, to 7.7 percent, beginning in fiscal year 1989. Further changes in the indirect teaching adjustment are being discussed in the Congress and the executive branch. The Commission will examine these potential changes and conduct related analyses during the coming year.

During fiscal year 1986, the disproportionate share payment adjustment was added to PPS. Disproportionate share is defined as the sum of (1) the percentage of Medicare hospital patient days attributed to Medicare beneficiaries entitled to Supplemental Security Income (SSI), and (2) the percentage of total hospital days attributed to Medicaid recipients. The formulas used to calculate the adjustment vary by urban or rural location and bed size.

The Commission's recommendation addresses four major issues related to these adjustments: the use of a data-based estimate for calculating the adjustments, the need for reestimating the adjustments on a periodic basis, the need to maintain these payment adjustments as long as the data support their continuation, and the need for further research to improve the equitable distribution of hospital payments.

Data-based Estimates—The indirect teaching and the disproportionate share adjustments were derived from different forms of regression analysis. Regression analysis was used to calculate estimates of how much hospital cost variation, measured by Medicare operating costs per case, could be attributed to different factors. These factors included area wage rates, case mix, urban or rural location, the indirect effects of teaching, and a disproportionate share of low-income patients.

The Commission generally supports the current analytic approach to derive estimates for the indirect teaching and the disproportionate share adjustments. The approach, although admittedly not perfect, appears consistent with current policy goals. This view was supported by a technical advisory panel, convened by ProPAC staff to review the technical aspects of the analysis used to derive the adjustments and their policy implications. ProPAC will undertake further analysis of the adjustments, using alternative approaches to estimate the effects of teaching and service to low-income patients on Medicare costs per case.

More importantly, the Commission stresses the need to base the indirect teaching and the disproportionate share adjustments on estimates derived from data analysis. As PPS moves to national rates, sources of cost variation are recognized to a lesser degree in hospital payments. Equity of payments, therefore, is dependent on the use of data-based estimates to adjust payments.

Further, the Commission urges that special attention be given to hospitals facing the largest share of the cost burden from both the indirect costs associated with teaching and a disproportionate share of low-income patients. As part of its future analysis, ProPAC will identify the effects of large teaching programs and a disproportionately high share of low-income patients on cost variation for these hospitals.

Reestimating Adjustments—As cost patterns of hospitals continue to change, and as other aspects of the payment system are revised, reviewing the estimates used for the indirect teaching and disproportionate share adjustments becomes essential. The Commission believes that the adjustments should be reestimated annually, using the most

recent cost data available. Revised estimates could be used as a basis for changing the amount or form of the adjustments.

In addition, the Commission maintains that the indirect teaching and disproportionate share adjustments should be retained in the payment system, as long as data analysis indicate they are appropriate. In particular, the Commission is concerned that the disproportionate share adjustment is scheduled to expire in 1990.

Further Research Efforts—The Commission recognizes that the estimates for both adjustments serve as proxies for factors associated with hospital cost variation—for example, severity of illness—for which adequate measures do not yet exist. The Commission is concerned about identifying other factors that affect variation in cost per case.

In addition to the unintended proxy effects of the indirect teaching estimate, the Commission is concerned in general with how well the teaching and disproportionate share estimates measure cost variation. The Commission strongly urges the Secretary to support research on the sources of hospital cost variation. Significant research effort needs to be devoted to identifying factors affecting cost variation among hospitals and improving methods to measure how these factors affect costs. Assessing the adequacy of the intern to bed ratio as a measure of teaching effort, along with other factors identified in the literature, is also strongly encouraged.

As part of its future analytic agenda, the Commission will critically review the overall approach and amounts used to adjust payments. The relationships between the current adjustments—for example, the relationship between outlier payments and the indirect teaching adjustment—need to be examined to ensure an equitable payment system.

Recommendation 9: Labor Market Area Definitions

The Commission continues to believe that the current hospital labor market area definitions are seriously flawed. These definitions can be improved substantially with currently available data. Therefore, the Secretary should adopt the following definitions of hospital labor market areas:

- **For urban areas, the Secretary should modify the current Metropolitan Statistical Areas (MSAs) to distinguish between central and outlying areas. The central area should be defined using urbanized areas as designated by the Census Bureau.**

- **For rural areas, the Secretary should distinguish between urbanized rural counties and other rural counties within each state. Urbanized rural counties should be defined as counties with a city or town having a population of 25,000 or greater.**

The implementation of improved definitions should not result in any change in aggregate hospital payments. Furthermore, these definitions should not affect the assignment of hospitals to urban or rural areas for purposes of determining standardized amounts.

The Commission has had a long-term commitment to this issue and has studied it extensively. The Commission has made recommendations calling for improvements in labor market area definitions in each of its annual reports to the Secretary since April 1985. Furthermore, ProPAC conducted its own major study, which led to specific recommendations for improvements in its April 1987 report to the Secretary.

The Secretary rejected the Commission's proposal last year, stating that additional study and analysis were necessary to evaluate alternative options to redefine labor market areas and to determine their impact. In 1986, Congress enacted legislation requiring the Secretary to report on methods for improving hospital labor market areas by May 1987. The legislation also required the Secretary to collaborate with ProPAC on this report. The results of ProPAC's study have been shared with HCFA staff.

The Commission continues to believe that improvements are necessary to increase the equity of hospital payments. ProPAC also believes that its proposal represents the best available means for improving labor market area definitions.

In urban areas, the greatest improvement can be achieved by dividing MSAs into urbanized and non-urbanized areas. Hospitals within urbanized areas, on average, have wages almost 16 percent higher than hospitals in non-urbanized areas.

In rural areas, the greatest improvement can be achieved by dividing rural counties within each state into urbanized and other counties. The average hospital wage within urbanized rural counties is about 8.5 percent higher than the average wage within non-urbanized counties.

If implemented, the Commission's recommendation would increase the number of labor market areas from 365 to 527. The Commission believes that the improved equity of hospital payments is well worth the additional effort needed to make hospitals familiar with these new geographic boundaries.

ProPAC's proposal identified labor market area definitions that produced the greatest percentage difference in average hospital wages. The Commission's study showed that these wage differences remained even after adjusting for skill-mix differences between areas. ProPAC considered a number of other factors in developing its recommendation, including the amount of variation explained by the new definitions, the total number of new labor market areas, and the financial impact on individual hospitals. A complete discussion of these factors was presented in Technical Appendix A of ProPAC's April 1987 report

The Commission believes that the effect of these new definitions on other PPS payment adjustments should be examined, and urges the Secretary to conduct such an analysis. ProPAC considered the financial impact of its proposal on individual hospitals. This analysis, published in Technical Appendix A of its April 1987 report, focused on changes in the wage index values of individual hospitals rather than the overall effect of new labor market areas on the distribution of PPS payments.

The Secretary conducted an analysis showing that ProPAC's recommendation would help hospitals already doing well under PPS. The Commission believes, however, that the Secretary should address the issue of financially troubled hospitals directly as a separate issue, not indirectly by delaying improvements in labor market area definitions.

There is ample evidence that current labor market areas are poorly defined. ProPAC has called attention to this issue in its annual reports for three years, but the Secretary has chosen to postpone or to minimize the significance of the problem. The Commission believes this fundamental flaw in the original design of PPS should be corrected as soon as possible.

Recommendation 10: Evaluation of Sole Community Hospital Policies

> **Using the most recent data available, the Secretary should immediately initiate an evaluation of the adequacy of current Sole Community Hospital policies for protecting isolated rural hospitals. Based on this evaluation, the Secretary should develop policies to ensure that PPS payment policy does not jeopardize Medicare beneficiaries' access to inpatient hospital care in isolated rural areas.**

The SCH adjustment was established under Section 223 of the 1972 Social Security Amendments and thus predates PPS Concern for beneficiary access underlies continuation by the Congress of the SCH exception under PPS Hospitals that become insolvent cannot continue to provide care to Medicare beneficiaries or anyone else In isolated areas with single hospital providers, hospital closure would likely force area residents to travel long distances to receive care. While such travel might not be unduly burdensome for the general population, it could create a significant barrier to care for Medicare beneficiaries. Moreover, it could result in higher costs for both the Medicare program and the beneficiaries.

Current legislation grants the Secretary the authority to provide designated Sole Community Hospitals with three basic protections against financial insolvency. First, payment is based on a combination of 75 percent hospital-specific and 25 percent regional average rates. Second, SCHs are exempt from capital payment cuts. Third, SCH payment is adjusted for a decline in discharges of more than 5 percent over the preceding cost period, if the decline is due to factors beyond the hospital's

control. OBRA 1987 expands the latter provision to allow hospitals that qualify as SCHs to apply for the volume adjustment, whether the hospital is actually an SCH-designated hospital or not.

In both its April 1986 and April 1987 reports, the Commission expressed concern that the current SCH provisions might inadequately protect isolated rural hospitals and the beneficiaries they serve. Since these reports were issued, the Commission has become convinced that current PPS payment policies require reevaluation based on the most recent financial data available.

Medicare cost report data for a sample of SCHs suggest that even with the presumable protections afforded by SCH status, 25 percent of these hospitals incurred PPS deficits during the first two years of PPS. By the third year, more than 50 percent of the SCHs incurred PPS deficits. In that year, one-quarter of the SCHs incurred PPS deficits greater than 13 percent, and one-tenth of the SCHs incurred PPS deficits of 37 percent or more.

These deficits occurred despite attempts to contain the rate of increase in hospital costs. In fact, preliminary Medicare cost report data suggest that SCHs achieved significant cost reductions during the first three years of PPS. During this period, these hospitals reduced their aggregate operating costs by 0.4 percent per year. A 7.6 percent reduction in discharges, however, resulted in a 7 7 percent average annual increase in SCH cost per case. Nevertheless, the increases for this group were less than for any other group studied except major teaching hospitals.

It has been suggested that the shift to discharge weighted standardized amounts will improve the financial status of rural hospitals. For SCHs, however, discharge weighting will have a relatively small impact, since only the 25 percent Federal payment portion of the rate would be affected.

Based on this information, the Commission has concluded that a comprehensive evaluation should be made of the protections afforded isolated rural hospitals under current PPS policies. The evaluation should address why some hospitals appear to fare poorly under current policies while others appear to flourish. For example, while one-tenth of the SCHs incurred PPS deficits of 37 percent or more, another one-tenth incurred PPS profits of 15 percent or higher during the third year of PPS. As will be discussed further in Recommendation 11, it is important to expand this evaluation to include all isolated hospitals, not just those currently designated as SCHs.

In ProPAC's opinion, any alternative policies developed should provide protections for financially vulnerable hospitals that serve isolated populations. The policies, however, do not have to reflect a return to cost-based reimbursement. Policies based on prospective rolling average base payments with annual updates, periodic rebasing to adjust for volume declines up to a threshold, and other alternatives should be explored.

The Commission will continue to evaluate this issue in an effort to assist the Secretary in the development of more appropriate policies for isolated rural hospitals. Efforts will focus on describing hospitals that gain or lose financially under current policies and relating hospital financial position to SCH status.

Recommendation 11: Clarification of Sole Community Hospital Designation Criteria

Before fiscal year 1989 begins, the Secretary should issue guidelines for interpreting the criteria used by HCFA regional offices to designate Sole Community Hospitals. The guidelines should be structured to provide greater uniformity in the standards used to designate SCHs. The Secretary should also assess whether the criteria themselves can be improved to better define sole hospital providers of care to isolated populations.

HCFA has specified that to qualify as a SCH under PPS, a hospital must meet one of the following conditions:

- It must be located more than 50 miles from the nearest similar hospital.
- It must be located between 25 and 50 miles from the nearest similar hospital and meet one of the following criteria:
  - — It must be the exclusive provider to at least 75 percent of the service population, or to

at least 75 percent of the Medicare beneficiaries in its area, or

— It must have fewer than 50 beds; further, the Peer Review Organization or intermediary must certify that it failed to meet the exclusive provider criterion because specialty services were unavailable, forcing beneficiaries to seek care outside the area, or

— It must be isolated from the nearest similar hospital for at least one month per year due to local topography or severe weather conditions.

• It must be located between 15 and 25 miles from the nearest similar hospital and be isolated for at least one month per year due to local topography or severe weather conditions.

As of June 1987, 361 hospitals were designated SCHs. There are a few urban SCHs; most are small, rural facilities.

Not all isolated rural hospitals that qualify for SCH status apply for it. Some find the advantages of staying on national PPS payment rates outweigh those of SCH status. In addition, some hospitals have given up their designation, believing they are financially disadvantaged by the SCH payment formula of 75 percent hospital-specific and 25 percent regional rates.

Consequently, while the number of hospitals designated as SCHs is known, the precise number of hospitals that would otherwise qualify for such status is unknown. Moreover, the criteria themselves may be so restrictive as to exclude hospitals that are the sole source of care for a substantial portion of the population in certain rural areas.

In Recommendation 10, the Commission cited its concern that current PPS payment policies inadequately protect isolated rural hospitals against financial insolvency. In designing better protections, it is important to ensure that the SCH designation criteria reasonably define the hospitals serving isolated populations. At the very least, the hospitals eligible for SCH designation on the basis of current criteria should be identified. Such information is essential to evaluate the impact of altering current SCH payment policies to better protect inpatient hospital access for Medicare beneficiaries living in isolated areas.

During the past year, ProPAC contracted to study the adequacy of current SCH criteria for identifying isolated rural hospitals. The study attempted to identify all rural hospitals eligible for SCH designation, whether they are actually designated or not. The study also simulated the impact of altering the criteria.

Study results suggest a mismatch between the set of hospitals that would meet current criteria and those that are currently designated. If the criteria were applied using nationally consistent standards, 211 rural hospitals would be eligible for SCH designation within the continental United States. This is significantly less than the approximately 308 rural hospitals currently designated as SCHs. Moreover, 119 SCH-eligible hospitals are not currently designated.

In part, the discrepancy may be attributable to the large number of rural SCHs that were grandfathered into the system (233). These hospitals were designated as SCHs by regional HCFA offices at a time when explicit criteria were not promulgated.

Another source of the discrepancy is the lack of uniform, measurable standards for implementing the current criteria. For example, the number of SCH-eligible hospitals is highly sensitive to the definition of a market area. The more narrowly defined the market area, the higher the probability a hospital can achieve a dominant market share. A small change in the hospital market area definition could qualify literally a hundred or more additional facilities.

Measurable standards do not exist for defining local market areas. The PPS regulations clearly indicate a 75 percent *market share* standard for hospitals between 25 and 50 miles from the nearest hospital. What is left unclear, however, is the definition of the local *market area*. Most regional offices use state planning areas to specify hospital market or service areas. These areas do not conform to any uniform definition across regions or states.

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Moreover, except for hospitals with fewer than 50 beds, the market share criterion makes no allowance for patients requiring specialty services unavailable in the area. Even if this exception were expanded, the dearth of areawide, service-specific patient origin data would severely limit implementation of the exception in many parts of the country. It may be administratively simpler to slightly lower the market share criterion for small rural hospitals (i.e., those below a given bed size threshold) than to attempt to incorporate complex adjustments for specialty service out-of-area use.

Finally, the study suggests the potential benefits of giving hospitals the option to demonstrate geographic isolation based on travel-time rather than distance. Under the current distance criterion, approximately 236 hospitals would not be considered isolated even though the nearest hospital was more than 40 minutes away by automobile. These hospitals would not be eligible for SCH status unless they met other criteria related to market share, severe weather, or local topography.

Based on its analyses, the Commission has concluded that the guidelines for interpreting the SCH designation criteria need to be strengthened. Moreover, the criteria themselves require a careful reevaluation. If the goal of the SCH provisions is to ensure that Medicare policies do not jeopardize beneficiary access to inpatient hospital services, the Commission believes that the SCH designation criteria should reasonably define the hospitals serving isolated populations. Potential changes that deserve particular attention include relaxing the 75 percent market share criterion, and providing the option for hospitals to demonstrate isolation based on travel-time instead of distance. (For more information on this recommendation, see Technical Appendix A.)

Quality of Care

Recommendation 12: Evaluation of PRO Review and Quality of Care

The Secretary should review and synthesize the findings of Peer Review Organizations over the past four years. A major, comprehensive evaluation of PROs and their impact on quality of care should follow. The evaluation should focus on issues of access to and use of services, patterns of denials, and instances of poor quality care. Issues related to expenditure control and efficient administration of PRO contract requirements should be secondary to broader quality of care evaluative goals. The assessment should evaluate and compare criteria used to make judgments about when care is appropriate. Finally, this major study should assist the Secretary in developing and implementing mechanisms for expanded PRO review of episodes of care that are patient-oriented rather than institution-oriented.

In making this recommendation, the Commission reiterates points made in previous reports. In 1986, ProPAC urged that PROs undertake expanded review into episodes of care. In 1987, the Commission called for a major evaluation of the findings of PROs and their impact on quality of care. Responding to the 1987 recommendation, the Secretary repeatedly mentioned administrative review techniques as a method of PRO evaluation. This ongoing contract monitoring and review was not the focus of ProPAC's concern. Instead, the recommended major evaluation should be in addition to the administrative program oversight frequently cited by the Secretary.

PROs have been in place for four years. The cumulative experience of all PROs in their review of the process and quality of care received by Medicare beneficiaries is unique and extremely valuable. This experience needs to be synthesized, analyzed, and evaluated. The results of this synthesis and evaluation should be made public.

Two ProPAC studies undertaken this year have indicated a need to review carefully the criteria PROs use to determine the necessity and appropriateness of acute medical services. In research on transitional and subacute care, the need for more uniformity in using and applying criteria to discharge decisions was documented. Similarly, a study of preadmission review identified problems with the definition and application of criteria for patient admissions to the hospital.

Thus, the Commission believes the Secretary's evaluation should review the development, use, and application of criteria related to medical necessity and appropriateness. The evaluation should

verify the suitability of all existing criteria for purposes of medical necessity and appropriateness review. The Secretary should then provide advice about the strengths and weaknesses of existing criteria to PROs and other utilization review organizations.

The conceptual basis of PRO review should be considered in detail. Early PRO activity was appropriately focused on expenditure and administrative controls. A maturing and evolving PRO program should focus more on outcomes of care as well as access to and use of services. The spectrum of review should be widened to consider preadmission activities, the process of acute care, and post-acute care needs and services. The appropriate mix of reviews in all these areas should be examined, along with the number of reviews and the types of tools needed to identify quality of care problems.

The refinements identified in the major evaluation should move the PRO program toward more extensive review of the appropriateness of medical care. Inappropriate and unnecessary care is not high-quality care. The development of more sophisticated techniques to identify inappropriate care should thus be a major priority for Federal research and analysis. The knowledge and experience of PROs should be used in these activities.

Patient Classification and Case-Mix Measurement

Recommendation 13: Improvements to Case-Mix Measurement

The Commission continues to believe that the DRG system is the best available measure of hospital case mix for the Medicare PPS. The Secretary should continue, however, to refine the DRGs to improve the equity of hospital payments and update the DRGs to account for changing technology. The Secretary should focus on generic improvements through the use of patient data currently available from the discharge abstract. The Secretary should also consider the use of temporary, technology-specific DRGs whenever assignment to existing DRGs is not appropriate.

In the past three years, the Commission has considered three general approaches to improving the measurement of hospital case mix: (1) retain the DRG system but revise it incrementally as problems emerge; (2) retain the DRG system in principle but reconstruct it using a newer, more complete data base; and (3) implement an alternative system, either in conjunction with or as a replacement for the DRGs.

To date, the Commission has recommended retaining the current system along with several incremental modifications and improvements. ProPAC has also expressed its concern regarding variations in resource use within some DRGs. The Commission recognizes that, as a case-mix measurement tool, DRGs require periodic adjustments to ensure fair and equitable payments. For example, DRGs periodically need to be created, changed, or modified to incorporate new technologies. ProPAC also recognizes that in the long-term it may be necessary to consider an alternative patient classification system to replace or modify the DRGs.

As part of its efforts to identify improvements in case-mix measurement, the Commission convened a technical advisory conference on patient classification systems in June 1987. Participants included the developers of six major patient classification systems, researchers, and policy makers knowledgeable in this area. The conference was held to inform ProPAC about the latest advances and developments in each of the systems, and to determine the Commission's role in evaluating their potential use in the Medicare prospective payment system.

Conference participants supported the conclusions regarding case-mix measurement reached by the Commission in its April 1987 report. These conclusions are:

- Research concerning the possible use of alternative case-mix systems to modify or to replace DRGs is still at an early stage. It is unlikely that any of the systems will be ready for use under PPS within the next two years.

- For the short-term, modest but important modifications in the DRGs can be made using currently available information from the discharge abstract.

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- For the long-term, greater improvements in case-mix measurement may be achieved through systems that use clinical data not currently available from the discharge abstract.

Further research is warranted to evaluate the cost and benefit of collecting additional data.

Based on the information presented and discussed at the conference, the Commission believes it is premature to implement an alternative case-mix system for payment of Medicare hospital inpatients. However, ProPAC will continue to monitor the development and implementation of alternative case-mix measurement systems. The Commission will also continue to track studies that evaluate alternative systems, including a comprehensive study recently funded by HCFA.

The Commission continues to believe that the DRG system can be improved In its April 1987 report, ProPAC made the following recommendations to the Secretary for generic improvements in the DRGs:

- Eliminate age over 69 as a criterion for defining DRGs,
- Refine the list of complications and comorbidities, and
- Update the surgical hierarchies and list of operating room procedures

The Secretary generally agreed with these recommendations and implemented some, but not all, the changes called for by the Commission For example, ProPAC recommended modifying the list of complications and comorbidities to reflect differences in the relative intensity of resource use ProPAC also recommended examining DRGs that do not currently split on the basis of CCs to determine whether such a split should be made. HCFA is conducting a study to develop both of these improvements in the use of CCs. The Commission encourages the Secretary to implement these improvements as soon as possible.

For fiscal year 1988, the Secretary expanded the use of non-operating room procedures and the use of combinations of diagnoses to assign cases to some DRGs. These fundamental changes may improve the DRGs. The Commission cautions the Secretary, however, not to implement such major changes on a piecemeal basis. Instead, the Secretary should identify appropriate fundamental changes and examine the potential benefits across all DRGs.

The Secretary's current policy for updating DRGs utilizes similarity of resource use as a criterion for determining DRG assignment for cases involving new technology. The costs associated with new technologies may, however, change rapidly as the technologies diffuse and are used more widely. This policy, therefore, can create inappropriate economic incentives or disincentives related to the use of new technologies. The Commission believes that temporary, technology-specific DRGs are a valuable alternative under certain circumstances when no existing DRG is appropriate for a new technology. The Commission's recommendation would permit the Secretary to collect data on the cost of a new technology for Medicare cases as use of the technology spreads It would also maintain the clinical coherence of existing DRGs.

Recommendation 14: Coding Improvements

The Secretary should formalize a more timely, systematic, and consultative approach to consider ICD-9-CM codes for new diagnoses, procedures, devices, and other treatments. When new codes are considered and created, both coding and clinical specialists should be involved. The Commission continues to support its previous recommendations that the Secretary review Chapter 16 codes and coding procedures.

The ICD-9-CM Coordination and Maintenance Committee has made a number of changes that have resulted in more timely implementation of new codes and improvements in existing codes However, the Committee could achieve further improvements by using a more systematic approach to identify conditions and treatments for review.

The Committee now considers coding changes that are requested by members and other interested parties on an ad hoc basis. It meets three times each year, and issues must be presented to the Committee no later than November for implementation in the following fiscal year. This timetable entails an 11- to 23-month delay after problems have been brought to the Committee's attention.

ProPAC believes that the need for new or modified codes could be identified earlier if the Committee followed a more systematic approach in setting its agenda. For example, the Committee should review all devices newly approved by the FDA. It should also routinely consult professional societies to identify important new technologies that merit codes. Both coding and clinical specialists should be involved in the development of new codes and the revision of existing codes.

Chapter 16 of the ICD-9-CM system is a compendium of symptoms, signs, ill-defined conditions, and abnormal findings of laboratory and investigative procedures. The Chapter 16 rules contradict the usual guidelines of the ICD-9-CM coding system concerning the sequence of principal and secondary diagnoses. They have, in some cases, impeded appropriate DRG assignment of important diagnoses. The Commission believes the guidelines prohibiting the use of Chapter 16 codes as principal diagnoses should be reviewed.

ProPAC has identified two specific coding problems in its work this year. The Commission believes that codes need to be created for partial joint replacements where they do not currently exist. There are also serious problems with the diagnosis codes for myocardial infarction and other ischemic heart disease. The ICD-9-CM Coordination and Maintenance Committee is modifying some of the long-recognized problems with these codes. These modifications will distinguish patients with a new-onset MI from those who have had an MI within several weeks. ProPAC has identified other problems with the MI codes that have not been addressed by the Committee. (See Technical Appendix B.)

DRG Classification and Weighting Factors

Recommendation 15: Method of Recalibrating the DRG Weights

The DRG weights should be annually recalibrated on the basis of costs rather than charges. The Secretary should implement cost-based weights starting with the fiscal year 1989 recalibration. The Commission is concerned, however, about the current Medicare cost-finding methods for estimating costs. The limitations of the Medicare cost report data may, in some cases, produce imprecise DRG weights. Thus, the Secretary should verify the accuracy of the cost report data and implement changes as necessary.

The Commission believes that, beginning in fiscal year 1989, the DRG weights should be calculated on the basis of charges adjusted to estimate costs rather than charges alone. Charges are set by hospitals based on many factors, including estimated costs, market conditions, payer mix, and revenue maximization strategies. This process may result in charges that are significantly above or below the costs of resources used to produce the service. The variation in charge-setting practices also results in charges that are generally not comparable across hospitals.

The original DRG weights were cost-based. Computed using 1981 patient-level charge data, they were adjusted using per diem costs and cost-to-charge ratios from the 1981 Medicare Cost Reports. The first recalibration of the weights was completed for fiscal year 1986 using fiscal year 1984 patient billing data. Because current cost report information was not available at the time, HCFA developed these new weights based on charges alone.

In the most recent recalibration for fiscal year 1988, HCFA has again used only charges to calculate the DRG weights, although more recent MCR data were available from the second year of PPS. During 1987, the Commission analyzed the two methods for recalibrating the DRG weights to determine if a return to cost-based weights is warranted. The analysis compared weights calculated using charge data alone (charge-based weights) with weights calculated using charges that were adjusted to approximate costs (cost-based weights). The results demonstrate that cost-based DRG weights and hospital case-mix indexes differ significantly from current charge-based weights and CMIs. Thus, the two sets of weights are not interchangeable, and the Commission believes that the cost-based methodology is preferable.

Weights for medical DRGs would be higher under the cost-based methodology, and surgical DRG weights would be lower. Thus, while aggregate payments would remain unchanged, moving to

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cost-based weights would redistribute payments from the surgical DRGs to the medical DRGs. In general, this redistribution would result in lower payments to large, urban, and teaching hospitals coupled with higher payments to small, rural, and nonteaching hospitals. This is because the former group of hospitals treats a larger proportion of surgical cases. Further information on the redistributive consequences of the Commission's recommendation and the related analyses are in Technical Appendix B.

ProPAC recognizes that uncertainty exists regarding the adequacy of the current data and methods for estimating costs. Some have argued that the current Medicare cost-finding methodology (i.e., step-down allocation, apportionment of costs between Medicare and other payers, and assignment of costs between PPS and pass-throughs) distorts estimates of true cost. Further, ancillary level cost-to-charge ratios (RCCs) may not be accurate for all services provided within a department.

ProPAC nevertheless believes that real resource use is more accurately reflected by currently available cost data—even if they are imperfect—than by charges. The cost-based methodology for calculating DRG weights removes some of the variation in charges related to hospital charge-setting practices. In addition, the cost-based methodology explicitly removes the estimated costs of capital and direct medical education. These costs currently are not paid under PPS and should not be reflected in the DRG weights. By contrast, the charge-based weights are assumed to include these costs.

For these reasons, ProPAC believes that the cost-based approach is preferable. The Commission, however, urges the Secretary to devote the necessary resources to study the current Medicare cost-finding methods. The Secretary should verify the adequacy of the cost report data and make the necessary improvements. During 1988, the Commission will also study this issue further.

Recommendation 16: Improvements to DRG 468

The Secretary should reassign cases from DRG 468 to existing surgical DRGs. These cases should be reassigned using secondary, rather than principal, diagnoses. Cases that can be reassigned to more than one DRG should be assigned to the DRG with the highest relative weight.

DRG 468 is the miscellaneous category for all surgical cases with procedures that are clinically unrelated to their principal diagnoses. The Commission believes that refinements to this DRG are necessary to improve the accuracy of patient classification. In fiscal year 1986, DRG 468 was one of the 15 highest-volume DRGs, with more than 120,000 cases. Because DRG 468 is a miscellaneous category, it shows considerable variation in resource use. It also has more outliers than any other DRG. Finally, DRG 468 is not clinically coherent because it contains all unrelated combinations of principal diagnosis and surgical procedure.

The Grouper program assigns cases to DRG 468 in the following way. First, it groups all cases into a Major Diagnostic Category according to principal diagnosis. Then, it assigns surgical cases to a DRG using an MDC-specific list of procedures. These lists were developed using clinical judgment to identify procedures related to the principal diagnoses in each MDC. Finally, the Grouper program assigns any surgical case with no procedures on the MDC-specific list to DRG 468.

For fiscal year 1988, the Secretary implemented several changes in the Grouper program to improve the clinical coherence of DRG 468. However, these changes will not substantially reduce the variation in resource use, the large number of cases, or the large number of outliers in DRG 468.

The Commission studied three alternative approaches for reducing the large volume of cases assigned to DRG 468. Each approach modified the Grouper program to reassign cases from DRG 468 to new or existing DRGs. (See Technical Appendix B.) This study led ProPAC to conclude that the best approach is to reassign cases from DRG 468 to existing DRGs, using resequenced secondary diagnoses.

The Commission's recommendation requires the following modifications to the Grouper program for cases in DRG 468. First, the Grouper should resequence each secondary diagnosis and treat it as a principal diagnosis. It should also treat the original principal diagnosis as a secondary diagnosis.

Then, the Grouper should determine a DRG assignment for each resequenced secondary diagnosis. This can produce as many as four possible DRG assignments, because Medicare discharge abstracts include up to four secondary diagnoses. Finally, cases with multiple DRG assignments should be assigned to the highest-weighted DRG.

The Commission believes this is the best approach for improving DRG 468. First, it does not require any new DRGs. Almost all cases (88 percent) in DRG 468 can be reassigned to an existing surgical DRG. Second, the average cost of cases reassigned from DRG 468 is comparable to the average cost of cases already in each reassigned DRG. Therefore, this approach will not substantially affect DRG relative weights.

The Commission's approach represents a departure from the current assignment principles of the DRG system. It permits secondary diagnoses, rather than the principal diagnosis, to determine DRG assignment for cases in DRG 468. But DRG 468 was always unusual in several respects. In fact, the system's architects originally designed this DRG to identify atypical cases rather than serve as a basis for payment. By removing many cases from DRG 468, the Commission's recommendation is consistent with this original intent.

ProPAC believes this change is justified because cases in DRG 468 cannot be assigned to existing surgical DRGs using principal diagnosis. The Commission's approach is similar to the assignment principles of other patient classification systems, such as Disease Staging and Patient Management Categories. Unlike DRGs, these systems examine all diagnoses regardless of their sequence to determine the patient's underlying disease condition. The Commission believes its approach substantially improves patient classification without greatly increasing the complexity of the DRG system. The Commission will continue to monitor the effect of its recommendation and to study additional ways of reducing assignment to DRG 468.

Recommendation 17: Burn Hospitals and Units

The Commission supports the intent of current legislation temporarily increasing outlier payments for burn DRGs. However, the Commission's preliminary analysis indicates that the increase in outlier payments is appropriate only for those cases treated in specialized burn centers and units. The Commission will examine this topic further and submit additional recommendations to the Congress and the Secretary of Health and Human Services as required by the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203.

The Omnibus Budget Reconciliation Act of 1987 temporarily increases outlier payments for burn DRGs. Cost outlier payments will be increased to 90 percent of marginal costs, and day outlier payments will be increased to 90 percent of the appropriate per diem. The legislation did not change the threshold for either cost or day outliers. This outlier payment policy will continue until fiscal year 1990.

OBRA 1987 also requires the Commission to report to Congress and the Secretary of HHS on this method of outlier payments for burn DRGs. In addition, ProPAC is required to present options for more adequate and appropriate payments with respect to burn outlier cases.

While the Commission supports the intent of this legislation, its analysis indicates that additional payments are appropriate only for those hospitals with specialized burn care units. The Commission analyzed data from 1986 MEDPAR file to determine the equity of PPS payment for burn cases treated by specialized burn centers and units. This analysis compared the average costs and average PPS payments for burn centers and other PPS hospitals. The preliminary results indicated that costs for hospitals with specialized burn centers and units were consistently higher than PPS payments for burn cases. The analysis also indicated that the costs of PPS hospitals without specialized burn units were considerably lower than PPS payments.

In addition, this analysis indicated that, compared with other PPS hospitals, hospitals with burn centers and units had a substantially higher percentage of outlier burn cases. (See Technical Appendix B for information on the burn DRGs examined.) The Commission believes that refinements in outlier payment policy may ameliorate some of the financial losses experienced by these hospitals (Recommendation 18).

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Payment for Outlier Cases

Recommendation 18: Outlier Payment Policy

The Secretary should modify outlier payment policy to protect hospitals more adequately from the risk of extremely costly cases. Hospital-specific cost-to-charge ratios should replace a national cost-to-charge ratio for calculating cost outlier payments. Greater emphasis should be placed on costs rather than length of stay for determining outlier payments. As an interim step toward emphasizing costs, the Secretary should move from day outlier precedence to paying the greater of day or cost outlier payments. Furthermore, the Secretary should adjust threshold levels so that 40 to 50 percent of outlier payments are paid as cost outliers.

The Commission urges the Secretary to increase outlier contributions to the maximum of 6 percent of total projected payments allowed under the statute. A correction should be made in the following year's payments if the amount paid for outliers is different from the amount set aside. If necessary, the Secretary should seek statutory change for these initial improvements while continuing analysis to refine outlier payment policy. Further analysis should also include consideration of an increase above the 6 percent set-aside amount allowed under the statute.

The Commission reaffirms its previous recommendation that outlier payment policy should be refined to reflect more accurately the resources hospitals use to treat extraordinarily expensive cases. The PPS statute recognized that hospitals warrant additional payment above the fixed DRG payment for treating such cases. As part of PPS, outlier policy was designed to limit the financial risks of a fixed-price system and to account for limitations in case-mix measurement.

The Commission is concerned with the level of losses that hospitals incur under current outlier policy. Analyses completed by ProPAC and others indicate that current outlier payments do not effectively limit the risk of financial losses associated with the random and systematic occurrence of extraordinarily expensive cases.

Ratios of costs to charges vary significantly across hospitals. Therefore, a change from national to hospital-specific RCCs will redistribute outlier payments to some extent. Under current policy, however, a comparison of national and hospital-specific RCCs showed no systematic pattern across hospital groups in the average difference between payments and costs for outlier cases. Further, there was no systematic pattern in major losses across hospital groups. These findings were also obtained in a simulation of paying for cost outliers only, which places maximum importance on the use of RCCs to calculate outlier payments.

Use of a national RCC combined with greater emphasis on costs would result in an inappropriate shift of payments to hospitals with low RCCs. The Commission believes that the incentives to raise charges to maximize outlier payments would become stronger with greater emphasis on costs if a national RCC were continued.

The Commission's analysis indicates that day outlier cases, on average, consume fewer hospital resources than cost outlier cases. ProPAC recognizes, however, that both days and costs, as derived from Medicare charge and cost data, are proxies for true costs. Emphasis on either factor affects the distribution of payments across hospital groups.

The Commission recommends changing from day outlier precedence to paying the greater of day or cost outlier payments. This recommendation is based on a preference for emphasizing costs in outlier payment policy. Better cost information is needed, however, to more accurately reflect true hospital costs and to develop hospital-specific RCCs. Therefore, the Commission favors a gradual approach toward greater recognition of cost outliers. Some hospitals that are adversely affected might not be able to absorb the entire reduction in outlier payments easily if the movement to greater emphasis on costs were abrupt. ProPAC is also concerned that the continued use of charge data to estimate costs can distort estimates of true costs in favor of certain types of procedures and hospitals.

The Commission's recommendation would allow more time to analyze the effect of the shift away from day outlier precedence on hospitals' pricing strategies. Analysis is needed to understand how hospital response to different precedence options would affect length of stay. Additional time is also required to develop cost data and methods that measure true costs more accurately.

Preliminary analysis indicates that greater loss protection can be achieved by increasing the outlier pool size. The amount of extra protection appears to fall as the pool size is increased, however. Alternative set-aside amounts should be evaluated to balance the risk-reduction objective of outlier payments with the cost-reduction incentives of fixed price payments. This evaluation should take into account a more optimal outlier payment policy that emphasizes costs.

Until this analysis can be completed, the Commission believes that the Secretary should increase the outlier pool to the maximum 6 percent of total projected payments allowed under the statute. In addition, since there have been significant differences between outlier set-asides and actual outlier payments, a correction should be made in the following year's payments if the amount paid for outliers is different from the amount set aside.

ProPAC will continue to examine outlier payment policy, including the goals of such policy and the extent to which total payments for outlier cases should reflect the reasonable costs of outlier cases. The Commission will also analyze the outlier payment structure, particularly the method for defining outliers and setting day or cost outlier thresholds.

Furthermore, the Commission believes the effects of increasing the outlier pool on inlier payments should be examined. Under current policy, the outlier pool is funded by reducing payments for the inlier portion of care. Therefore, increasing the outlier pool might result in significant losses for hospitals that have relatively few outlier cases. In addition, alternative funding approaches, such as DRG-specific set-asides, should be examined.

Still other issues that remain for future examination include determination of a marginal cost factor, and the relationship between outlier payments and the indirect teaching and disproportionate share adjustments. Further analysis of these additional outlier issues is necessary before a fully integrated, reformed policy can be developed. The Commission will be pleased to work with the Secretary in analytic efforts to improve outlier payment policy.

Chapter 3

Issues for Future Consideration

In the early years of PPS, attention was appropriately focused on improving its technical aspects. Continued refinements of PPS, however, are increasingly dependent on broader-based evaluations of the impact of the system. The Commission's work has also changed, shifting emphasis to an assessment and evaluation of PPS. This chapter discusses the major issues the Commission will consider in its future analytic work as PPS and the health care system continue to evolve.

The changing characteristics of the health care system further underscore the need for a broader evaluation of the effects of PPS. Medical care provided to inpatients and care provided in other settings are increasingly interdependent. ProPAC will thus examine PPS in light of the experiences in the entire health care system, not just the inpatient hospital setting.

ProPAC is concerned that emphasis on moderating inpatient costs may have caused increases in total health care costs. The Commission believes that shifts in site of care, changes in the volume of services delivered in various settings, and increases in competition among providers affect total health care costs. As it evaluates the impact of PPS, ProPAC will consider these changes in health care delivery and financing. The Commission will consult and coordinate its efforts to investigate these issues with the Physician Payment Review Commission.

More comprehensive evaluations of PPS are possible because more data are available. Information on Medicare inpatient costs, total hospital costs, and beneficiary utilization under PPS has been compiled. More and better data sources to supplement Medicare billing information are needed, however. The continuing challenge is to develop data capabilities to evaluate the quality of care, total costs, and service utilization throughout an entire episode of care.

The major Medicare and PPS issues the Commission believes require public policy attention are: level of PPS payments, distribution of PPS payments, improving the data used for analyzing PPS payments, hospital behavioral responses to PPS, shift of services for an episode of care, and beneficiary access and quality of care. The Commission will continue to explore these issues, as discussed below.

LEVEL OF PPS PAYMENTS

The total level of payments under PPS is adjusted annually through the update to the standardized amounts. The Commission is concerned about providing an appropriate level of payments to hospitals because of the need to ensure beneficiary access and high quality of care. At the same time, payments should encourage efficiency and cost-consciousness in the delivery of services. The Commission will continue to examine the level of PPS payments. These efforts will focus on estimating and understanding the factors that affect hospital costs.

Annual Update Factor

The principal components of the Commission s annual update recommendation are the market basket forecast and the discretionary adjustment factor. The market basket forecast allows for changes in the price of the goods and services used by hospitals. The DAF is composed of four components that influence the average cost of a discharge: scientific and technological advances, hospital productivity, site-of-care substitution, and real case-mix change. Within this analytic framework, the

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Commission has developed separate measures for each of these components. (These are described in more detail in Technical Appendix A.)

Scientific and Technological Advances—The Commission bases this component of the DAF on estimates of the change in Medicare operating costs caused by the adoption of specific quality-enhancing technologies. In 1986, ProPAC estimated the additional operating costs associated with adopting selected new technologies. In 1987, the Commission expanded its approach to include a more comprehensive list of technologies. ProPAC will continue to use and refine the same methodology to estimate the costs of scientific and technological advances. The methodology, however, will be more comprehensive by including estimates of use and costs of a broader range of new technologies and practice patterns. It will also incorporate refined cost-estimation techniques.

Hospital Productivity—The Commission has tried to understand factors that affect hospital productivity by examining changes in both hospital inputs and expenditures since the early 1980s. Hospital productivity trends are particularly difficult to measure and assess because productivity and changes in the hospital product are hard to define. For example, inflation-adjusted expenses per discharge, an aggregate output measure, rose 4.1 percent from 1985 to 1986. Controlling for real case-mix change—a measure of product change—reduces the growth rate to 2.1 percent. Future Commission work will focus on refining measures of intermediate and discharge productivity and accounting for product change.

Site-of-Care Substitution—The Commission has estimated the effect of site-of-care substitution on the basis of declines in hospital length of stay and evidence that more services were being provided out of the hospital. Hospital length of stay now is relatively stable. This partially removes the empirical basis for continuing this adjustment. The Commission will continue to monitor data on length of stay and service delivery for renewed evidence of a need for the site-of-care substitution adjustment.

Real Case-Mix Change—The average DRG case weight increased more than 7 percent from 1984 to 1986. This change partly reflects increases in the resources devoted to treating the average Medicare inpatient—that is, real case-mix change. Changes in the average DRG case-weight also reflect improved medical record coding practices that alter DRG assignment. The Commission is working with HCFA to develop a method to apportion case-mix index change into real and coding change components. ProPAC also is refining its method to measure case-complexity change within DRGs, a component of real case-mix change that is not measured by the case-mix index. The method will group patients in each DRG by severity of illness using alternative patient classification systems. Changes in severity of illness, holding DRG constant, will be calculated using Medicare program data. The estimated costliness of these changes will be used to develop the within-DRG case-complexity change component of the update recommendation.

PPS Costs, Revenues, and Operating Margins

The Commission will continue to examine the factors that affect hospital costs. Medicare operating costs per case rose at an average annual rate of 10.2 percent during the second and third years of PPS. This increase is 6.4 percentage points above the average PPS market basket increase during this period. Average PPS hospital revenues increased 10.3 percent between the first and second years and 3.0 percent between the second and third years of PPS.

Hospital PPS operating margins—the difference between PPS payments and Medicare allowable operating costs as a percent of such payment—reflect these changes in costs and revenues. During the first and second years of PPS, the overall PPS operating margin was 14.0 percent and 14.3 percent, respectively. It had fallen to 8.2 percent by the third year of PPS. Based on preliminary data, the Commission estimates that the average PPS operating margin fell to about 2 percent in 1987 and will probably fall below zero in 1988.

Clearly, the large volume declines that hospitals experienced during the first three years of PPS contributed to the rapid increase in average costs per case. Volume, however, is not the only factor contributing to this change. A better understanding of hospital costs and the factors that influence

changes over time will help inform the deliberations on the annual update factor. Further, this information is essential for modifying PPS to better serve the Medicare program and its beneficiaries.

PAYMENT DISTRIBUTION ISSUES

Under PPS, the distribution of these payments across types of hospitals is as important as the level of aggregate payments. In general, the distribution of payments is governed by four elements of PPS: DRG classifications and weights; payment adjustments for indirect teaching and disproportionate share status; outlier payments; and payment adjustments for geographical cost differences. Variation in resource use across hospitals also affects the adequacy of the distribution of payments. Analyses related to these factors are discussed below.

DRG Classifications and Weights

The equitable distribution of PPS payments is directly influenced by the adequacy of the DRG classifications and the accuracy of the DRG weights. The classifications and weights must be updated to account for new technologies and changing practice patterns, and to reflect changes in relative resource use. In addition, the methods and tools used to define the DRGs and to calculate weights require continued study to ensure proper distribution of payments.

During 1988, ProPAC will continue to analyze changes in the treatment of myocardial infarction and hospital admissions related to AIDS. In addition, many of the other issues the Commission has already addressed will be monitored to determine if further adjustments are needed. Implementing these improvements may require modifications to the ICD-9-CM coding system. Although HCFA is primarily responsible for coding maintenance and improvements, ProPAC will continue to monitor this activity and suggest necessary modifications to the coding system.

In addition to specific improvements to DRGs or groups of DRGs, generic improvements in the DRG definitions are sometimes warranted. Since the implementation of PPS, a significant amount of government and private research has focused on the ability of the DRG classifications to distribute payments equitably across hospitals and patients. These efforts have typically attempted to measure and reduce the heterogeneity of the DRGs.

Research on alternative case-mix measurement systems to modify or replace the DRGs is still at an early stage. A potentially fruitful area for short-term generic DRG improvement is through refining the definitions of CCs. Work on CCs, sponsored by HCFA, is nearing completion and may yield significant improvements in DRG homogeneity for fiscal year 1989. The Commission will continue to examine these and other improvements under consideration by HCFA.

Indirect Teaching and Disproportionate Share Adjustments

The indirect teaching and disproportionate share adjustments to PPS payments significantly affect the distribution of payments across hospitals. More than 1,000 PPS hospitals receive an indirect teaching adjustment. For those hospitals, the average adjustment to the Federal rate is about $475 per case in 1988 dollars. More than 1,200 hospitals receive adjustments to their PPS payments because they treat a disproportionate number of poor people. Prior to recent legislation, the average adjustment to the Federal rate for these hospitals was $280 per case in 1988 dollars. Further, many hospitals that receive an indirect teaching adjustment also receive a disproportionate share adjustment.

These adjustments were developed to compensate hospitals for increased costs not otherwise recognized by the PPS payment formula. ProPAC is examining these two major adjustments as part of a broader effort to understand cost variations across hospitals. The Commission will analyze the empirical basis and the policy implications of these adjustments as well as possible alternative measures of these costs. This study will be helpful in evaluating the appropriateness of PPS payments.

Outlier Payments

Since the implementation of PPS, modifying outlier payment policy has been recognized as one of the most important avenues for improving the equity of PPS payments. Outlier payments are included in PPS to limit hospitals' financial risks. These risks arise in part because of deficiencies in measuring case mix. Although it was expected that hospitals would incur losses on some cases and

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realize profits on others, both random and systematic occurrences of costly cases may cause financial hardship for some hospitals.

Previous analyses by ProPAC and others have demonstrated that the number of outlier cases and the amount of payments are unevenly distributed across DRGs and hospitals. Further, the Commission's analysis of cases treated in specialty hospitals has demonstrated that payment inequities for these cases are largely due to problems with outlier payment policy.

ProPAC will devote significant resources to studying outlier payment policy, focusing on the basis for calculating outlier payments and the size of the outlier pool as a percentage of total PPS payments. The Commission will also examine the methods of funding outlier payments, the methods for setting outlier thresholds, the marginal cost factor, DRG-specific outlier set-asides, adequate payments for burn outliers, and the relationship between outlier payment policy and the indirect teaching and disproportionate share adjustments.

One of the more difficult issues in outlier payment is estimating the marginal cost factor used to calculate payments for outlier cases. Currently, there are no adequate measures of true marginal costs. ProPAC, therefore, has funded a major research project to study daily cost patterns for inpatient care. The study also will provide more information about the services provided throughout a hospital stay, the timing of those services, and the effect of varying lengths of stay on costs.

Payment Adjustments for Geographical Cost Differences

Data from Medicare Cost Reports indicate that, during the first three years of PPS, small rural hospitals were much more likely to have negative operating margins than their urban counterparts. This has raised concerns about a subgroup of rural hospitals that may be particularly vulnerable under PPS. Legislative changes have been enacted since the third year of PPS to help the financial position of rural hospitals. Despite these changes, some rural hospitals may continue to have problems under PPS. Legislative changes have been enacted since the third year of PPS to help the financial position of rural hospitals. Despite these changes, some rural hospitals may continue to have problems under PPS.

The Commission is thus focusing analytic efforts on isolated hospitals that may be the only source of care for beneficiaries in rural areas. Using more recent data, ProPAC will examine the differences in costs between urban and rural hospitals. The Commission also will consider the criteria for defining Sole Community Hospitals. The analysis will determine which hospitals meet alternative criteria for SCH status and whether the SCH volume payment adjustments provide adequate financial relief to those with declining admissions.

ProPAC plans to examine the basis for the separate urban and rural standardized amounts. Congress, in the Omnibus Reconciliation Act of 1987, asked that ProPAC consider two major issues. The first is the feasibility, impact, and desirability of eliminating or phasing out separate urban and rural payment rates. The second issue concerns the desirability of maintaining separate payment rates for hospitals located in large urban areas.

The Commission will continue to monitor the Secretary's efforts to develop new labor market area definitions. ProPAC believes the current definitions are a fundamental flaw in the design of PPS. Current labor market areas fail to recognize the substantial wage differences between inner-city and suburban hospitals in urban areas. They also fail to account for wage differences in rural areas. Analytic efforts will focus on examining methods for developing a skill-mix adjustment to the area wage index. ProPAC also will study the feasibility and appropriateness of adjusting the non-wage-related portion of the adjusted standardized amounts. These adjustments would be based on area differences in hospitals' non-labor costs and input prices.

Variation in Resource Use and the Distribution of Payments

Variations in the use of procedures, hospitalizations, and other medical services have been well documented. These variations have not yet been explained adequately by population characteristics. Further, the extent to which unexplained variation reflects appropriate differences in medical practices or inefficient medical care remains unclear.

Work completed by ProPAC during the past year suggests that differences in medical practice may be a major contributor to the unexplained variation of resource use in the DRG system. This study of hospital-level variation in charges demonstrated that using currently available data refinements of the DRGs is unlikely to alter the distribution of payments to hospitals. Further, other research suggests that even if additional data were used to refine DRGs, the impact on aggregate payments would be limited.

During 1988, ProPAC will complete additional analyses of hospital resource use. These efforts will determine the extent to which resource use variation is due to different use of specific inpatient services, such as special care units and individual ancillary departments. In addition, the analyses will document the relationship between variation in costs and payments under PPS.

The Commission also plans to study regional variation in per-case treatment costs within specific surgical procedure groups and medical conditions. The effect of varying medical practice patterns on hospital costs will be examined for the selected procedures and conditions. This analysis will develop the groundwork for explaining the linkage between variation in resource use at the hospital level and variation in medical practice patterns.

Related analyses will study the effects of PPS on medical practice patterns. ProPAC is conducting a longitudinal analysis of trends in the concentration of specialized procedures. The study will examine the changes in hospital procedure volumes, costs, and operating margins from 1984 to 1986. ProPAC will estimate the effect of these changes on the number of hospitals performing these procedures.

IMPROVING THE DATA USED FOR ANALYZING PPS PAYMENTS

Timely and accurate cost data are critical for developing improvements to PPS, as well as for evaluating the effects of this system. Although PPS has shifted Medicare away from cost-based reimbursement, cost data are central to many of the analyses necessary for maintaining and evaluating the system. The Commission, for example, uses cost data to develop recommendations for updates to the PPS payment amounts, to study PPS payment adjustments, to simulate DRG recalibration using cost-based weights, and to calculate hospital-specific cost-to-charge ratios for outlier payments.

During 1987, HCFA significantly improved the timeliness of cost data. A sample of Medicare Cost Reports for the third year of PPS (primarily covering fiscal year 1986) was made available in June 1987. It essentially constituted the "early returns" sample recommended by ProPAC in its April 1987 report to the Secretary. Barring any major changes in the MCR, the relatively short time lag in data availability should continue. In this report, the Commission urges the Secretary to explore additional areas for improving the timeliness of cost data.

The accuracy and validity of cost report data continue to be more difficult to address. The cost report was designed solely to estimate costs for Medicare reimbursement purposes. Cost report data, therefore, may not fully reflect the actual costs of treating Medicare patients. Estimating costs from the MCR is complicated by accounting and management strategies that vary across hospitals and over time. These include hospital step-down allocation methods, pricing strategies, and apportionment of costs between Medicare and other payers.

The Commission sponsored a preliminary effort to assess the accuracy of data from the MCR. A survey of fiscal intermediaries and hospital administrators provided some broad perceptions on the accuracy of cost data under PPS. Results indicate that although PPS has broken the link between the MCR and Medicare payment, the quality of the cost data has not changed. The data, however, still reflect techniques hospitals used to maximize cost-based reimbursement. They indicate some new incentives as well, such as more complete reporting of costs for PPS pass-throughs and outpatient department services. (The results of this work are summarized in Technical Appendix A.)

ProPAC plans to conduct additional analyses on the adequacy of MCR data for specific purposes. The Commission also is developing a longitudinal data base linking MCRs from 1981 through the third year of PPS. This data base will be used to analyze costs before and after PPS implementation. Analyses will focus on changes in per-case costs, ancillary cost-to-charge ratios, and the

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relationship between per-case costs and the case-mix index over time.

HOSPITAL BEHAVIORAL RESPONSES TO PPS

PPS and other forces in the health care industry have changed the way hospitals deliver care to Medicare beneficiaries. Indications of such changes can be evaluated through cost report or patient billing data, as discussed earlier. The Commission also evaluates these changes by examining the hospital industry more directly. Because hospital behavioral changes could affect both cost and quality of care, ProPAC will continue to expand its study of these changes.

Management Strategies

Managerial strategies alter the structure or the process of care in various ways to respond to the incentives of the payment method. These strategies affect both the circumstances under which care is delivered and the resources made available for patient care. ProPAC will examine the changes in the structure and process of patient care by focusing on three major factors: hospital staffing, the structure of the industry, and the sensitivity of hospitals to the DRG prices.

Staffing—Hospitals have reduced the size of their inpatient work force since the implementation of PPS. Inpatient FTEs declined by 2.1 percent from 1983 to 1986. Inpatient FTEs per admission, however, increased by 0.8 percent during this period. These trends may reflect hospitals' inability to respond quickly to declining admissions. In addition, hospitals may not be able to reduce inpatient FTEs per admission due to increasing patient severity.

ProPAC will investigate these staffing trends, focusing on how the function, numbers, and organization of hospital employees have changed. Research will emphasize understanding how and why staffing changes differ across hospitals. The Commission will examine information on the extent to which changes are attributable to PPS and prospective pricing instituted by other payers. These data will be used to infer the potential effects of staffing changes on hospitals, hospital employees, the Medicare program, and its beneficiaries.

Structure of the Industry—Until recently, most health care was provided by single entities like hospitals, physicians, clinics, and nursing homes. Facing new market pressures, however, the structure of the health care industry is changing. Particularly notable are vertical and horizontal integration strategies. These are strategies in which hospitals expand to provide similar services or related services covering other phases and levels of care. Little is known about the effects of these strategies on the Medicare program and its beneficiaries.

ProPAC is undertaking an investigation of alternative vertical and horizontal integration strategies and the effects of each on the overall structure of the hospital industry. The study will look at existing data on the prevalence of such strategies in the health care industry. The Commission will review alternative corporate governing and decision-making structures. The legal and financial implications of these alternative approaches, including consequences for Medicare payments to hospitals, will be explored. Finally, the study will address the hospitals' objectives in adopting these integration strategies.

DRG Price Sensitivity—The extent to which hospitals are sensitive to variations in DRG prices is an important component of the relationship between prospective pricing incentives and hospital behavioral changes. ProPAC will identify the extent and objectives of hospital strategies to concentrate in or discontinue selected services. The analysis will assess whether these strategies are a direct response to variations in the DRG prices or other factors influencing hospital management. The role of product-line management and service costing in hospitals' responses to DRG price variations also will be examined. ProPAC will use this information to examine changes in the provision of hospital services over time. Any trends in the adoption or discontinuation of services since the introduction of PPS will be identified.

Responses to the Continuation of the Capital Cost Pass-Through

Capital continues to be reimbursed on a pass-through basis. Paying for capital in this manner—while operating costs are paid under a prospective system—has given hospitals economic incentives

to substitute capital for operating costs. Some hospitals may have responded to the incentives by actually increasing their capital investments. Others may have attempted to maximize Medicare reimbursement by changing their accounting strategies so that more costs are classified as capital. Indeed, it is uncertain whether part of the 11.5 percent annual growth rate in capital costs since PPS implementation is attributable to these kinds of behavioral changes. Under current policy, payments were reduced below costs for 1987 through 1989. This policy may thus lessen the effect of the incentives.

ProPAC will examine the impact of the dual capital-operating cost payment system. Medicare cost report trend data will provide descriptive information on changes in hospital investment behavior. The study will examine, for example, changes in the relative capital costs of ancillary departments compared with their total costs. From this, ProPAC will draw general conclusions about the effects of the incentives inherent in the dual payment method.

In addition, ProPAC will study the relationship between capital costs and occupancy. This information will support Commission judgments on the feasibility and appropriateness of linking capital payments to hospital occupancy rates. This study is in response to a congressional mandate in the Omnibus Budget Reconciliation Act of 1987.

SHIFT OF SERVICES FOR AN EPISODE OF CARE

There have been major shifts in the site of health care service delivery since the implementation of PPS. Two phenomena are largely responsible. First, medical or surgical procedures that were performed in inpatient hospital facilities are being shifted to ambulatory settings, eliminating hospital admissions. This trend began well before the implementation of PPS. Second, services that used to be provided as part of a hospital admission increasingly are delivered before or after the hospital stay in an ambulatory setting. This trend is associated with declining lengths of stay that can, in part, be attributed to the incentives of PPS.

These major changes in site of care have raised many questions about total costs, quality of care, and beneficiary access to services. Further, the extent and nature of site-of-care shifts may vary across beneficiary groups and hospital types. It is difficult to explore these issues because available data are inadequate to investigate services provided throughout an entire episode of care. For certain service delivery sites there are neither data nor plans to develop sources of data. ProPAC is interested in these issues because of the critical role PPS is playing in these changes even though they involve outpatient service settings.

PPS incentives to shift services out of the inpatient hospital setting affect beneficiary out-of-pocket spending. The Commission has examined illustrative examples of typical cases. ProPAC determined that beneficiary cost-sharing responsibilities for the facility charges are usually less for outpatient surgery than for the same surgery performed in an inpatient setting. This would probably be true for medical treatment performed in the outpatient setting as well. On the other hand, when beneficiaries are treated as inpatients, but discharged earlier for further treatment, they must bear the cost of coinsurance for additional facility charges, thus increasing total liability.

Many questions remain about the effects of site-of-care shifts on total health care costs. While such shifts could reduce costs for inpatient care, they may increase the total costs over an episode of care. These changing cost patterns may vary across types of procedures, DRGs, or various beneficiary groups. The quality of care also may be affected by the shifts in site of care.

Finally, beneficiary access to appropriate services, particularly because patients are being discharged from hospitals earlier, needs to be assessed and monitored. Post-hospitalization services may not be available to some beneficiaries, either because they are not provided in a particular area or because the beneficiaries cannot afford them.

One of the Commission's major priorities in the coming year is to better understand the cost, quality, and access to services throughout an entire episode of care. To do this, beneficiary-level data on an entire episode of care are needed. These data would include utilization and costs of services covered under both Medicare Part A and Medicare Part B.

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Because of the importance of these issues and the clear need for more and better data, ProPAC is initiating a major data development effort to merge Medicare Part A and B files. The Commission is carefully monitoring other organizations' efforts to produce similar data bases and will collaborate on these efforts if possible. The development of a linked data base is the first stage of several specific analytic activities ProPAC plans to undertake. These include examinations of particularly vulnerable beneficiary groups and variations in medical practice patterns.

A related effort will examine benefit changes in the Medicare program since 1980 by reviewing statutory, regulatory, and administrative changes. These benefit changes affect utilization and costs, so they will be important to understand in analyses of changes in services provided throughout an episode of care.

BENEFICIARY ACCESS AND QUALITY

Beneficiary access to health care, and the quality of that care, continue to be among the most important issues facing the Medicare program. To assess PPS fully, methods are needed that accurately measure and assess changes in access and quality of care. Additional methods are necessary to identify what has caused these changes—for example, specific provider practices, features of PPS, or other factors.

Ensuring beneficiary access to high-quality care has always been one of the Commission's major priorities. All analyses and policy recommendations are undertaken considering their potential effects on quality of care. One of the major objectives of ProPAC's work on variations in resource use, for example, is to assess how these variations affect quality of care. The studies of hospitals' behavioral responses to PPS also will examine potential effects on quality of care. In addition, ProPAC will look at specific activities that may compromise quality of care. It will also identify specific populations that may be particularly vulnerable to declines in quality of care. The Commission will continue to use existing data to investigate particular characteristics of the process of care in light of its concerns about quality.

Studies of beneficiary access and quality require considerable time and financial resources. To conserve and focus the Commission's resources, therefore, ProPAC will continue to monitor research conducted by other organizations. The Institute of Medicine of the National Academy of Sciences recently launched a major assessment of quality of care mechanisms under the Medicare program. This congressionally mandated study may become the basis of critical public policy discussions and actions on beneficiary access and quality of care. The study will provide important information that the Commission will consider in its deliberations.

Measuring the Quality of Inpatient Care

As its focus shifts to the broader effects of PPS, the Commission has intensified its attempts to use health outcomes to measure quality of care, although data inadequacies continue to limit these efforts. Only very crude outcome statistics, such as mortality and readmission rates, are available. Findings based on these data are incomplete and difficult to interpret.

The Commission believes that mortality statistics are an important source of information about quality of care. Further technical and statistical analysis, however, is needed to refine the methodology for calculating mortality statistics. In particular, data need to be adequately adjusted for severity of illness. The Commission thus plans to complete a preliminary study of the effects of within-DRG patient severity on mortality statistics. Information from this study will supplement data HCFA is gathering on this issue.

Changes in readmission rates over time may provide additional empirical evidence about how hospital responses to the incentives of PPS affect quality of care. The Commission is analyzing rates of readmission during the first three years of PPS. This study will document overall changes in readmission rates for beneficiaries in all DRGs as well as for specific groups of DRGs. In addition, readmission rates will be compared across various hospital types.

Although the currently available outcome measures of quality of care are limited, there is a significant amount of data that can provide descriptive information about the quality of care

provided to Medicare beneficiaries. ProPAC will continue its analysis of vulnerable beneficiary groups that may be at a greater risk of adverse health outcomes if quality of care declines. The groups are defined by diagnosis, age, and income status. For these vulnerable groups, ProPAC will document longitudinal patterns of inpatient resource use, including length of stay, total charges, and mortality and readmission rates. This descriptive information will be useful in understanding the changing hospital stay and identifying areas needing further research.

Measuring the Quality of Non-Inpatient Care

As more of the beneficiary's care is provided outside the hospital, ProPAC will broaden its examinations of quality of care to incorporate these other settings. The Commission will continue to devote a significant portion of its resources to examining the structure and process of the care provided throughout an episode of care. Two such efforts are described below.

Transitional Care—The Commission's major study of post-acute, or transitional, care is in its second year. This study was initiated to examine the provision of post-acute care in hospital settings. A national survey and series of case studies were designed to define transitional care, measure its prevalence and distribution, and examine the cost and quality of care implications for this level of care.

Preliminary findings from the study's survey and from several case studies are summarized in Technical Appendix C. During 1988, the Commission will complete this analysis and consider additional research suggested by the results.

Shift of Inpatient Care to Outpatient Settings—Consistent with the incentives of PPS and PRO activities, service delivery is increasingly being shifted to outpatient settings. Unlike the problems associated with post-acute care, this shift of site may affect beneficiaries who are not hospitalized. It is important, therefore, to begin developing data bases to document the magnitude of the shift and to characterize the patients now treated in outpatient settings.

The Commission has developed several research strategies for addressing this issue. As described earlier, ProPAC is developing a data base that links hospital and outpatient services by beneficiary. The Commission will use these and other data to document changes in volume and costs for several procedures provided in the inpatient and outpatient setting. ProPAC will compare, by service setting, the health outcomes and severity of illness of patients undergoing these procedures.

The Commission will also study hospital outpatient services that are not necessarily provided during an episode of care that includes hospitalization. The Omnibus Reconciliation Act of 1987 instructed ProPAC to advise the Secretary on the payment system for ambulatory surgery and nonsurgical outpatient services furnished by hospitals. Initially, ProPAC will examine available MCR data to describe the cost and use of these services across hospitals.

Perceptions of Quality of Care

Beneficiaries' and providers' perceptions of quality are important sources of information. ProPAC considers these perceptions in assessing changes in quality, identifying particular problem areas, and determining research needs. The Commission systematically reviewed anecdotal evidence and perceptions related to quality of care in 1986. Besides identifying areas that were most sensitive to changes in quality of care, the study helped ProPAC refine its research agenda for this issue. The Commission worked closely with the American Association of Retired Persons (AARP), which is continuing analyses and studies on this topic. ProPAC will monitor AARP's efforts and will review the information developed through its studies.

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Friday
May 27, 1988

Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 602

Income Taxes; Partnerships, S Corporations and Personal Service Corporations; Taxable Year Election; Temporary Regulations and Notice of Proposed Rulemaking

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8205]

Income Taxes; Election of Taxable Year Other Than Required Year by Partnerships, S Corporations and Personal Service Corporations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the election by partnerships, S corporations, and personal service corporations to use a taxable year other than their required taxable year. In addition, the text of the temporary regulations set forth in this document serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the proposed rules section of this issue of the **Federal Register**. Changes to the applicable law were made by the Revenue Act of 1987. The regulations affect partnerships, S corporations, and personal service corporations (and owners of those entities) and provide them with the guidance needed to comply with the law. In addition, the temporary regulations include conforming and clarifying rules regarding the determination of the taxable year of a partnership under section 706.

EFFECTIVE DATE: The temporary regulations are generally effective for taxable years beginning after December 31, 1986.

FOR FURTHER INFORMATION CONTACT: Arthur E. Davis III of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention: CC:LR:T), (202) 566–3918, not a toll-free call.

SUPPLEMENTARY INFORMATION:

Background

Sections 706(b), 1378, and 441(i) of the Internal Revenue Code (the Code), as amended by section 806 of the Tax Reform Act of 1986 (the 1986 Act) (Pub. L. 99–514, 100 Stat. 2085), generally require partnerships, S corporations, and personal service corporations ("PSCs"), respectively, to conform their taxable years to the taxable years of their owners.

The Revenue Act of 1987 (the 1987 Act) (Pub. L. 100–203, 101 Stat. 1330), enacted on December 22, 1987, added sections 444, 7519, and 280H to the Code, effective for taxable years beginning after December 31, 1986. Section 444 allows certain partnerships, S corporations, and PSCs to make an election (a "section 444 election") to use a taxable year that is different from the taxable year that such entities would otherwise be required to use. Section 444(d)(3), however, generally prohibits entities that are members of a tiered structure from making a section 444 election.

Electing partnerships and S corporations are required to make payments under section 7519 ("required payments") to the Federal government that are intended to represent the value of the tax deferral obtained by the owners of those entities through the entity's use of a taxable year different from the required taxable year.

Electing PSCs failing to distribute certain amounts to employee-owners by December 31 of a taxable year may be required, under section 280H, to defer certain deductions for amounts includible (at any time) in the gross income of employee-owners.

On January 15, 1988, the Internal Revenue Service issued Notice 88–10 (1988–5 I.R.B. 24) to provide guidance with respect to certain issues of immediate concern to taxpayers affected by section 444. Notice 88–10 stated that forthcoming temporary regulations would provide that a section 444 election shall not be required to be made before the later of (i) April 30, 1988, or (ii) 60 days after the publication of those temporary regulations in the **Federal Register**. Publication of these temporary regulations in the **Federal Register** commences the beginning of the 60-day period for making a section 444 election. Thus, a section 444 election for the first taxable year beginning after December 31, 1986, must be made on or before July 26, 1988.

On March 11, 1988, the Internal Revenue Service issued Announcement 88–49 (1988–13 I.R.B. 34) to provide guidance to corporations electing S status that are considering whether to make a section 444 election. On March 15, 1988, the Internal Revenue Service issued Notice 88–36 (1988–13 I.R.B. 27) to provide guidance regarding the definition of a "tiered structure" for purposes of section 444 (d)(3).

Furthermore, on April 4, 1988, the Internal Revenue Service issued Notice 88–49 (1988–16 I.R.B. 29). Notice 88–49 waived certain penalties and answered additional questions regarding sections 444, 7519, and 280H that had not been answered in the earlier notices related to these sections.

Section 444

a. In General

If three conditions are met, a partnership, S corporation, or PSC is eligible to make a section 444 election. First, with one limited exception, the entity may not be a member of a tiered structure. Second, the entity must not have had a section 444 election in effect previously. Third, certain restrictions on the deferral period of the taxable year to be elected must be satisfied. In general, the deferral period of the taxable year to be elected must be no more than three months. However, there are special rules regarding the deferral period for entities that are changing or retaining their taxable year.

For purposes of section 444 and these temporary regulations, the term "required taxable year" is defined as the taxable year that is determined under section 706(b), 1378, or 441(i), without taking into account any taxable year which is allowable by reason of business purpose. Thus, the calendar year is the required taxable year for most partnerships and all S corporations and PSCs. The only partnerships that can have a required taxable year of other than a calendar year are certain partnerships with fiscal year partners.

Furthermore, for purposes of section 444 and these temporary regulations, the term "deferral period" is defined as the number of months that occur after the end of the taxable year desired under section 444 and through the close of the required taxable year. For example, if the taxable year desired under section 444 is September 30 and the required taxable year is December 31, the deferral period for such September 30 taxable year is 3 months (September 30 to December 31). With respect to taxpayers using a taxable year that is the same as their required taxable year, the deferral period for such year is zero.

If an entity qualifies to make a section 444 election and desires to make such election, the entity must file Form 8716 in accordance with § 1.444–3T of these temporary regulations. Furthermore, the entity must comply with the requirements of section 7519 or 280H, whichever is applicable.

A section 444 election shall remain in effect until it is terminated. Paragraph (a)(5) of § 1.444–1T of these temporary regulations provides that a section 444 election is terminated when the entity (1) changes to the required taxable year, (2) liquidates (including a deemed liquidation of a partnership pursuant to § 1.708–1(b)(1)(iv)), (3) willfully fails to comply with the requirements of section 7519 or 280H, whichever is applicable, or

(4) becomes a member of a tiered structure (unless the "same taxable year exception" provided in § 1.444–2T(e) of these temporary regulations applies). In addition, a section 444 election is generally terminated if (5) a corporation's S election is terminated or (6) a PSC ceases to be a PSC. However, if a corporation is a PSC immediately after termination of its S election, a section 444 election may be continued by the PSC (subject to the rules of § 1.280H–1T). Furthermore, a PSC that ceases to be a PSC solely because it becomes an S corporation may also continue a section 444 election (subject to the rules of §§ 1.7519–1T and 1.7519–2T).

b. Tiered Structure

1. In General

If an entity is a member of a tiered structure, such entity cannot make or continue a section 444 election unless the same taxable year exception provided in § 1.444–2T(e) applies. An entity is generally considered a member of a tiered structure if the entity directly owns any portion of a deferral entity or a deferral entity owns any portion of the entity. A deferral entity is any entity that is a partnership, S corporation, PSC, or trust. However, grantor trusts and certain trusts treated like grantor trusts are excluded from the definition of a deferral entity. Furthermore, as provided in § 1.444–2T(c) of these temporary regulations, certain deferral entities may be disregarded if, in the aggregate, they are de minimis with respect to the entity desiring to make a section 444 election.

These temporary regulations provide that the date for determining the existence of a tiered structure is generally the last day of the required taxable year ending within the taxable year that would result from a section 444 election. Thus, for example, assume an S corporation that historically used a September 30 taxable year desires to retain its September 30 taxable year by making a section 444 election for its taxable year beginning October 1, 1987. The general rule provides that December 31, 1987, is the time for determining whether such S corporation is a member of a tiered structure. However, for taxable years beginning in 1987, these temporary regulations provide that an entity will not be a member of a tiered structure if, on the date the entity files its section 444 election for such taxable year, the entity is not a member of a tiered structure. Thus, in the above example, the S corporation will be considered to be a member of a tiered structure for its taxable year beginning October 1, 1987, only if the S corporation is a member of a tiered structure on both December 31, 1987, and the date the S corporation files its section 444 election for such year.

2. De minimis Rules

These temporary regulations include two de minimis rules that allow an entity to disregard certain deferral entities in determining whether the entity is a member of a tiered structure. The "downstream de minimis rule" provides that if an entity owns any portion of one or more deferral entities, such ownership is disregarded if, in the aggregate, all such deferral entities meet either (i) the 5 percent adjusted taxable income test, or (ii) the 2 percent gross income test. See § 1.444–2T(c)(2) of these temporary regulations for further details on these two tests. The "upstream de minimis rule" provides that if an entity is directly owned by one or more deferral entities, such ownership is disregarded if deferral entities directly own, in the aggregate, 5 percent or less of the entity desiring to make or continue a section 444 election.

3. Same Taxable Year Exception

Paragraph (e) of § 1.444–2T of these temporary regulations provides that if a partnership or S corporation is a member of a tiered structure, the partnership or S corporation may have a section 444 election in effect if the tiered structure consists entirely of partnerships or S corporations (or both), all of which have the same taxable year. The same taxable year exception is generally not available if a PSC is a member of the tiered structure. The temporary regulations provide detailed rules for the interaction of the de minimis rules with the same taxable year exception (see § 1.444–2T(e)(5)).

4. Notice 88–36

Except for three minor clarifications and several minor editorial changes, § 1.444–2T of these temporary regulations contains the same tiered structure rules first provided in Notice 88–36. The first clarification relates to the date for determining the existence of a tiered structure (see § 1.444–2T(d)). Specifically, these temporary regulations clarify that if the taxable year resulting from a section 444 election does not include the last day of the required taxable year for such taxable year, then the entity making the section 444 election is not considered to be a member of a tiered structure for such year (see example (2) in § 1.444–2T (d)(1)).

The second clarification relates to the exception from the term "deferral entity" for grantor trusts (and certain trusts treated as grantor trusts) in § 1.444–2T(b)(2)(ii). Specifically, these temporary regulations clarify that to the extent any taxpayer owns a grantor trust, such taxpayer is treated as directly owning the assets of such a trust. For illustrations of this rule, see examples (1) and (2) in § 1.444–2T (b)(2)(ii).

The third clarification is that an affiliated group of personal service corporations filing a consolidated income tax return is treated as a single entity for purposes of determining whether a taxpayer is part of a tiered structure. See § 1.444–2T(b)(2)(i).

c. Limitations on Deferral Period

In general, a section 444 election may be made only if the deferral period of the taxable year to be elected is not longer than three months. However, if an entity is changing its taxable year, the deferral period of the taxable year to be elected may not be longer than the shorter of (1) three months or (2) the deferral period of the taxable year that is being changed. These temporary regulations define the phrase "deferral period of the taxable year that is being changed" as the deferral period of the taxable year immediately preceding the taxable year for which the entity desires to make a section 444 election.

Thus, for example, assume a partnership that has historically used a March 31 taxable year desires to change to a taxable year ending September 30 for its taxable year beginning April 1, 1987. Further assume that for the taxable year beginning April 1, 1987, the partnership's required taxable year is December 31. Based on these facts, the deferral period of the taxable year being changed is nine months (March 31 to December 31) and the deferral period of the taxable year being elected is three months (September 30 to December 31). As a result, the partnership may, if otherwise qualified (*i.e.*, the partnership is not considered to be a member of a tiered structure), make a section 444 election to change to a year ending September 30 for its taxable year beginning April 1, 1987.

These temporary regulations provide special transitional rules for certain taxpayers. First, § 1.444–1T(b)(2)(ii) of these temporary regulations provides that if a corporation (1) elected S status after September 18, 1986, and before January 1, 1988, and (2) elected to have a calendar taxable year, then such corporation is allowed to modify the normal deferral period limitations on changing its taxable year. Specifically, such corporation may substitute the deferral period of the last taxable year

prior to electing to be an S corporation for the deferral period of the taxable year that is being changed. Thus, in order to benefit from this special rule, the corporation electing S status must have been in existence prior to electing S status.

The second special transitional rule provides that an entity may, if otherwise qualified, make a section 444 election for its first taxable year beginning after December 31, 1986, to have a taxable year that is the same as the entity's last taxable year beginning in 1986. See § 1.444–1T(b)(3) of these temporary regulations.

d. Procedures for Making a Section 444 Election (Section 1.444–3T)

1. In General

A section 444 election is made by filing Form 8716, "Election to Have a Tax Year Other Than a Required Tax Year," with the Service Center indicated by the instructions to Form 8716. In general, Form 8716 must be filed by the earlier of (i) the 15th day of the fifth month following the month that includes the first day of the taxable year for which the election will first be effective, or (ii) the due date (without regard to extensions) of the income tax return resulting from the section 444 election. However, if, based on the general rule set forth in the preceding sentence, the due date for filing Form 8716 is prior to July 26, 1988, the due date is extended to July 26, 1988. In addition to filing Form 8716 with the appropriate Service Center, a copy of Form 8716 must be attached to the entity's income tax return for the taxable year for which the section 444 election is made.

2. Corporations Electing S Status

A corporation electing S status is subject to the same procedural rules for filing Form 8716 as any other entity making a section 444 election. Thus, a corporation electing S status that desires to make a section 444 election is required to file Form 8716 in accordance with the rules in these temporary regulations, but is not required to file Form 8716 with its Form 2553, "Election by a Small Business Corporation." However, a corporation electing S status after September 26, 1988, that desires to make a section 444 election, is required to state on Form 2553 its intention to (i) make a section 444 election, if qualified, or (ii) make a "back-up section 444 election." If a corporation electing S status fails to state either of the above intentions, the District Director may, at his discretion, disregard a subsequent section 444 election for such entity.

Section 1.444–1T(a)(6) provides rules for reactivating certain S elections with respect to the first taxable year of the taxpayer beginning after December 31, 1986.

e. Back-up Section 444 Election

These temporary regulations provide that if an entity requests permission, based on business purpose, to use a particular taxable year, such entity may, if otherwise qualified, file a back-up section 444 election. Thus, if the entity's business purpose request is subsequently denied by the Commissioner, the entity shall activate the back-up election for such year. The rules and procedures concerning back-up section 444 elections are provided in § 1.444–3T(b)(4) of these temporary regulations.

f. Miscellaneous Administrative Relief

These temporary regulations automatically extend the due dates for filing certain income tax returns (see § 1.444–3T(c)(1)). These temporary regulations also waive certain late payment penalties that may otherwise be imposed on a PSC or S corporation (see § 1.444–3T(c)(2)).

Section III. B. of Notice 88–49 waived certain late payment and filing penalties that may otherwise be imposed on the owners of a partnership or S corporation considering whether to make a section 444 election for its first taxable year beginning after December 31, 1986. However, section III. C. of Notice 88–49 requires that interest must be paid on any underpayment of income tax.

Section 7519

a. In General

Section 7519 and the temporary regulations thereunder apply to any taxable year that a partnership or S corporation has a section 444 election in effect (an "applicable election year"). For each applicable election year, a partnership or S corporation must file a return and make a required payment as provided in § 1.7519–2T. However, if the required payment for an applicable election year is not more than $500 and the partnership or S corporation has not been required to make a required payment for a prior year, the partnership or S corporation should not make a required payment for that applicable election year. Nevertheless, such partnership or S corporation must file a return.

b. Required Payment

1. In General

Section 1.7519–1T(a)(3) provides that the term "required payment" means, with respect to any applicable election year of a partnership or S corporation, an amount equal to the excess of—

(i) The product of the applicable percentage of the adjusted highest section 1 rate, multiplied by the net base year income of the entity, over

(ii) The cumulative amount of the required payments, actually made for all preceding applicable election years (reduced by the cumulative amount of payments refunded under section 7519(c) for all such preceding years).

Under the temporary regulations, a partnership or S corporation that has made a section 444 election and that is a member of a tiered structure must separately determine the amount of its required payment without regard to the required payment of any other member of the tiered structure. (See example (3) of § 1.7519–1T(d)).

2. Applicable Percentage

Under section 806(e)(2)(C) of the 1986 Act, certain partners and shareholders are entitled to a four-year "spread" of the income and expense items from a partnership or S corporation that is required to change its taxable year under the 1986 Act. In order to provide a de facto four-year spread, section 7519(b)(1)(A) multiplies the required payment otherwise required to be made by a partnership or S corporation by the applicable percentage defined in section 7519(d)(4). However, certain entities (*e.g.*, a corporation that elected to be an S corporation for a taxable year beginning in 1987) that qualify to make a section 444 election, and thereby obtain

the de facto four-year spread, may have partners or shareholders that would not have been entitled to the four-year spread under section 806(e)(2)(C) of the 1986 Act. Nevertheless, the temporary regulations provide that the applicable percentage for the first taxable year beginning in 1987 of any partnership or S corporation properly making a section 444 election is 25 percent.

3. Adjusted Highest Section 1 Rate

For any applicable election year, the term "adjusted highest section 1 rate" means the highest rate of tax under section 1 applicable to the period defined in the regulations, plus 1 percentage point. Notwithstanding the preceding sentence, the adjusted highest section 1 rate is 36 percent for applicable election years beginning in 1987. The temporary regulations provide that for purposes of section 7519 the highest rate of tax is determined without regard to the effect of section 1(g) (relating to the phaseout of the 15-percent rate and personal exemptions).

4. Net Base Year Income

In general, the net base year income of a partnership or S corporation is the sum of—

(i) The deferral ratio multiplied by the partnership's or S corporation's net income for the base year, plus

(ii) The excess (if any) of—

(A) The deferral ratio multiplied by the aggregate amount of applicable payments made by the partnership or S corporation during the base year, over

(B) The aggregate amount of such applicable payments made during the deferral period of the base year.

For purposes of section 7519 and the temporary regulation, the term "base year" means, with respect to any applicable election year, the taxable year of the partnership or S corporation immediately preceding such applicable election year. The temporary regulations define the term "deferral ratio" as the number of months in the deferral period of the applicable election year divided by 12 months.

5. Applicable Payment

For purposes of section 7519, the temporary regulations generally define the term "applicable payment" as any amount deductible in the base year that is includible at any time, directly or indirectly, in the gross income of a taxpayer that during the base year is a partner or shareholder. The temporary regulations provide that the term "applicable payment" does not include any guaranteed payments under section 707(c).

In general, an amount is indirectly includible in the gross income of a partner or shareholder if the amount is includible in the gross income of a related party, as determined under § 1.7519–1T(b)(5)(iv)(D) of the temporary regulations.

The temporary regulations further provide that if an S corporation was a C corporation for the base year, the corporation shall be treated as if it were an S corporation for the base year for purposes of determining the corporation's net base year income, including applicable payments. Thus, amounts deductible by a C corporation in the base year that are includible at any time in the gross income of a taxpayer that is a shareholder during the base year are treated as if deductible by an S corporation and are, therefore, within the meaning of the term "applicable payment."

6. Special Rule for Base Year of Less Than Twelve Months

If a base year is a taxable year of less than twelve months (a "short base year"), the temporary regulations provide special rules for computing the net base year income for such short year. The net base year income for the short base year is an amount equal to the excess, if any, of—

(i) The deferral ratio multiplied by the annualized short base year income, over

(ii) Applicable payments made during the deferral period of the applicable election year following the base year.

See § 1.7519–1T(b)(5)(v) of these temporary regulations.

c. Special Rules for Certain Applicable Election Years

The temporary regulations provide special rules for determining the applicable payment for certain applicable election years. If an applicable election year is a partnership's or S corporation's first year in existence (*i.e.*, the partnership or S corporation is newly formed and therefore does not have a base year), the temporary regulations provide that the required payment for such applicable election year is zero. If a partnership or S corporation makes a section 444 election and the resulting applicable election year (the "first applicable election year") of the partnership or S corporation ends prior to the last day of the required year, the temporary regulations provide that the required payment for the first applicable election year is zero.

d. Refunds of Required Payments

A partnership or S corporation is entitled to make a claim for refund if (1) the product of th applicable percentage of the adjusted highest section 1 rate multiplied by the net base year income is less than the cumulative amount of required payments in all preceding applicable election years (reduced by the cumulative amount of refunds for such preceding years), or (2) the partnership or S corporation terminates its section 444 election as defined in paragraph (a)(5) of § 1.444–1T.

e. Returns Under Section 7519

Section 7519(e)(3) provides that each partnership or S corporation that makes a section 444 election shall include on any required return or statement such information as the Secretary shall prescribe as is necessary to carry out the provisions of section 7519. The temporary regulations provide that with respect to an applicable election year, a partnership or S corporation must file a return showing the required payment, even if the required payment for the applicable election year is zero. For an applicable election year beginning in 1987, the return shall be made on Form 720, "Quarterly Federal Excise Tax Return." For an applicable election year beginning after 1987, the return shall also be made on Form 720 unless another form is prescribed by the Commissioner.

Partnerships and S corporations that would otherwise file Form 720 for the second quarter of 1988 must file Form 720 by the normal due date of such form for the second quarter of 1988. Thus, in most cases, these partnerships and S coporations will file Form 720 on or before July 31, 1988. However, some partnerships and S corporations (for example, those required to pay the windfall profits tax) must file Form 720 on or before August 31, 1988. See the instructions to Form 720 for additional general information. Partnerships and S corporations making a section 444 election that would not othewise file Form 720 for the second quarter of 1988 must file Form 720 on or before July 31, 1988. See § 1.444–3T(b)(4)(iii) for a special rule that may extend the due date for filing a return when a partnership or S corporation makes a back-up section 444 election.

f. Payment of Required Payments

For an applicable election year beginning in 1987, the required payment is due and patable without assessment and notice on or before the date specified in the temporary regulations for filing the Form 720. The required payment must be paid by check or money order and such check or money order must be sent, together with Form

720, to the Service Center indicated by the instructions to Form 720. See § 1.444–3T(b)(4)(iii) for a special rule that may extend the due date for making a required payment when a partnership or S corporation makes a back-up section 444 election.

For an applicable election year beginning after 1987, the required payment is due and payable without assessment and notice on or before May 15 of the calendar year following the calendar year in which the applicable election year begins.

Section 280H

a. In General

Section 280H applies to any taxable year that a personal service corporation (PSC) has a section 444 election in effect (an "applicable election year"). For purposes of section 280H, the term "personal service corporation" has the same meaning given such term in § 1.441–4T(d).

If, for any applicable election year, a PSC does not satisfy the minimum distribution requirement of section 280H(c), the deduction otherwise allowable under chapter 1 of the Code for applicable amounts shall not exceed the maximum deductible amount. Any amount not allowed as a deduction in an applicable election year is allowed as a deduction in the succeeding taxable year.

Section 280H provides that the disallowance of deductions under section 280H shall not apply for purposes of subchapter G of chapter 1 of the Code (relating to personal holding companies). The temporary regulations clarify that the disallowance of deductions under section 280H does not apply for purposes of determining whether compensation to employee-owners is reasonable.

b. Applicable Amount

For purposes of section 280H, the term "applicable amount" means, with respect to a taxable year, any amount that is otherwise deductible by a PSC in such year and includible at any time, directly or indirectly, in the gross income of employee-owners. The temporary regulations clarify that an amount includible in the gross income of an employee-owner will be considered an applicable amount even though such employee owns no stock of the corporation on the date the employee included the amount in income.

In general, an amount is indirectly includible in the gross income of an employee-owner if the amount is includible in the gross income of a related party, as determined under § 1.280H–1T(b)(4)(ii) of the temporary regulations.

c. Minimum Distribution Requirement

A PSC meets the minimum distribution requirement for an applicable election year if, during the deferral period of such year, applicable amounts (not including excess applicable amounts carried over from the preceding year) for all employee-owners in the aggregate equal or exceed the lesser of the amount determined under the "preceding year test" or the amount determined under the "3-year average test" as described in paragraph (c) of § 1.280H–1T.

The temporary regulations provide special rules for applying section 280H to newly organized personal service corporations and to existing corporations that become PSCs. A newly organized PSC is deemed to satisfy the preceding year test and the 3-year average test for the first year of the corporation's existence. If an existing corporation was not a PSC for each of the three years preceding the corporation's first applicable year, the determination of whether the corporation satisfies the preceding year test and the three-year average test is made by treating the corporation as though it were a PSC for each of the three preceding years (or as many years as the corporation has been in existence).

d. Preceding Year Test

The amount determined under the preceding year test is the product of (1) the applicable amounts during the taxable year preceding the applicable election year (the "preceding taxable year"), divided by the number of months in the preceding taxable year, multiplied by (2) the number of months in the deferral period of the preceding taxable year.

e. 3-year Average Test

The amount determined under the 3-year average test is the applicable percentage multiplied by the adjusted taxable income for the deferral period of the applicable election year. The term "applicable percentage" means the percentage (not in excess of 95 percent) determined by dividing—

(1) The applicable amounts during the 3 taxable years of the corporation immediately preceding the applicable election year, by

(2) The adjusted taxable income of such corporation for such 3 taxable years.

The temporary regulations provide that if the PSC has been in existence less than 3 years, the 3-year average test is applied taking into account the years the corporation has been in existence.

f. Adjusted Taxable Income

The temporary regulations define the term "adjusted taxable income" as taxable income determined without regard to applicable amounts. The temporary regulations provide that the adjusted taxable income for the deferral period of the applicable election year equals the adjusted taxable income that would result if the PSC filed an income tax return for the deferral period of the applicable election year under its normal methods of accounting. However, under the temporary regulations, a PSC may make a reasonable estimate of such amount.

For purposes of determining the adjusted taxable income for any period, the temporary regulations provide that any NOL carryover shall be reduced by the amount of such carryover that is attributable to the deduction of applicable amounts. The portion of the NOL carryover attributable to the deduction of applicable amounts is the difference between the NOL carryover computed with the deduction of such a mounts and the NOL carryover computed without the deduction of such amounts. For purposes of determining the adjusted taxable income for the deferral period, an NOL carryover to the applicable election year, as reduced, shall be allowed first against the income of the deferral period.

g. Maximum Deductible Amount

The term "maximum deductible amount" means the applicable amounts during the deferral period of the applicable election year, plus the product of (1) such applicable amounts divided by the number of months in the deferral period of the applicable election year, multiplied by (2) the number of months in the nondeferral period of the applicable election year. The term "nondeferral period" means the portion of the applicable election year that occurs after the portion of such year constituting the deferral period.

h. NOL Carrybacks Disallowed

No net operating loss carryback is allowed to (or from) any taxable year of a PSC to which a section 444 election applies.

Special Analyses

The Commissioner of Internal Revenue has determined that this temporary rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required. A general

notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Accordingly, the temporary regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

The collection of information requirements contained in this regulation have been submitted to the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1980. These requirements have been approved by OMB under control number 1545–1036.

Drafting Information

The principal author of these temporary regulations is Arthur E. Davis III of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and the Department of Treasury participated in developing the regulations on matters of both substance and style.

List of Subjects

26 CFR 1.444–1—1.483–2

Income taxes, Accounting, Deferred compensation plans.

26 CFR 1.7519–OT—1.7519–3T

Income taxes, Administrative and procedure, Miscellaneous, Required payments.

26 CFR 1.701–1—1.771–1

Income taxes, Partnerships.

26 CFR 1.61–1—1.281–4

Income taxes, Taxable income, Deductions, Exemptions.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

For the reasons set forth in the preamble, Parts 1 and 602 of Title 26, Code of Federal Regulations, are amended as set forth below:

Income Tax Regulations

PART 1—[AMENDED]

Paragraph 1. The authority for Part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805. * * * Sections 1.444–0T through 1.444–3T and section 1.706–3T are also issued under 26 U.S.C. 444 (f). Sections 1.7519–0T through 1.7519–3T, and 1.280H–0T and 1.280H–1T also issued under 26 U.S.C. 7519 (g).

Par. 2. Sections 1.444–0T through 1.444–3T are added in the appropriate place.

§ 1.444–0T Table of contents (temporary).

This section lists the captions that appear in the temporary regulations under section 444.

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(B) Procedure for superseding return.
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(c) Effective date.
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(1) Changes in taxable year.
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§ 1.444–2T Tiered structure (temporary).

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(2) Downstream de minimis rule.
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(A) In general.
(B) Special rule for members of a tiered structure directly owned by a downstream controlled partnership.
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§ 1.444–3T Manner and time of making section 444 election (temporary).

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(i) In general.
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§ 1.444–1T Election to use a taxable year other than the required taxable year (temporary).

(a) *General rules*—(1) *Year other than required year.* Except as otherwise provided in this section and § 1.444–2T, a partnership, S corporation, or personal service corporation (as defined in § 1.441–4T(d)) may make or continue an election (a "section 444 election") to have a taxable year other than its required taxable year. See paragraph (b) of this section for limitations on the taxable year that may be elected. See § 1.444–2T for rules that generally prohibit a partnership, S corporation, or personal service corporation that is a member of a tiered structure from making or continuing a section 444 election. See § 1.444–3T for rules explaining how and when to make a section 444 election.

(2) *Effect of section 444 election*—(i) *In general.* A partnership or S corporation that makes or continues a section 444 election shall file returns and make payments as required by §§ 1.7519–1T and 1.7519–2T. A personal service corporation that makes or continues a section 444 election is subject to the deduction limitation of § 1.280H–1T.

(ii) *Duration of section 444 election.* A section 444 election shall remain in effect until the election is terminated pursuant to paragraph (a)(5) of this section.

(3) *Section 444 election not required for certain years.* A partnership, S corporation, or personal service corporation is not required to make a section 444 election to use—

(i) A taxable year for which such entity establishes a business purpose to the satisfaction of the Commissioner (*i.e.*, approved under section 4 or 6 of Rev. Proc. 87–32, 1987–28 I.R.B. 14, or any successor revenue ruling or revenue procedure), or

(ii) A taxable year that is a "grandfathered fiscal year," within the meaning of section 5.01(2) of Rev. Proc. 87–32 or any successor revenue ruling or revenue procedure.

Although a partnership, S corporation or personal service corporation qualifies to use a taxable year described in paragraph (a)(3) (i) or (ii) of this section, such entity may, if otherwise qualified, make a section 444 election to use a different taxable year. Thus, for example, assume that a personal service corporation that historically used a January 31 taxable year established to the satisfaction of the Commissioner, under section 6 of Rev. Proc. 87–32, a business purpose to use a September 30 taxable year for its taxable year beginning February 1, 1987. Pursuant to this paragraph (a)(3), such personal service corporation may use a September 30 taxable year without making a section 444 election. However, the corporation may, if otherwise qualified, make a section 444 election to use a year ending other than September 30 for its taxable year beginning February 1, 1987.

(4) *Required taxable year.* For purposes of this section, the term "required taxable year" means the taxable year determined under section 706(b), 1378, or 441(i) without taking into account any taxable year which is allowable either—

(i) By reason of business purpose (*i.e.*, approved under section 4 or 6 of Rev. Proc. 87–32 or any successor revenue ruling or procedure), or

(ii) As a "grandfathered fiscal year" within the meaning of section 5.01(2) of Rev. Proc. 87–32, or any successor revenue ruling or procedure.

(5) *Termination of section 444 election*—(i) *In general.* A section 444 election is terminated when—

(A) A partnership, S corporation, or personal service corporation changes to its required taxable year; or

(B) A partnership, S corporation, or personal service corporation liquidates (including a deemed liquidation of a partnership under § 1.708–1 (b)(1)(iv)); or

(C) A partnership, S corporation, or personal service corporation willfully fails to comply with the requirements of section 7519 or 280H, whichever is applicable; or

(D) A partnership, S corporation, or personal service corporation becomes a member of a tiered structure (within the meaning of § 1.444–2T), unless it is a partnership or S corporation that meets the same taxable year exception under § 1.444–2T (e); or

(E) An S corporation's S election is terminated; or

(F) A personal service corporation ceases to be a personal service corporation.

However, if a personal service corporation, that has a section 444 election in effect, elects to be an S corporation, the S corporation may continue the section 444 election of the personal service corporation. Similarly, if an S corporation that has a section 444 election in effect terminates its S election and immediately becomes a personal service corporation, the personal service corporation may continue the section 444 election of the S corporation. If a section 444 election is terminated under this paragraph (a)(5), the partnership, S corporation, or personal service corporation may not make another section 444 election for any taxable year.

(ii) *Effective date of termination.* A termination of a section 444 election shall be effective—

(A) In the case of a change to the required year, on the first day of the short year caused by the change;

(B) In the case of a liquidating entity, on the date the liquidation is completed for tax purposes;

(C) In the case of willful failure to comply, on the first day of the taxable year (determined as if a section 444 election had never been made) determined in the discretion of the District Director;

(D) In the case of membership in a tiered structure, on the first day of the taxable year in which the entity is considered to be a member of a tiered structure, or such other taxable year determined in the discretion of the District Director;

(E) In the case of termination of S status, on the first day of the taxable year for which S status no longer exists;

(F) In the case of a personal service corporation that changes status, on the first day of the taxable year, for which the entity is no longer a personal service corporation.

In the case of a termination under this paragraph (a)(5) that results in a short taxable year, an income tax return is required for the short period. In order to allow the Service to process the affected income tax return in an efficient manner, a partnership, S corporation, or

personal service corporation that files such a short period return should type or legibly print at the top of the first page of the income tax return for the short taxable year—"SECTION 444 ELECTION TERMINATED." In addition, a personal service corporation that changes its taxable year to the required taxable year is required to annualize its income for the short period.

(iii) *Example.* The provisions of paragraph (a)(5)(ii) of this section may be illustrated by the following example.

Example. Assume a partnership that is 100 percent owned, at all times, by calendar year individuals has historically used a June 30 taxable year. Also assume the partnership makes a valid section 444 election to retain a year ending June 30 for its taxable year beginning July 1, 1987. However, for its taxable year beginning July 1, 1988, the partnership changes to a calendar year, its required year. Based on these facts, the partnership's section 444 election is terminated on July 1, 1988, and the partnership must file a short period return for the period July 1, 1988–December 31, 1988. Furthermore, pursuant to § 1.702–3T(a)(1), the partners in such partnership are not entitled to a 4-year spread with respect to partnership items of income and expense for the taxable year beginning July 1, 1988 and ending December 31, 1988.

(iv) *Special rule for entity that liquidates or is sold prior to making a section 444 election, required return, or required payment.* A partnership, S corporation, or personal service corporation that is liquidated or sold for tax purposes before a section 444 election, required return, or required payment is made for a particular year may, nevertheless, make or continue a section 444 election, if otherwise qualified. (See §§ 1.7519–2T (a)(2) and 1.7519–1T (a)(3), respectively, for a description of the required return and a definition of the term "required payment.") However, the partnership, S corporation, or personal service corporation (or a trustee or agent thereof) must comply with the requirements for making or continuing a section 444 election. Thus, if applicable, required payments must be made and a subsequent claim for refund must be made in accordance with § 1.7519–2T(a)(6). The following examples illustrate the application of this paragraph (a)(5)(iv).

Example (1). Assume an existing S corporation historically used a June 30 taxable year and desires to make a section 444 election for its taxable year beginning July 1, 1987. Assume further that the S corporation is liquidated for tax purposes on February 15, 1988. If otherwise qualified, the S corporation (or a trustee or agent thereof) may make a section 444 election to have a taxable year beginning July 1, 1987, and ending February 15, 1988. However, if the S corporation makes a section 444 election, it must comply with the requirements for making a section 444 election, including making required payments.

Example (2). The facts are the same as in example (1), except that instead of liquidating on February 15, 1988, the shareholders of the S corporation sell their stock to a corporation on February 15, 1988. Thus, the corporation's S election is terminated on February 15, 1988. If otherwise qualified, the corporation may make a section 444 election to have a taxable year beginning July 1, 1987, and ending February 14, 1988.

Example (3). The facts are the same as in example (2), except that the new shareholders are individuals. Furthermore, the corporation's S election is not terminated. Based on these facts, the S corporation, if otherwise qualified, may make a section 444 election to retain a year ending June 30 for its taxable year beginning July 1, 1987. Furthermore, the S corporation may, if otherwise qualified, continue its section 444 election for subsequent taxable years.

(6) *Re-activating certain S elections*—(i) *Certain corporations electing S status that did not make a back-up calendar year request.* If a corporation that timely filed Form 2553, Election by a Small Business Corporation, effective for its first taxable year beginning in 1987—

(A) Requested a fiscal year based on business purpose,

(B) Did not agree to use a calendar year in the event its business purpose request was denied, and

(C) Such business purpose request is denied or withdrawn,

such corporation may retroactively re-activate its S election by making a valid section 444 election for its first taxable year beginning in 1987 and complying with the procedures in paragraph (a)(6)(iii) of this section.

(ii) *Certain corporations that revoked their S status.* If a corporation that used a fiscal year revoked its S election (pursuant to section 1362(d)(1)) for its first taxable year beginning in 1987, such corporation may retroactively re-activate its S election (*i.e.* rescind its revocation) by making a valid section 444 election for its first taxable year beginning in 1987 and complying with the procedures in paragraph (a)(6)(iii) of this section.

(iii) *Procedures for re-activating an S election.* A corporation re-activating its S election pursuant to paragraph (a)(6)(i) or (ii) of this section must—

(A) Obtain the consents of all shareholders who have owned stock in the corporation since the first day of the first taxable year of the corporation beginning after December 31, 1986,

(B) Include the following statement at the top of the first page of the corporation's Form 1120S for its first taxable year beginning in 1987—"SECTION 444 ELECTION—RE-ACTIVATES S STATUS," and

(C) Include the following statement with Form 1120S—RE-ACTIVATION CONSENTED TO BY ALL SHAREHOLDERS WHO HAVE OWNED STOCK AT ANY TIME SINCE THE FIRST DAY OF THE FIRST TAXABLE YEAR OF THIS CORPORATION BEGINNING AFTER DECEMBER 31, 1986."

(iv) *Examples.* The provisions of this paragraph (a)(6) may be illustrated by the following examples.

Example (1). Assume a corporation historically used a June 30 taxable year and such corporation timely filed Form 2553, Election by a Small Business Corporation, to be effective for its taxable year beginning July 1, 1987. On its Form 2553, the corporation requested permission to retain its June 30 taxable year based on business purpose. However, the corporation did not agree to use a calendar year in the event its business purpose request was denied. On April 1, 1988, the Internal Revenue Service notified the corporation that its business purpose request was denied and therefore the corporation's S election was not effective. Pursuant to paragraph (a)(6)(i) of this section, the corporation may re-activate its S election by making a valid section 444 election and complying with the procedures in paragraph (a)(6)(iii) of this section.

Example (2). The facts are the same as in example (1), except that as of July 26, 1988, the Internal Revenue Service has not yet determined whether the corporation has a valid business purpose to retain a June 30 taxable year. Based on these facts, the corporation may, if otherwise qualified, make a back-up section 444 election as provided in § 1.444–3T(b)(4). If the corporation's business purpose request is subsequently denied, the corporation should follow the procedures in §1.444–3T(b)(4)(iii) for activating a back-up section 444 election rather than the procedures provided in this paragraph (a)(6 for re-activating an S election.

Example (3). Assume a corporation has historically been an S corporation with a March 31 taxable year. However, for its taxable year beginning April 1, 1987, the corporation revoked its S election pursuant to section 1362 (d)(1). Pursuant to paragraph (a)(6)(ii) of this section, such corporation may retroactively rescind its S election revocation by making a valid section 444 election for its taxable year beginning April 1, 1987, and complying with the procedures provided in paragraph (a)(6)(iii) of this section. If the corporation retroactively rescinds its S revocation, the corporation shall file a Form 1120S for its taxable year beginning April 1, 1987.

(b) *Limitation on taxable years that may be elected*—(1) *General rule.* Except as provided in paragraphs (b)(2) and (3) of this section, a section 444 election may be made only if the deferral period (as defined in paragraph (b)(4) of this section) of the taxable year

to be elected is not longer than three months.

(2) *Changes in taxable year*—(i) *In general.* In the case of a partnership, S corporation, or personal service corporation changing its taxable year, such entity may make a section 444 election only if the deferral period of the taxable year to be elected is not longer than the shorter of—

(A) Three months, or

(B) The deferral period of the taxable year that is being changed, as defined in paragraph (b)(2)(iii) of this section.

(ii) *Special rule for certain existing corporations electing S status.* If a corporation with a taxable year other than the calendar year—

(A) Elected after September 18, 1986, and before January 1, 1988, under section 1362 of the Code to be an S corporation, and

(B) Elected to have the calendar year as the taxable year of the S corporation, then, for taxable years beginning before 1989, paragraph (b)(2)(i) of this section shall be applied by taking into account the deferral period of the last taxable year of the corporation prior to electing to be an S corporation, rather than the deferral period of the taxable year that is being changed. Thus, the provisions of the preceding sentence do not apply to a corporation that elected to be an S corporation for its first taxable year.

(iii) *Deferral period of the taxable year that is being changed.* For purposes of paragraph (b)(2)(i)(B) of this section, the phrase "deferral period of the taxable year that is being changed" means the deferral period of the taxable year immediately preceding the taxable year for which the taxpayer desires to make a section 444 election. Furthermore, the deferral period of such year will be determined by using the required taxable year of the taxable year for which the taxpayer desires to make a section 444 election. For example, assume P, a partnership that has historically used a March 31 taxable year, desires to change to a September 30 taxable year by making a section 444 election for its taxable year beginning April 1, 1987. Furthermore, assume that pursuant to paragraph (a)(4) of this section, P's required taxable year for the taxable year beginning April 1, 1987 is a year ending December 31. Based on these facts the deferral period of the taxable year being changed is nine months (the period from March 31 to December 31).

(iv) *Examples.* See paragraph (d)(1) of this section for examples that illustrate the provisions of this paragraph (b)(2).

(3) *Special rule for entities retaining 1986 taxable year.* Notwithstanding paragraph (b)(2) of this section, a partnership, S corporation, or personal service corporation may, for its first taxable year beginning after December 31, 1986, if otherwise qualified, make a section 444 election to have a taxable year that is the same as the entity's last taxable year beginning in 1986. See paragraph (d)(2) of this section for examples that illustrate the provisions of this paragraph (b)(3).

(4) *Deferral period*—(i) *Retentions of taxable year.* For a partnership, S corporation, or personal service corporation that desires to retain its taxable year by making a section 444 election, the term "deferral period" means the months between the beginning of such year and the close of the first required taxable year (as defined in paragraph (a)(4) of this section). The following example illustrates the application of this paragraph (b)(4)(i).

Example. AB partnership has historically used a taxable year ending July 31. AB desires to retain its July 31 taxable year by making a section 444 election for its taxable year beginning August 1, 1987. Calendar year individuals, A and B, each own 50 percent of the profits and capital of AB; thus, under paragraph (a)(4) of this section AB's required taxable year is the year ending December 31. Pursuant to this paragraph (b)(4)(i), if AB desires to retain its year ending July 31, the deferral period is five months (the months between July 31 and December 31).

(ii) *Adoptions of and changes in taxable year*—(A) *In general.* For a partnership, S corporation, or personal service corporation that desires to adopt or change its taxable year by making a section 444 election, the term "deferral period" means the months that occur after the end of the taxable year desired under section 444 and before the close of the required taxable year.

(B) *Special rule.* If a partnership, S corporation or personal service corporation is using the required taxable year as its taxable year, the deferral period is deemed to be zero.

(C) *Examples.* The provisions of this paragraph (b)(4)(ii) may be illustrated by the following examples.

Example (1). Assume that CD partnership has historically used the calendar year and that CD's required taxable year is the calendar year. Under the special rule provided in paragraph (b)(4)(ii)(B) of this section, CD's deferral period is zero. See paragraph (b)(2)(i) of this section for rules that preclude CD from making a section 444 election to change its taxable year.

Example (2). E, a newly formed partnership, began operations on December 1, 1987, and is owned by calendar year individuals. E desires to make a section 444 election to adopt a September 30 taxable year. E's required taxable year is December 31. Pursuant to paragraph (b)(4)(ii)(A) of this section E's deferral period for the taxable year beginning December 1, 1987, is three months (the number of months between September 30 and December 31).

Example (3). Assume that F, a personal service corporation, has historically used a June 30 taxable year. F desires to make a section 444 election to change to an August 31 taxable year, effective for its taxable year beginning July 1, 1987. For purposes of determining the availability of a section 444 election for changing to the taxable year ending August 31, the deferral period of an August 31 taxable year is four months (the number of months between August 31 and December 31). The deferral period for F's existing June 30 taxable year is six months (the number of months between June 30 and December 31). Pursuant to § 1.444–1T(b)(2)(i), F may not make a section 444 election to change to an August 31 taxable year.

(5) *Miscellaneous rules*—(i) *Special rule for determining the taxable year of a corporation electing S status.* For purposes of this section, and only for purposes of this section, a corporation that elected to be an S corporation for a taxable year beginning in 1987 or 1988 and which elected to be an S corporation prior to September 26, 1988, will not be considered to have adopted or changed its taxable year by virtue of information included on Form 2553, Election by a Small Business Corporation. See example (8) in paragraph (d) of this section.

(ii) *Special procedure for cases where an income tax return is superseded*—(A) *In general.* In the case of a partnership, S corporation, or personal service corporation that filed an income tax return for its first taxable year beginning after December 31, 1986, but subsequently makes a section 444 election that would result in a different year end for such taxable year, the income tax return filed pursuant to the section 444 election will supersede the original return. However, any payments of income tax made with respect to such superseded return will be credited to the taxpayer's superseding return and the taxpayer may file a claim for refund for such payments. See examples (5) and (7) in paragraph (d)(2) of this section.

(B) *Procedure for superseding return.* In order to allow the Service to process the affected income tax returns in an efficient manner, a partnership, S corporation, or personal service corporation that desires to supersede an income tax return in accordance with paragraph (b)(5)(ii)(A) of this section, should type or legibly print at the top of the first page of the income tax return for the taxable year elected—"SECTION 444 ELECTION—SUPERSEDES PRIOR RETURN."

(iii) *Anti-abuse rule*—If an existing partnership, S corporation or personal service corporation ("predecessor entities"), or the owners thereof, transfer assets to a related party and the principal purpose of such transfer is to—

(A) Create a deferral period greater than the deferral period of the predecessor entity's taxable year, or

(B) Make a section 444 election following the termination of the predecessor entity's section 444 election, then such transfer will be disregarded for purposes of section 444 and this section, even if the deferral created by such change is effectively eliminated by a required payment (within the meaning of section 7519) or deferral of a deduction (to a personal service corporation under section 280H). The following example illustrates the application of this paragraph (b)(5)(iii).

Example. Assume that P1 is a partnership that historically used the calendar year and is owned by calendar year partners. Assume that P1 desires to make a section 444 election to change to a September year for the taxable year beginning January 1, 1988. P1 may not make a section 444 election to change taxable years under section 444(b)(2) because its current deferral period is zero. Assume further that P1 transfers a substantial portion of its assets to a newly-formed partnership (P2), which is owned by the partners of P1. Absent paragraph (b)(5)(iii) of this section, P2 could, if otherwise qualified, make a section 444 election under paragraph (b)(1) of this section to use a taxable year with a three month or less deferral period (*i.e.*, a September 30, October 31, or November 30 taxable year). However, if the principal purpose of the asset transfer was to create a one-, two-, or three-month deferral period by P2 making a section 444 election, the section 444 election shall not be given effect, even if the deferral would be effectively eliminated by P2 making a required payment under section 7519.

(iv) *Special rules for partial months and 52–53-week taxable years.* Except as otherwise provided in § 1.280H–1T(c)(2)(i)(A), for purposes of this section and §§ 1.7519–1T, 1.7519–2T and 1.280H–1T—

(A) A month of less than 16 days is disregarded, and a month of more than 15 days is treated as a full month; and

(B) A 52–53-week taxable year with reference to the end of a particular month will be considered to be the same as a taxable year ending with reference to the last day of such month.

(c) *Effective date.* This section is effective for taxable years beginning after December 31, 1986.

(d) *Examples*—(1) *Changes in taxable year.* The following examples illustrate the provisions of paragraph (b)(2) of this section.

Example (1). A is a personal service corporation that historically used a June 30 taxable year. A desires to make a section 444 election to change to an August 31 taxable year, effective with its taxable year beginning July 1, 1987. Under paragraph (b)(4)(ii) of this section, the deferred period of the taxable year to be elected is four months (the number of months between August 31 and December 31). Furthermore, the deferral period of the taxable year that is being changed is six months (the number of months between June 30 and December 31). Pursuant to paragraph (b)(2)(i) of this section, a taxpayer may, if otherwise qualified, make a section 444 election to change to a taxable year only if the deferral period of the taxable year to be elected is not longer than the shorter of three months or the deferred period of the taxable year being changed. Since the deferral period of the taxable year to be elected (August 31) is greater than three months, A may not make a section 444 election to change to the taxable year ending August 31. However, since the deferral period of the taxable year that is being changed is three months or more, A may, if otherwise qualified, make a section 444 election to change to a year ending September 30, 1987 (three-month deferral period), a year ending October 31, 1987 (two-month deferral period), or a year ending November 30, 1987 (one-month deferral period). In addition, instead of making a section 444 election to change its taxable year, A could, if otherwise qualified, make a section 444 election to retain its June end, pursuant to paragraph (b)(3) of this section.

Example (2). B, a corporation that historically used an August 31 taxable year, elected on November 1, 1986 to be an S corporation for its taxable year beginning September 1, 1986. As a condition to having the S election accepted, B agreed on Form 2553 to use calendar year. Pursuant to the general effective date provided in paragraph (c) of this section, B may not make a section 444 election for its taxable year beginning in 1986. Thus, B must file a short period income tax return for the period September 1 to December 31, 1986.

Example (3). The facts are the same as in example (2), except that B desires to make a section 444 electin for its taxable year beginning January 1, 1987. Absent paragraph (b)(2)(ii) of this section, B would not be allowed to change its taxable year because the deferral period of the taxable year being changed (*i.e.*, the calendar year) is zero. However, pursuant to the special rule provided in paragraph (b)(2)(ii) of this section, B shall apply paragraph (b)(2)(i) of this section by taking into account the deferral period of the last taxable year of B prior to B's election to be an S corporation (four months), rather than the deferral period of B's taxable year that is being changed (zero months). Thus, if otherwise qualified, B may make a section 444 election to change to a taxable year ending September 30, October 31, or November 30, for its taxable year beginning January 1, 1987.

Example (4). The facts are the same as in example (3), except that B files a calendar year income tax return for 1987 rather than making a section 444 election. However, for its taxable year beginning January 1, 1988, B desires to change its taxable year by making a section 444 election. Given that the special rule provided in paragraph (b)(2)(ii) of this section applies to section 444 elections made in taxable years beginning before 1989, B may, if otherwise qualified, make a section 444 election to change to a taxable year ending September 30, October 31, or November 30 for its taxable year beginning January 1, 1988.

Example (5). C, a corporation that historically used a June 30 taxable year, elected on December 15, 1986 to be an S corporation for its taxable year beginning July 1, 1987. As a condition to having the S election accepted, C agreed on Form 2553 to use a calendar year. Although pursuant to paragraph (b)(3) of this section, C would, if otherwise qualified, be allowed to retain its June 30 taxable year, C desires to change to a September 30 taxable year by making a section 444 election. Pursuant to paragraph (b)(2) of this section, a taxpayer may, if otherwise qualified, make a section 444 election to change to a taxable year only if the deferral period of the taxable year to be elected is not longer than the shorter of three months or the deferral period of the taxable year being changed. Given these facts, the deferral period of the taxable year to be elected is 3 months (September 30 to December 31) while the deferral period of the taxable year being changed is 6 months (June 30 to December 31). Thus, C may, if otherwise qualified, change to a September 30 taxable year for its taxable year beginning July 1, 1987, by making a section 444 election. The fact that C agreed on Form 2553 to use a calendar year is not relevant.

Example (6). D, a corporation that historically used a March 31 taxable year, elects on June 1, 1988 to be an S corporation for its taxable year beginning April 1, 1988. D desires to change to a June 30 taxable year by making a section 444 election for its taxable year beginning April 1, 1988. Pursuant to paragraph (b)(2)(i) of this section, D may not change to a June 30 taxable year because such year would have a deferral period greater than 3 months. However, if otherwise qualified, D may make a section 444 election to change to a taxable year ending September 30, October 31, or November 30 for its taxable year beginning April 1, 1988.

Example (7). E, a corporation that began operations on November 1, 1986, elected to be an S corporation on December 15, 1986, for its taxable year beginning November 1, 1986. E filed a short period income tax return for the period November 1 to December 31, 1986. E desires to change to a September 30 taxable year by making a section 444 election for its taxable year beginning January 1, 1987. Although E elected to be an S corporation after September 18, 1986, and before January 1, 1988, paragraph (b)(2)(ii) of this section does not apply to E since E was not a C corporation prior to electing S status. Thus, E may not change its taxable year for the taxable year beginning January 1, 1987, by making a section 444 election.

Example (8). The facts are the same as in example (7), except that E began operations on April 15, 1987, and elected to be an S corporation on June 1, 1987, for its taxable year beginning April 15, 1987. As a condition

to being an S corporation, E agreed on Form 2553 to use a calendar year. E desires to make a section 444 election to use a year ending September 30 for its taxable year beginning April 15, 1987. Pursuant to paragraph (b)(5)(i) of this section, E's agreement to use a calendar year on Form 2553 does not mean that E has adopted a calendar year. Thus, E's desire to make a section 444 election to use a September 30 taxable year will not be considered a change in taxable year and thus paragraph (b)(2) of this section will not apply. Instead, E will be subject to paragraph (b)(1) of this section. Since a September 30 taxable year would result in only a three-month deferral period (September 30 to December 31), E may, if otherwise qualified, make a section 444 election to use a year ending September 30 for its taxable year beginning April 15, 1987.

(2) *Special rule for entities retaining their 1986 taxable year.* The following examples illustrate the provisions of paragraph (b)(3) of this section.

Example (1). F, an S corporation that elected to be an S corporation several years ago, has historically used a June 30 taxable year. F desires to retain its June 30 taxable year by making a section 444 election for its taxable year beginning July 1, 1987. Pursuant to paragraph (b)(4)(i) of this section, the deferral period of the taxable year being retained is 6 months (June 30 to December 31, F's required taxable year). Absent the special rule provided in paragraph (b)(3) of this section, F would be subject to the general rule provided in paragraph (b)(1) of this section which limits the deferral period of the taxable year elected to three months or less. However, pursuant to paragraph (b)(3) of this section, F may, if otherwise qualified, make a section 444 election to retain its year ending June 30 for its taxable year beginning July 1, 1987.

Example (2). The facts are the same as in example (1), except that F received permission from the Commissioner to change its taxable year to the calendar year, and filed a short period income tax return for the period July 1 to December 31, 1986. F desires to make a section 444 election to use a year ending June 30 for its taxable year beginning January 1, 1987. Given that F had a December 31 taxable year for its last taxable year beginning in 1986, the special rule provided in paragraph (b)(3) of this section does not allow F to use a June 30 taxable year for its taxable year beginning January 1, 1987. Furthermore, pursuant to paragraph (b)(2)(i) of this section, F is not allowed to change its taxable year from December 31 to June 30 because the deferral period of the taxable year being changed is zero months.

Example (3). G, a corporation that historically used an August 31 taxable year, elected be an S corporation on November 15, 1986, for its taxable year beginning September 1, 1986. As a condition to obtaining S status, G agreed to use a calendar year. Thus, G filed its first S corporation return for the period September 1 to December 31, 1986. G desires to make a section 444 election to use a year ending August 31 for its taxable year beginning January 1, 1987. Since G's last taxable year beginning in 1986 was a calendar year, G cannot use paragraph (b)(3) of this section, relating to retentions of taxable years, to elect an August 31 taxable year. Thus, G is subject to paragraph (b)(2)(i) of this section, relating to changes in taxable year. Although G, if otherwise qualified, may use the special rule provided in paragraph (b)(2)(ii) of this section, G may only change from its current taxable year (*i.e.*, the calendar year) to a taxable year that has no more than a three-month deferral period (*i.e.*, September 30, October 31, or November 30).

Example (4). The facts are the same as in example (3), except that G elected to be an S corporation for its taxable year beginning September 1, 1987, rather than its taxable year beginning September 1, 1986. As a condition to making its S election, G agreed, on Form 2553, to use the calendar year. However, G has not yet filed a short period income tax return for the period September 1 to December 31, 1987. Given these facts, paragraph (b)(3) of this section would allow G, if otherwise qualified, to make a section 444 election to retain an August 31 taxable year for its taxable year beginning September 1, 1987.

Example (5). The facts are the same as in example (4), except that G has already filed a short period income tax return for the period September 1 to December 31, 1987. Pursuant to paragraph (b)(5)(ii)(A) of this section, G may supersede the return it filed for the period September 1 to December 31, 1987. Thus, pursuant to paragraph (b)(3) of this section, G may, if otherwise qualified, make a section 444 election to retain an August 31 taxable year for the taxable year beginning September 1, 1987. In addition, G should follow the special procedures set forth in paragraph (b)(5)(ii)(B) of this section.

Example (6). H, a corporation that historically used a May 31 taxable year, elects to be an S corporation on June 15, 1988 for its taxable year beginning June 1, 1988. H desires to make a section 444 election to use a taxable year other than the calendar year. Since the taxable year in issue is not H's first taxable year beginning after December 31, 1986, H may not use the special rule provided in paragraph (b)(3)(i) and thus may not retain its May 31 year. However, H may, if otherwise qualified, make a section 444 election under paragraph (b)(2)(i) of this section, to change to a taxable year that has no more than a three-month deferral period (*i.e.*, September 30, October 31, or November 30) for its taxable year beginning June 1, 1988.

Example (7). I is a partnership that has historically used a calendar year. Sixty percent of the profits and capital of I are owned by Q, a corporation (that is neither an S corporation nor a personal service corporation) that has a June 30 taxable year, and 40 percent of the profits and capital are owned by R, a calendar year individual. Since the partner that has more than a fifty percent interest in I has a June 30 taxable year, I's required taxable year is June 30. Accordingly, I filed an income tax return for the period January 1 to June 30, 1987. Based on these facts, I may, pursuant to paragraph (b)(5)(ii)(A) of this section, disregard the income tax return filed for the period January 1 to June 30, 1987. Thus, if otherwise qualified, I may make a section 444 election under paragraph (b)(2)(i) of this section to use a calendar year for its taxable year beginning January 1, 1987. If I makes such a section 444 election, I should follow the special procedures set forth in paragraph (b)(5)(ii)(B) of this section.

§ 1.444–2T Tiered structure (temporary).

(a) *General rule.* Except as provided in paragraph (e) of this section, no section 444 election shall be made or continued with respect to a partnership, S corporation, or personal service corporation that is a member of a tiered structure on the date specified in paragraph (d) of this section. For purposes of this section, the term "personal service corporation" means a personal service corporation as defined in § 1.441–4T (d).

(b) *Definition of a member of a tiered structure*— (1) *In general.* A partnership, S corporation, or personal service corporation is considered a member of a tiered structure if—

(i) The partnership, S corporation, or personal service corporation directly owns any portion of a deferral entity, or

(ii) A deferral entity directly owns any portion of the partnership, S corporation, or personal service corporation.

However, see paragraph (c) of this section for certain de minimis rules, and see paragraph (b)(3) of this section for an anti-abuse rule. In addition, for purposes of this section, a beneficiary of a trust shall be considered to own an interest in the trust.

(2) *Deferral entity*—(i) *In general.* For purposes of this section, the term "deferral entity" means an entity that is a partnership, S corporation, personal service corporation, or trust. In the case of an affiliated group of corporations filing a consolidated income tax return that is treated as a personal service corporation pursuant to § 1.441–4T (i), such affiliated group is considered to be a single deferral entity.

(ii) *Grantor trusts.* The term "deferral entity" does not include a trust (or a portion of a trust) which is treated as owned by the grantor or beneficiary under Subpart E, part I, subchapter J, chapter 1, of the Code (relating to grantor trusts), including a trust that is treated as a grantor trust pursuant to section 1361(d)(1)(A) of the Code (relating to qualified subchapter S trusts). Thus, any taxpayer treated under subpart E as owning a portion of a trust shall be treated as owning the assets of the trust attributable to that ownership. The following examples illustrate the provisions of this paragraph (b)(2)(ii).

Example (1). A, an individual, is the sole beneficiary of T. T is a trust that owns 50 percent of the profits and capital of X, a partnership that desires to make a section 444 election. Furthermore, pursuant to Subpart E, Part I, subchapter J, chapter 1 of the Code, A is treated as an owner of X. Based upon these facts, T is not a deferral entity and 50 percent of X is considered to be directly owned by A.

Example (2). The facts are the same as in example (1), except that A is a personal service corporation rather than an individual. Given these facts, 50 percent of X is considered to be directly owned by A, a deferral entity. Thus, X is considered to be a member of a tiered structure.

(3) *Anti-abuse rule.* Notwithstanding paragraph (b)(1) of this section, a partnership, S corporation, or personal service corporation is considered a member of a tiered structure if the partnership, S corporation, personal service corporation, or related taxpayers have organized or reorganized their ownership structure or operations for the principal purpose of obtaining a significant unintended tax benefit from making or continuing a section 444 election. For purposes of the preceding sentence, a significant unintended tax benefit results when a partnership, S corporation, or personal service corporation makes a section 444 election and, as a result, a taxpayer (not limited to the entity making the election) obtains a significant deferral of income substantially all of which is not eliminated by a required payment under section 7519. See examples (15) through (19) in paragraph (f) of this section.

(c) *De minimis rules*—(1) *In general.* For rules relating to a de minimis exception to paragraph (b)(1)(i) of this section (the "downstream de minimis rule"), see paragraph (c)(2) of this section. For rules relating to a de minimis exception to paragraph (b)(1)(ii) of this section (the "upstream de minimis rule"), see paragraph (c)(3) of this section. For rules relating to the interaction of the de minimis rules provided in this paragraph (c) and the "same taxable year exception" provided in paragraph (e) of this section, see paragraph (e)(5) of this section.

(2) *Downstream de minimis rule*—(i) *General rule.* If a partnership, S corporation, or personal service corporation directly owns any portion of one or more deferral entities as of the date specified in paragraph (d) of this section, such ownership is disregarded for purposes of paragraph (b)(1)(i) of this section if, in the aggregate, all such deferral entities accounted for—

(A) Not more than 5 percent of the partnership's, S corporation's, or personal service corporation's adjusted taxable income for the testing period ("5 percent adjusted taxable income test"), or

(B) Not more than 2 percent of the partnership's, S corporation's, or personal service corporation's gross income for the testing period ("2 percent gross income test"). See section 702 (c) for rules relating to the determination of gross income of a partner in a partnership.

See examples (3) through (5) in paragraph (f) of this section.

(ii) *Definition of testing period.* For purposes of this paragraph (c)(2), the term "testing period" means the taxable year that ends immediately prior to the taxable year for which the partnership, S corporation, or personal service corporation desires to make or continue a section 444 election. However, see the special rules provided in paragraph (c)(2)(iv) of this section for certain special cases (*e.g.*, the partnership, S corporation, personal service corporation or deferral entity was not in existence during the entire testing period). The following example illustrates the application of this paragraph (c)(2)(ii).

Example. A partnership desires to make a section 444 election for its taxable year beginning November 1, 1987. The testing period for purposes of determining whether deferral entities owned by such partnership are de minimis under paragraph (c)(2) of this section is the taxable year ending October 31, 1987. If either the partnership or the deferral entities were not in existence for the entire taxable year ending October 1, 1987, see the special rules provided in paragraph (c)(2)(iv) of this section.

(iii) *Definition of adjusted taxable income*—(A) *Partnership.* In the case of a partnership, adjusted taxable income for purposes of paragraph (c)(2) of this section is an amount equal to the sum of the—

(*1*) Aggregate amount of the partnership items described in section 702(a) (other than credits and tax-exempt income),

(*2*) Applicable payments defined in section 7519(d)(3) that are deducted in determining the amount described in paragraph (c)(2)(iii)(A)(*1*) of this section, and

(*3*) Guaranteed payments defined in section 707(c) that are deducted in determining the amount described in paragraph (c)(2)(iii)(A)(*1*) of this section and are not otherwise included in paragraph (c)(2)(iii)(A)(*2*) of this section. For purposes of determining the aggregate amount of partnership items under paragraph (c)(2)(iii)(A)(*1*) of this section, deductions and losses are treated as negative income. Thus, for example, if under section 702(a) a partnership has $1,000 of ordinary taxable income, $500 of specially allocated deductions, and $300 of capital loss, the partnership's aggregate amount of partnership items under paragraph (c)(2)(iii)(A)(*1*) of this section is $200 ($1,000–$500–$300).

(B) *S corporation.* In the case of an S corporation, adjusted taxable income for purposes of paragraph (c)(2) of this section is an amount equal to the sum of the—

(*1*) Aggregate amount of the S corporation items described in section 1366(a) (other than credits and tax-exempt income), and

(*2*) Applicable payments defined in section 7519(d)(3) that are deducted in determining the amount described in paragraph (c)(2)(iii)(B)(*1*) of this section.

For purposes of determining the aggregate amount of S corporation items under paragraph (c)(2)(iii)(B)(*1*) of this section, deductions and losses are treated as negative income. Thus, for example, if under section 1366(a) an S corporation has $2,000 of ordinary taxable income, $1,000 of deductions described in section 1366(a)(1)(A) of the Code, and $500 of capital loss, the S corporation's aggregate amount of S corporation items under paragraph (c)(2)(iii)(B)(*1*) of this section is $500 ($2,000–$1,000–$500).

(C) *Personal service corporation.* In the case of a personal service corporation, adjusted taxable income for purposes of paragraph (c)(2) of this section is an amount equal to the sum of the—

(*1*) Taxable income of the personal service corporation, and

(*2*) Applicable amounts defined in section 280H(f)(1) that are deducted in determining the amount described in paragraph (c)(2)(iii)(C)(*1*) of this section.

(iv) *Special rules*—(A) *Pro-forma rule.* Except as provided in paragraph (c)(iv)(C)(*2*) of this section, if a partnership, S corporation, or personal service corporation directly owns any interest in a deferral entity as of the date specified in paragraph (d) of this section and such ownership interest is different in amount from the partnership's, S corporation's, or personal service corporation's interest on any day during the testing period, the 5 percent adjusted taxable income test and the 2 percent gross income test must be applied on a pro-forma basis (*i.e.*, adjusted taxable income and gross income must be calculated for the testing period assuming that the partnership, S corporation, or personal service corporation owned the same interest in the deferral entity that it owned as of the date specified in paragraph (d) of this section). The

following example illustrates the application of this paragraph (c)(2)(iv)(A).

Example. A personal service corporation desiring to make a section 444 election for its taxable year beginning October 1, 1987, acquires a 25 percent ownership interest in a partnership on or after October 1, 1987. Furthermore, the partnership has been in existence for several years. The personal service corporation must modify its calculations of the 5 percent adjusted taxable income test and the 2 percent gross income test for the testing period ended September 30, 1987, by assuming that the personal service corporation owned 25 percent of the partnership during such testing period and the personal service corporation's adjusted taxable income and gross income were correspondingly adjusted.

(B) *Reasonable estimates allowed.* If the information necessary to complete the pro-forma calculation described in paragraph (c)(2)(iv)(A) of this section is not readily available, the partnership, S corporation, or personal service corporation may make a reasonable estimate of such information.

(C) *Newly formed entities—(1) Newly formed deferral entities.* If a partnership, S corporation, or personal service corporation owns any portion of a deferral entity on the date specified in paragraph (d) of this section and such deferral entity was not in existence during the entire testing period (hereinafter referred to as a "newly formed deferral entity"), both the 5 percent adjusted taxable income test and the 2 percent gross income test are modified as follows. First, the partnership, S corporation, or personal service corporation shall calculate the percentage of its adjusted taxable income or gross income that is attributable to deferral entities, excluding newly formed deferral entities. Second, the partnership, S corporation, or personal service corporation shall calculate (on the date specified in paragraph (d) of this section) the percentage of the tax basis of its assets that are attributable to its tax basis with respect to its ownership interests in all newly formed deferral entities. If the sum of the two percentages is 5 percent or less, the deferral entities are considered de minimis and are disregarded for purposes of paragraph (b)(1)(i) of this section. If the sum of the two percentages is greater than 5 percent, the deferral entities do not qualify for the de minimis rule provided in paragraph (c)(2) of this section and thus the partnership, S corporation, or personal service corporation is considered to be a member of a tiered structure for purposes of this section.

(2) Newly formed partnership, S corporation, or personal service corporation desiring to make a section 444 election. If a partnership, S corporation, or personal service corporation desires to make a section 444 election for the first taxable year of its existence, the 5 percent adjusted taxable income test and the 2 percent gross income test are replaced by a 5 percent of assets test. Thus, if on the date specified in paragraph (d) of this section, 5 percent or less of the assets (measured by reference to the tax basis of the assets) of the newly formed partnership, S corporation, or personal service corporation are attributable to the tax basis with respect to its ownership interests in the deferral entities, the deferral entities will be considered de minimis and will be disregarded for purposes of paragraph (b)(1)(i) of this section.

(3) Upstream de minimis rule. If a partnership, S corporation, or personal service corporation is directly owned by one or more deferral entities as of the date specified in paragraph (d) of this section, such ownership is disregarded for purposes of paragraph (b)(1)(ii) of this section if on the date specified in paragraph (d) of this section the deferral entities directly own, in the aggregate, 5 percent or less of—

(i) An interest in the current profits of the partnership, or

(ii) The stock (measured by value) of the S corporation or personal service corporation.

See examples (6) and (7) in paragraph (f) of this section.

(d) *Date for determining the existence of a tiered structure—(1) General rule.* For purposes of paragraph (a) of this section, a partnership, S corporation, or personal service corporation will be considered a member of a tiered structure for a particular taxable year if the partnership, S corporation, or personal service corporation is a member of a tiered structure on the last day of the required taxable year (as defined in section 444 (e) of the Code) ending within such year. If a particular taxable year does not include the last day of the required taxable year for such year, the partnership, S corporation, or personal service corporation will not be considered a member of a tiered structure for such year. The following examples illustrate the application of this paragraph (d)(1).

Example (1). Assume that a newly formed partnership whose first taxable year begins November 1, 1988, desires to adopt a September 30 taxable year by making a section 444 election. Furthermore, assume that for its taxable year beginning November 1, 1988, the partnership's required taxable year is December 31. If the partnership is a member of a tiered structure on December 31, 1988, it will not be eligible to make a section 444 election for a taxable year beginning November 1, 1988, and ending September 30, 1989.

Example (2). Assume an S corporation that historically used a June 30 taxable year desires to make a section 444 election to change to a year ending September 30 for its taxable year beginning July 1, 1987. If the S corporation can make the section 444 election, it will have a short taxable year beginning July 1, 1987, and ending September 30, 1987. Given these facts, the short taxable year beginning July 1, 1987, does not include the last day of the S corporation's required taxable year for such year (*i.e.*, December 31, 1987). Thus, pursuant to paragraph (d)(1) of this section, the S corporation will not be considered a member of a tiered structure for its taxable year beginning July 1, 1987, and ending September 30, 1987.

(2) *Special rule for taxable years beginning in 1987.* For purposes of paragraph (a) of this section, a partnership, S corporation, or personal service corporation will not be considered a member of a tiered structure for a taxable year beginning in 1987 if the partnership, S corporation, or personal service corporation is not a member of a tiered structure on the day the partnership, S corporation, or personal service corporation timely files its section 444 election for such year. The following examples illustrate the application of this paragraph (d)(2).

Example (1). Assume that a partnership desires to retain a June 30 taxable year by making a section 444 election for its taxable year beginning July 1, 1987. Furthermore, assume that the partnership's required taxable year for such year is December 31 and that the partnership was a member of a tiered structure on such date. Also assume that the partnership was not a member of a tiered structure as of the date it timely filed its section 444 election for its taxable year beginning July 1, 1987. Based upon the special rule provided in this paragraph (d)(2), the partnership will not be considered a member of a tiered structure for its taxable year beginning July 1, 1987.

Example (2). Assume the same facts as in example (1), except that the partnership was a member of a tiered structure on the date it filed its section 444 election for its taxable year beginning July 1, 1987, but was not a member of a tiered structure on December 31, 1987. Paragraph (d)(1) of this section would still apply and thus the partnership would not be considered part of a tiered structure for its taxable year beginning July 1, 1987. However, the partnership would be considered a member of a tiered structure for its taxable year beginning July 1, 1988, if the partnership was a member of a tiered structure on December 31, 1988.

(e) *Same taxable year exception—(1) In general.* Although a partnership or S corporation is a member of a tiered

structure as of the date specified in paragraph (d) of this section, the partnership, S corporation may make or continue a section 444 election if the tiered structure (as defined in paragraph (e)(2) of this section) consists entirely of partnerships or S corporations (or both), all of which have the same taxable year as determined under paragraph (e)(3) of this section. However, see paragraph (e)(5) of this section for the interaction of the de minimis rules provided in paragraph (c) of this section with the same taxable year exception. For purposes of this paragraph (e), two or more entities are considered to have the same taxable year if their taxable years end on the same day, even though they begin on different days. See examples (8) through (14) in paragraph (f) of this section.

(2) *Definition of tiered structure*—(i) *General rule.* For purposes of the same taxable year exception, the members of a tiered structure are defined to include the following entities—

(A) The partnership or S corporation that desires to qualify for the same taxable year exception,

(B) A deferral entity (or entities) directly owned (in whole or in part) by the partnership or S corporation that desires to qualify for the same taxable year exception,

(C) A deferral entity (or entities) directly owning any portion of the partnership or S corporation that desires to qualify for the same taxable year exception, and

(D) A deferral entity (or entities) directly owned (in whole or in part) by a "downstream controlled partnership," as defined in paragraph (e)(2)(ii) of this section.

(ii) *Special flow-through rule for downstream controlled partnerships.* If more than 50 percent of a partnership's profits and capital are owned by a partnership or S corporation that desires to qualify for the same taxable year exception, such owned partnership is considered a downstream controlled partnership for purposes of paragraph (e)(2)(i) of this section. Furthermore, if more than 50 percent of a partnership's profits and capital are owned by a downstream controlled partnership, such owned partnership is considered a downstream controlled partnership for purposes of paragraph (e)(2)(i) of this section.

(3) *Determining the taxable year of a partnership or S corporation.* The taxable year of a partnership or S corporation to be taken into account for purposes of paragraph (e)(1) of this section is the taxable year ending with or prior to the date specified in paragraph (d) of this section. Furthermore, the determination of such taxable year will take into consideration any section 444 elections made by the partnership or S corporation. See examples (10) and (11) in paragraph (f) of this section.

(4) *Special rule for 52–53-week taxable years.* For purposes of this paragraph (e), a 52–53-week taxable year with reference to the end of a particular month will be considered to be the same as a taxable year ending with reference to the last day of such month.

(5) *Interaction with de minimis rules*—(i) *Downstream de minimis rule*—(A) *In general.* If a partnership or S corporation that desires to make or continue a section 444 election is a member of a tiered structure (as defined in paragraph (e)(2) of this section) and directly owns any member (or members) of the tiered structure with a taxable year different from the taxable year of the partnership or S corporation, such ownership is disregarded for purposes of the same taxable year exception of paragraph (e)(1) of this section provided that, in the aggregate, the de minimis rule of paragraph (c)(2) of this section is satisfied with respect to such owned member (or members). The following example illustrates the application of this paragraph (e)(5)(i)(A).

Example. P, a partnership with a June 30 taxable year, owns 60 percent of P1, another partnership with a June 30 taxable year. P also owns 1 percent of P2 and P3, calendar year partnerships. If, in the aggregate, P's ownership interests in P2 and P3 are considered de minimis under paragraph (c)(2) of this section, P meets the same taxable year exception and may make a section 444 election to retain its June 30 taxable year.

(B) *Special rule for members of a tiered structure directly owned by a downstream controlled partnership.* For purposes of paragraph (e)(5)(i)(A) of this section, a partnership or S corporation desiring to make or continue a section 444 election is considered to directly own any member of the tiered structure (as defined in paragraph (e)(2) of this section) directly owned by a downstream controlled partnership (as defined in paragraph (e)(2)(ii) of this section). The adjusted taxable income or gross income of the partnership or S corporation that is attributable to a member of a tiered structure directly owned by a downstream controlled partnership equals the adjusted taxable income or gross income of such member multiplied by the partnership's or S corporation's indirect ownership percentage of such member. The following example illustrates the application of this paragraph (e)(5)(i)(B).

Example. P, a partnership, desires to retain its June 30 taxable year by making a section 444 election. However, as of the date specified in paragraph (d) of this section, P owns 75 percent of P1, a June 30 partnership, and P1 owns 40 percent of P2, a calendar year partnership. P also owns 25 percent of P3, a calendar year partnership. Pursuant to paragraphs (e)(5)(i) (A) and (B) of this section, P may only qualify to use the same taxable year exception if, in the aggregate, P2 and P3 are de minimis with respect to P. Pursuant to paragraph (e)(5)(i)(B) of this section, P's adjusted taxable income or gross income attributable to P2 equals 30 percent (75 percent times 40 percent) of P2's adjusted taxable income or gross income.

(ii) *Upstream de minimis rule.* If a partnership or S corporation that desires to make or continue a section 444 election is a member of a tiered structure (as defined in paragraph (e)(2) of this section) and is owned directly by a member (or members) of the tiered structure with taxable years different from the taxable year of the partnership or S corporation, such ownership is disregarded for purposes of the same taxable year exception of paragraph (e)(1) of this section provided that, in the aggregate, the de minimis rule of paragraph (c)(3) of this section is satisfied with respect to such owning member (or members). See example (12) of paragraph (f) of this section.

(f) *Examples.* The provisions of this section may be illustrated by the following examples.

Example (1). A, a partnership, desires to make or continue a section 444 election. However, on the date specified in paragraph (d) of this section, A is owned by a combination of individuals and S corporations. The S corporations are deferral entities, as defined in paragraph (b)(2) of this section. Thus, pursuant to paragraph (b)(1)(ii) of this section, A will be a member of a tiered structure unless under paragraph (c)(3) of this section, the S corporations, in the aggregate, own a de minimis portion of A. If the S corporations' ownership in A is not considered de minimis under paragraph (c)(3) of this section, A is a member of a tiered structure and will be allowed to make or continue a section 444 election only if it meets the same taxable year exception provided in paragraph (e) of this section.

Example (2). B, a partnership, desires to make or continue a section 444 election. However, on the date specified in paragraph (d) of this section, B is a partner in two partnerships, B1 and B2. B1 and B2 are deferral entities, as defined in paragraph (b)(2) of this section. Thus, under paragraph (b)(1)(i) of this section, B will be a member of a tiered structure unless B's aggregate ownership interests in B1 and B2 are considered de minimis under paragraph (c)(2) of this section. If B is a member of a tiered structure on the date specified in paragraph (d) of this section, B will be allowed to make or continue a section 444 election only if it

meets the same taxable year exception provided in paragraph (e) of this section.

Example (3). C, a partnership with a September 30 taxable year, is 100 percent owned by calendar year individuals. C desires to make a section 444 election for its taxable year beginning October 1, 1987. However, on the date specified in paragraph (d) of this section, C owns a 1 percent interest in C1, a partnership. C does not own any other interest in a deferral entity. For the taxable year ended September 30, 1987, 10 percent of C's adjusted taxable income (as defined in paragraph (c)(2)(iii) of this section) was attributable to C's partnership interest in C1. Furthermore, 4 percent of C's gross income for the taxable year ended September 30, 1987, was attributable to C's partnership interest in C1. Under paragraph (c)(2) of this section, C's partnership interest in C1 is not de minimis because during the testing period more than 5 percent of C's adjusted taxable income is attributable to C1 and more than 2 percent of C's gross income is attributable to C1. Thus, C is a member of a tiered structure for its taxable year beginning October 1, 1987.

Example (4). The facts are the same as example (3), except that for the taxable year ended September 30, 1987, only 2 percent of C's adjusted taxable income was attributable to C1. Under paragraph (c)(2) of this section, C's partnership interest in C1 is considered de minimis for purposes of determining whether C is a member of a tiered structure because not more than 5 percent of C's adjusted taxable income during the testing period is attributable to C1. Thus, C is not a member of a tiered structure for its taxable year beginning October 1, 1987.

Example (5). The facts are the same as example (4), except that in addition to owning C1, C also owns 15 percent of C2, another partnership. For the taxable year ended September 30, 1987, 2 percent of C's adjusted taxable income is attributable to C1 and an additional 4 percent is attributable to C2. Furthermore, for the taxable year ended September 30, 1987, 4 percent of C's gross income is attributable to C1 while 3 percent is attributable to C2. Under paragraph (c)(2) of this section, C1 and C2 must be aggregated for purposes of determining whether C meets either the 5 percent adjusted taxable income test or the 2 percent gross income test. Since C's adjusted taxable income attributable to C1 and C2 is 6 percent (2 percent + 4 percent) and C's gross income attributable to C1 and C2 is 7 percent (4 percent + 3 percent), C does not meet the downstream de minimis rule provided in paragraph (c)(2) of this section. Thus, C is a member of a tiered structure for its taxable year beginning October 1, 1987.

Example (6). The facts are the same as example (3), except that instead of determining whether C is part of a tiered structure, the issue is whether C1 is part of a tiered structure. In addition, assume that on the date specified in paragraph (d) of this section, the remaining 99 percent of C1 is owned by calendar year individuals and C1 does not own an interest in any deferral entity. Although C in Example (3) was considered to be a part of a tiered structure by virtue of its ownership interest in C1, C1 must be tested separately to determine whether it is part of a tiered structure. Since C's interest in C1 is 5 percent or less, C's interest in C1 is de minimis with respect to C1. See paragraph (c)(3) of this section. Thus, based upon these facts, C1 is not part of a tiered structure.

Example (7). The facts are the same as example (6), except that the remaining 99 percent of C1 is owned 94 percent by calendar year individuals and 5 percent by C3, another partnership. Thus, deferral entities own 6 percent of C1 (1 percent owned by C and 5 percent owned by C3). Under paragraph (c)(3) of this section, deferral entities own more than a de minimis interest (*i.e.*, 5 percent) of C1, and thus C1 is part of a tiered structure.

Example (8). D, a partnership with a September 30 taxable year, desires to make a section 444 election for its taxable year beginning October 1, 1987. On December 31, 1987, and the date D plans to file its section 444 election, D is 10 percent owned by D1, a personal service corporation with a September 30 taxable year, and 90 percent owned by calendar year individuals. Furthermore, D1 will retain its September 30 taxable year because it previously established a business purpose for such year. Since D is owned in part by D1, a personal service corporation, and the ownership interest is not de minimis under paragraph (c)(3) of this section, D is considered a member of a tiered structure for its taxable year beginning October 1, 1987. Furthermore, although D and D1 have the same taxable year, D does not qualify for the same taxable year exception provided in paragraph (e) of this section because D1 is a personal service corporation rather than a partnership or S corporation. Thus, pursuant to paragraph (a) of this section, D may not make a section 444 election for its taxable year beginning October 1, 1987.

Example (9). The facts are the same as example (8), except that D1 is a partnership rather than a personal service corporation. Based upon these facts, D qualifies for the same taxable year exception provided in paragraph (e) of this section. Thus, D may make a section 444 election for its taxable year beginning October 1, 1987.

Example (10). The facts are the same as example (9), except that D1 has not established a business purpose for a September 30 taxable year. In addition, D1 does not desire to make a section 444 election and, under section 706(b), D1 will be required to change to a calendar year for its taxable year beginning October 1, 1987. Pursuant to paragraph (e)(3) of this section, D and D1 do not have the same taxable year for purposes of the same taxable year exception provided in paragraph (e) of this section. Thus, D may not make a section 444 election for its taxable year beginning October 1, 1987.

Example (11). The facts are the same as example (8), except that D1 is a partnership with a March 31 taxable year. Furthermore, for its taxable year beginning April 1, 1987, D1 will change to a September 30 taxable year by making a section 444 election. Pursuant to paragraph (e)(3) of this section, D1 is considered to have a September 30 taxable year for purposes of determining whether D qualifies for the same taxable year exception provided in paragraph (e) of this section. Since both D and D1 will have the same taxable year as of the date specified in paragraph (d) of this section, D may make a section 444 election for its taxable year beginning October 1, 1987.

Example (12). The facts are the same as example (11), except that instead of the remaining 90 percent of D being owned by calendar year individuals, it is owned 86 percent by individuals and 4 percent by D2, a calendar year partnership. Thus, D, a September 30 partnership, is 10 percent owned by D1, a September 30 partnership, 86 percent owned by calendar year individuals, and 4 percent owned by D2, a calendar year partnership. Under paragraph (e)(5)(ii) of this section, D2's ownership interest in D is considered de minimis for purposes of the same taxable year exception. Since D2's ownership interest in D is considered de minimis, it is disregarded for purposes of determining whether D qualifies for the same taxable year exception provided in paragraph (e) of this section. Thus, since both D and D1 will have the same taxable year as of the date specified in paragraph (d) of this section, D may make a section 444 election for its taxable year beginning October 1, 1987.

Example (13). E, a partnership with a June 30 taxable year, desires to make a section 444 election for its taxable year beginning July 1, 1987. On the date specified in paragraph (d) of this section, E is 100 percent owned by calendar year individuals; E owns 99 percent of the profits and capital of E1, a partnership with a June 30 taxable year; and E1 owns 30 percent of the profits and capital of E2, a partnership with a September 30 taxable year. E owns no other deferral entities. Pursuant to paragraph (b)(1)(i) of this section, E is considered to be a member of a tiered structure. Furthermore, pursuant to paragraph (e) of this section, E does not qualify for the same taxable year exception because E2 does not have the same taxable year as E and E1.

Example (14). The facts are the same as example (13), except that E owns only 49 percent (rather than 99 percent) of the profits and capital of E1. Pursuant to paragraph (e) of this section, E qualifies for the same taxable year exception because E and E1 have the same taxable year. Pursuant to paragraph (e) of this section, E1's ownership interest in E2 is disregarded since E does not own more than 50 percent of E1's profits and capital.

Example (15). Prior to consideration of the anti-abuse rule provided in paragraph (b)(3) of this section, H, a partnership that commenced operations on October 1, 1987, is eligible to make a section 444 election for its taxable year beginning October 1, 1987. Although H may obtain a significant deferral of income substantially all of which is not eliminated by a required payment under section 7519 (since there will be no required payment for H's first taxable year), the anti-abuse rule of paragraph (b)(3) will not apply unless the principal purpose of organizing H was the attainment of a significant deferral of income that would result from making a section 444 election.

Example (16). F, a partnership with a January 31 taxable year, desires to make a

section 444 election to retain its January 31 taxable year for the taxable year beginning February 1, 1987. F is 100 percent owned by calendar year individuals. Prior to the date specified in paragraph (d) of this section, F contributes substantially all of its assets to F1, a partnership, in exchange for a 51 percent interest in F1. The remaining 49 percent of F1 is owned by the calendar year individuals owning 100 percent of F. If F is allowed to make a section 444 election to retain its January 31 taxable year, F1's required taxable year will be January 31 since a majority of F1's partners use a January 31 taxable year (see § 1.706–3T). F's principal purpose for creating F1 and contributing its assets to F1 is to obtain an 11-month deferral on 49 percent of the income previously earned by F and now earned by F1. Pursuant to paragraph (b)(3) of this section, F is not allowed to make a section 444 election for its taxable year beginning February 1, 1987.

Example (17). The facts are the same as in example (16), except that F does not create F1 and contribute its assets to F1 until immediately after F makes its section 444 election for the taxable year beginning February 1, 1987. Thus, F is allowed to make a section 444 election for its taxable year beginning February 1, 1987. However, pursuant to paragraph (b)(3) of this section, F will have its section 444 election terminated for subsequent years unless the tax deferral inherent in the structure is eliminated (*e.g.*, F1 is liquidated or the individual owners of F contribute their interests in F1 to F) prior to the date specified in paragraph (d) of this section for subsequent taxable years beginning on or after February 1, 1988.

Example (18). The facts are the same as in example (16), except that F1 is 99 percent owned by F and none of the individual owners of F own any portion of F1. Furthermore, F obtained no tax benefit from creating and contributing assets to F1. Given these facts paragraph (b)(3) of this section does not apply and thus, F may make a section 444 election for its taxable year beginning February 1, 1987.

Example (19). G, a partnership with an October 31 taxable year, desires to retain its October 31 taxable year for its taxable year beginning November 1, 1987. However, as of December 31, 1987, G owns a 30 percent interest in G1, a calendar year partnership. G owns no other deferral entity, and G is 100 percent owned by calendar year individuals. Furthermore, G's interest in G1 does not meet the de minimis rule provided in paragraph (c)(3) of this section. Thus, in order to avoid being a tiered structure, G sells its interest in G1 to an unrelated third party prior to the date G timely makes it section 444 election for its taxable year beginning November 1, 1987. Although the sale of G1 allows G to qualify to make a section 444 election, and therefore to obtain a significant tax benefit, such benefit is not unintended. Thus, paragraph (b)(3) of this section does not apply, and G may make a section 444 election for its taxable year beginning November 1, 1987.

(g) *Effective date.* This section is effective for taxable years beginning after December 31, 1986.

§ 1.444–3T Manner and time of making section 444 election (temporary).

(a) *In general.* A section 444 election shall be made in the manner and at the time provided in this section.

(b) *Manner and time of making election*—(1) *General rule.* A section 444 election shall be made by filing a properly prepared Form 8716, "Election to Have a Tax Year Other Than a Required Tax Year," with the Service Center indicated by the instructions to Form 8716. Except as provided in paragraphs (b) (2) and (4) of this section, Form 8716 must be filed by the earlier of—

(i) The 15th day of the fifth month following the month that includes the first day of the taxable year for which the election will first be effective, or

(ii) The due date (without regard to extensions) of the income tax return resulting from the section 444 election.

In addition, a copy of Form 8716 must be attached to Form 1065 or Form 1120 series form, whichever is applicable, for the first taxable year for which the section 444 election is made. Form 8716 shall be signed by any person who is authorized to sign Form 1065 or Form 1120 series form, whichever is applicable. (See sections 6062 and 6063, relating to the signing of returns.) The provisions of this paragraph (b)(1) may be illustrated by the following examples.

Example (1). A, a partnership that began operations on September 10, 1988, is qualified to make a section 444 election to use a September 30 taxable year for its taxable year beginning September 10, 1988. Pursuant to paragraph (b)(1) of this section, A must file Form 8716 by the earlier of the 15th day of the fifth month following the month that includes the first day of the taxable year for which the election will first be effective (*i.e.*, February 15, 1989) or the due date (without regard to extensions) of the partnership's tax return for the period September 10, 1988 to September 30, 1988 (*i.e.*, January 15, 1989). Thus, A must file Form 8716 by January 15, 1989.

Example (2). The facts are the same as in example (1), except that A began operations on October 20, 1988. Based upon these facts, A must file Form 8716 by March 15, 1989, the 15th day of the fifth month following the month that includes the first day of the taxable year for which the election will first be effective.

Example (3). B is a corporation that first becomes a personal service corporation for its taxable year beginning September 1, 1988. B qualifies to make a section 444 election to use a September 30 taxable year for its taxable year beginning September 1, 1988. Pursuant to this paragraph (b)(1), B must file Form 8716 by December 15, 1988, the due date of the income tax return for the short period September 1 to September 30, 1988.

(2) *Special extension of time for making an election.* If, pursuant to paragraph (b)(1) of this section, the due date for filing Form 8716 is prior to July 26, 1988, such date is extended to July 26, 1988. The provisions of this paragraph (b)(2) may be illustrated by the following examples.

Example (1). B, a partnership that historically used a June 30 taxable year, is qualified to make a section 444 election to retain a June 30 taxable year for its taxable year beginning July 1, 1987. Absent paragraph (b)(2) of this section, B would be required to file Form 8716 by December 15, 1987. However, pursuant to paragraph (b)(2) of this section, B's due date for filing Form 8716 is extended to July 26, 1988.

Example (2). C, a partnership that began operations on January 20, 1988, is qualified to make a section 444 election to use a year ending September 30 for its taxable year beginning January 20, 1988. Absent paragraph (b)(2) of this section, C is required to file Form 8716 by June 15, 1988 (the 15th day of the fifth month following the month that includes the first day of the taxable year for which the election will first be effective). However, pursuant to paragraph (b)(2) of this section, the due date for filing Form 8716 is July 26, 1988.

(3) *Corporation electing to be an S corporation*—(i) *In general.* A corporation electing to be an S corporation is subject to the same time and manner rules for filing Form 8716 as any other taxpayer making a section 444 election. Thus, a corporation electing to be an S corporation that desires to make a section 444 election is not required to file Form 8716 with its Form 2553, "Election by a Small Business Corporation." However, a corporation electing to be an S corporation after September 26, 1988, is required to state on Form 2553 its intention to—

(A) Make a section 444 election, if qualified, or

(B) Make a "back-up section 444 election" as described in paragraph (b)(4) of this section.

If a corporation electing to be an S corporation fails to state either of the above intentions, the District Director may, at his discretion, disregard any section 444 election for such taxpayer.

(ii) *Examples.* The provisions of this paragraph (b)(3) may be illustrated by the following examples.

Example (1). D is a corporation that commences operations on October 1, 1988, and elects to be an S corporation for its taxable year beginning October 1, 1988. All of D's shareholders use the calendar year as their taxable year. D desires to adopt a September 30 taxable year. D does not believe it has a business purpose for a September 30 taxable year and thus it must make a section 444 election to use such year. Based on these facts, D must, pursuant to the instructions to Form 2553, state on Form 2553 that, if qualified, it will make a section 444 election to adopt a year ending September 30

for its taxable year beginning October 1, 1988. If D is qualified (*i.e.*, D is not a member of a tiered structure on December 31, 1988) to make a section 444 election for its taxable year beginning October 1, 1988, D must file Form 8716 by March 15, 1989. If D ultimately is not qualified to make a section 444 election for its taxable year beginning October 1, 1988, D's election to be an S corporation will not be effective unless, pursuant to the instructions to Form 2553, D made a back-up calendar year election (*i.e.*, an election to adopt the calendar year in the event D ultimately is not qualified to make a section 444 election for such year).

Example (2). The facts are the same as in example (1), except that D believes it can establish, to the satisfaction of the Commissioner, a business purpose for adopting a September 30 taxable year. However, D desires to make a "back-up section 444 election" (see paragraph (b)(4) of this section) in the event that the Commissioner does not grant permission to adopt a September 30 taxable year based upon business purpose. Based on these facts, D must, pursuant to the instructions to Form 2553, state on Form 2553 its intention, if qualified, to make a back-up section 444 election to adopt a September 30 taxable year. If, by March 15, 1989, D has not received permission to adopt a September 30 taxable year and D is qualified to make a section 444 election, D must make a back-up election in accordance with paragraph (b)(4) of this section.

(4) *Back-up section 444 election*—(i) *General rule.* A taxpayer that has requested (or is planning to request) permission to use a particular taxable year based upon business purpose, may, if otherwise qualified, file a section 444 election (referred to as a "back-up section 444 election"). If the Commissioner subsequently denies the business purpose request, the taxpayer will, if otherwise qualified, be required to activate the back-up section 444 election. See examples (1) and (2) in paragraph (b)(4)(iv) of this section.

(ii) *Procedures for making a back-up section 444 election.* In addition to following the general rules provided in this section, a taxpayer making a back-up section 444 election should, in order to allow the Service to process the affected returns in an efficient manner, type or legibly print the words "BACK-UP ELECTION" at the top of Form 8716, "Election to Have a Tax Year Other Than a Required Tax Year." However, if such Form 8716 is filed on or after the date a Form 1128, Application for Change in Accounting Period, is filed with respect to a period that begins on the same date, the words "FORM 1128 BACK-UP ELECTION" should be typed or legibly printed at the top of Form 8716.

(iii) *Procedures for activating a back-up section 444 election*—(A) *Partnerships and S corporations*—(*1*) *In general.* A back-up section 444 election made by a partnership or S corporation is activated by filing the return required in § 1.7519–2T (a)(2)(i) and making the payment required in § 1.7519–1T. The due date for filing such return and payment will be the later of—

(*i*) The due dates provided in § 1.7519–2T, or

(*ii*) 60 days from the date the Commissioner denies the business purpose request.

However, interest will be assessed (at the rate provided in section 6621 (a)(2)) on any required payment made after the due date (without regard to any extension for a back-up election) provided in § 1.7519–2T (a)(4)(i) or (a)(4)(ii), whichever is applicable, for such payment. Interest will be calculated from such due date to the date such amount is actually paid. Interest assessed under this paragraph will be separate from any required payments. Thus, interest will not be subject to refund under § 1.7519–2T.

(*2*) *Special rule if Form 720 used to satisfy return requirement.* If, pursuant to § 1.7519–2T (a)(3), a partnership or S corporation must use Form 720, "Quarterly Federal Excise Tax Return," to satisfy the return requirement of § 1.7519–2T (a)(2), then in addition to following the general rules provided in § 1.7519–2T, the partnership or S corporation must type or legibly print the words "ACTIVATING BACK-UP ELECTION" on the top of Form 720. A partnership or S corporation that would otherwise file a Form 720 on or before the date specified in paragraph (b)(4)(iii)(A)(*1*) of this section may satisfy the return requirement by including the necessary information on such Form 720. Alternatively, such partnership or S corporation may file an additional Form 720 (*i.e.*, a Form 720 separate from the Form 720 it would otherwise file). Thus, for example, if the due date for activating an S corporation's back-up election is November 15, 1988, and the S corporation must file a Form 720 by October 31, 1988, to report manufacturers excise tax for the third quarter of 1988, the S corporation may use that Form 720 to activate its back-up election. Alternatively, the S corporation may file its regular Form 720 that is due October 31, 1988, and file an additional Form 720 by November 15, 1988, activating its back-up election.

(B) *Personal service corporations.* A back-up section 444 election made by a personal service corporation is activated by filing Form 8716 with the personal service corporation's original or amended income tax return for the taxable year in which the election is first effective, and typing or legibly printing the words—"ACTIVATING BACK-UP ELECTION" on the top of such income tax return.

(iv) *Examples.* The provisions of this paragraph (b)(4) may be illustrated by the following examples. Also see example (2) in paragraph (b)(3) of this section.

Example (1). E, a partnership that historically used a June 30 taxable year, requested (pursuant to section 6 of Rev. Proc. 87–32, 1987–28 I.R.B. 14) permission from the Commissioner to retain a June 30 taxable year for its taxable year beginning July 1, 1987. Furthermore, E is qualified to make a section 444 election to retain a June 30 taxable year for its taxable year beginning July 1, 1987. However, as of the date specified in paragraph (b)(2) of this section, the Commissioner has not determined whether E has a valid business purpose for retaining its June 30 taxable year. Based on these facts, E may, by the date specified in paragraph (b)(2) of this section, make a back-up section 444 election to retain its June 30 taxable year.

Example (2). The facts are the same as in example (1). In addition, on August 12, 1988, the Internal Revenue Service notifies E that its business purpose request is denied. E asks for reconsideration of the Service's decision, and the Service sustains the original denial on September 30, 1988. Based on these facts, E must activate its back-up section 444 election within 60 days after September 30, 1988.

Example (3). The facts are the same as in example (1), except that E desires to make a section 444 election to use a year ending September 30 for its taxable year beginning July 1, 1987. Although E qualifies to make a section 444 election to retain its June 30 taxable year, E may make a back-up section 444 election for a September 30 taxable year.

(c) *Administrative relief*—(1) *Extension of time to file income tax returns*—(i) *Automatic extension.* If a partnership, S corporation, or personal service corporation makes a section 444 election (or does not make a section 444 election, either because it is ineligible or because it decides not to make the election, and therefore changes to its required taxable year) for its first taxable year beginning after December 31, 1986, the due date for filing its income tax return for such year shall be the later of—

(A) The due date established under—

(*1*) Section 6072, in the case of Form 1065,

(*2*) § 1.6037–1 (b), in the case of Form 1120S,

(*3*) Section 6072 (b), in the case of other Form 1120 series form; or

(B) August 15, 1988.

The words "SECTION 444 RETURN" should, in order to allow the Service to process the affected returns in an

efficient manner, be typed or legibly printed at the top of the Form 1065 or Form 1120 series form, whichever is applicable, filed under this paragraph (c)(1)(i).

(ii) *Additional extensions.* If the due date of the income tax return for the first taxable year beginning after December 31, 1986, extended as provided in paragraph (c)(1)(i)(B) of this section, occurs before the date that is 6 months after the date specified in paragraph (c)(1)(i)(A) of this section, the partnership, S corporation, or personal service corporation may request an additional extension or extensions of time (up to 6 months after the date specified in paragraph (c)(1)(i)(A) of this section) to file its income tax return for such first taxable year. The request must be made by the later of the date specified in paragraph (c)(1)(i)(A) or (c)(1)(i)(B) of this section and must be made on Form 7004, "Application for Automatic Extension of Time To File Corporation Income Tax Return", or Form 2758, "Application for Extension of Time to File U.S. Partnership, Fiduciary, and Certain Other Returns," whichever is applicable, in accordance with the form and its instructions. In addition, the following words should be typed or legibly printed at the top of the form—"SECTION 444 REQUEST FOR ADDITIONAL EXTENSION."

(iii) *Examples.* The provisions of paragraph (c)(1) of this section may be illustrated by the following examples.

Example (1). G, a partnership that historically used a January 31 taxable year, makes a section 444 election to retain such year for its taxable year beginning February 1, 1987. Absent paragraph (c)(1)(i) of this section, G's Form 1065 for the taxable year ending January 31, 1988, is due on or before May 15, 1988. However, if G types or legibly prints "SECTION 444 RETURN" at the top of Form 1065 for such year, paragraph (c)(1)(i) of this section automatically extends the due date of such return to August 15, 1988.

Example (2). The facts are the same as in example (1), except that G desires to extend the due date of its income tax return for the year ending January 31, 1988, to a date beyond August 15, 1988. Pursuant to paragraph (c)(1)(ii) of this section, G may extend such return to November 15, 1988 (*i.e.*, the date that is up to 6 months after May 15, 1988, the normal due date of the return). However, in order to obtain this additional extension, G must file Form 2758 pursuant to paragraph (c)(1)(i) of this section on or before August 15, 1988.

Example (3). H, a partnership that historically used a May 31 taxable year, makes a section 444 election to use a year ending September 30 for its taxable year beginning on June 1, 1987. Absent paragraph (c)(1)(i) of this section, H's Form 1065 for the taxable year beginning June 1, 1987, and ending September 30, 1987, is due on or before January 15, 1988. However, if H types or legibly prints "SECTION 444 RETURN" at the top of Form 1065 for such year, paragraph (c)(1)(i) of this section automatically extends to due date of such return to August 15, 1988.

Example (4). The facts are the same as in example (3), except H desires to further extend (*i.e.*, extend beyond August 15, 1988) the due date of its income tax return for its taxable year beginning June 1, 1987, and ending September 30, 1987. Since August 15, 1988, is 6 months or more after the due date (without extensions) of such return, paragraph (c)(1)(ii) of this section prevents H from further extending the time for filing such return.

Example (5). I, a partnership that historically used a June 30 taxable year, considered making a section 44 election to retain such taxable year, but eventually decided to change to a December 31, taxable year (I's required taxable year). Absent paragraph (c)(1)(i) of this section, I's Form 1065 for the taxable year beginning July 1, 1987, and ending December 31, 1987, is due on or before April 15, 1988. Pursuant to paragraph (c)(1)(i) of this section, if I types or legibly prints "SECTION 444 RETURN" at the top of Form 1065 for such year, paragraph (c)(1)(i) of this section automatically extends the due date of such return to August 15, 1988. In addition, I may further extend such return pursuant to paragraph (c)(1)(ii) of this section.

(2) *No penalty for certain late payments*—(i) *In general.* In the case of a personal service corporation or S corporation described in paragraph (c)(1)(i) of this section, no penalty under section 6651 (a)(2) will be imposed for failure to pay income tax (if any) for the first taxable year beginning after December 31, 1986, but only for the period beginning with the last date for payment and ending with the later of the date specified in paragraph (c)(1)(i) or paragraph (c)(1)(ii) of this section.

(ii) *Example.* The provisions of paragraph (c)(2)(i) of this section may be illustrated by the following example.

Example. J, a personal service corporation that historically used a January 31 taxable year, makes a section 444 election to retain such year for its taxable year beginning February 1, 1987. The last date (without extension) for payment of J's income tax (if any) for its taxable year beginning February 1, 1987, is April 15, 1988. However, under paragraph (c)(2)(i) of this section, no penalty under section 6651(a)(2) will be imposed on any underpayment of income tax for the period beginning April 15, 1988 and ending August 15, 1988.

(d) *Effective date.* This section is effective for taxable years beginning after December 31, 1986.

Par. 3. Sections 1.7519–0T through 1.7519–3T are added in the appropriate place.

§ 1.7519–0T Table of contents (temporary).

This section lists the captions that appear in the temporary regulations under section 7519.

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§ 1.7519–1T Required payments for entities electing not to have required year (temporary).

(a) *In general*—(1) *Applicability.* This section applies to any taxable year that a partnership or S corporation has an election under section 444 in effect (an "applicable election year").

(2) *Returns and required payments.* For each applicable election year, a partnership or S corporation must—

(i) File a return as provided in § 1.7519—2T (a)(2), and

(ii) Make a required payment (as defined in paragraph (a)(3) of this section) as provided in § 1.7519–2T. However, if the required payment for an applicable election year is not more than $500 and the partnership or S corporation has not been required to make a required payment for a prior year, the partnership or S corporation should not make a required payment for such applicable election year.

(3) *Required payment.* The term "required payment" means, with respect to any applicable election year, an amount equal to the excess of—

(i) The product of the applicable percentage of the adjusted highest section 1 rate, multiplied by the net base year income (as defined in paragraph (b)(5) of this section) of the entity over

(ii) The cumulative amount of required payments actually made for all preceding applicable election years (reduced by the cumulative amount of such payments refundable under section 7519(c) for all such preceding years).

Furthermore, the amount of the required payment is determined without regard to the required payment of any other partnership or S corporation. See example (3) in paragraph (d) of this section.

(4) *Examples.* The provisions of paragraph (a) of this section may be illustrated by the following examples.

Example (1). A, a partnership, makes a section 444 election to retain its taxable year ending September 30. For A's first applicable election year, A's required payment, as defined in paragraph (a) (3) of this section, is $400. Thus, A does not have to make a required payment for that year. However, A is required to file the return prescribed by § 1.7519–2T(a)(2).

Example (2). The facts are the same as in example (1), and, in addition to those facts, for A's second applicable election year, the amount determined under paragraph (a)(3)(i) of this section is $800. Because A did not actually make a required payment for A's first applicable election year, A's required payment is $800 for its second applicable election year. Since the required payment is greater than $500, A must make a required payment for its second applicable election year. Furthermore, A must file the return prescribed by § 1.7519–2T(a)(2).

Example (3). The facts are the same as in example (2), and, in addition to those facts, for A's third applicable election year, the amount determined under paragraph (a)(3)(i) of this section is $1,200. Thus, A's required payment is $400 ($1,200 determined under paragraph (a)(3)(i) of this section less $800 determined under paragraph (a)(3)(ii) of this section). Although A's required payment for its third applicable election year is not more than $500, A must make its required payment for such year because the required payment for a preceding applicable election year exceeded $500. A must also file the return prescribed by § 1.7519–2T(a)(2) for its third applicable election year.

(b) *Definitions and special rules*—(1) *Applicable percentage*—(i) *In general.* Except as provided in paragraph (b)(1)(ii) of this section, the term "applicable percentage" means the percentage determined in accordance with the following table:

If the applicable election year of the partnership or S corporation begins during—	The applicable percentage is—
1987	.25
1988	.50
1989	.75
1990 or thereafter	100

(ii) *Exception for certain applicable election years beginning after 1987.* [Reserved.]

(iii) *Example.* The provisions of paragraph (b)(1) of this section may be illustrated by the following example.

Example. B is a corporation that has historically used a June 30 taxable year. For its taxable year beginning July 1, 1987, B elects to be an S corporation and elects under § 1.444–1T(b)(3) to retain its June 30 taxable year. Had B changed to a calendar year, its required year under section 1378, B's shareholders would not have been entitled to the 4-year spread under section 806(e)(2)(C) of the Tax Reform Act of 1986 because B was not an S corporation for its taxable year beginning in 1986. Nevertheless, for purposes of determining the required payment for B's applicable election year beginning July 1, 1987, the applicable percentage is 25 percent.

(2) *Adjusted highest section 1 rate*—(i) *General rule.* For any applicable election year, the term "adjusted highest section 1 rate" means the highest rate of tax under section 1 applicable to the period defined in paragraph (b)(2)(ii) of this section, plus 1 percentage point. Notwithstanding the preceding sentence, the adjusted highest section 1 rate is 36 percent for applicable election years beginning in 1987. For purposes of this section, the highest rate of tax is determined without regard to the effect of section 1(g), relating to the phaseout of the 15-percent rate and personal exemptions.

(ii) *Period for determining highest section 1 rate.* For purposes of paragraph (b)(2)(i) of this section, the period for determining the highest rate of tax under section 1 is the 12 month period that—

(A) Ends with the required taxable year for the applicable election year, and

(B) Includes the end of the base year.

For example, assume that a partnership's applicable election year begins on October 1, 1988 and that the required taxable year for such applicable election year is December 31. Based upon these facts, the period for determining the highest section 1 rate is the 12-month period ending December 31, 1988.

(3) *Base year.* The term "base year" means, with respect to any applicable election year, the taxable year of the partnership or S corporation preceding such applicable election year.

(4) *Special rules for certain applicable election years*—(i) *First applicable election year of new entities.* If an applicable election year is a partnership's or S corporation's first year in existence (*i.e.*, the partnership or S corporation is newly formed and therefore does not have a base year), the required payment for such applicable election year is zero.

(ii) *Applicable election years ending prior to the required taxable year.* If a partnership or S corporation makes a section 444 election and the resulting applicable election year (the "first applicable election year") of the partnership or S corporation ends prior to the last day of the required year, the required payment for the first applicable election year is zero. See example (5) in paragraph (b)(5)(vi) of this section.

(5) *Net base year income*—(i) *In general.* Except as provided in paragraph (b)(5)(v) of this section (relating to short base years), the net base year income of a partnership or S corporation is the sum of—

(A) The deferral ratio multiplied by the partnership's or S corporation's net income for the base year, plus

(B) The excess (if any) of—

(*1*) The deferral ratio multiplied by the aggregate amount of applicable payments made by the partnership or S corporation during the base year, over

(*2*) The aggregate amount of such applicable payments made during the deferral period of the base year.

The term "deferral ratio" means the ratio which the number of months in the deferral period (as defined in § 1.444–1T (b)(4)) of the applicable election year bears to 12 months.

(ii) *Partnership net income.* For purposes of paragraph (b)(5)(i) of this section—

(A) *In general.* The net income of the partnership is the amount (not below zero) determined by taking into account the aggregate amount of the partnership's items described in section 702(a), except for—

(*1*) Credits,

(*2*) Tax-exempt income, and

(*3*) Guaranteed payments under section 707(c).

(B) *Treatment of deductions and losses.* For purposes of determining the aggregate amount of partnership items, deductions and losses are treated as negative income. Thus, for example, if under section 702(a) a partnership has $1,000 of ordinary taxable income, $500 of specially allocated deductions, and $300 of capital loss, the net income of the partnership is $200 ($1,000–$500–$300).

(C) *Partner limitations disregarded.* Any limitation on the amount of a partnership item described in section 702(a) which may be taken into account for purposes of computing the taxable income of a partner shall be disregarded in computing the net income of the partnership.

(iii) *S corporation net income.* For purposes of paragraph (b)(5)(i) of this section—

(A) *In general.* The net income of an S corporation is the amount (not below zero) determined by taking into account the aggregate amount of the S corporation's items described in section 1366(a) (other than credits and tax-exempt income). If the S corporation was a C corporation for the base year, the taxable income of the C corporation shall be treated as the net income of the S corporation for such year.

(B) *Treatment of deductions and losses.* For purposes of determining the aggregate amount of S corporation items, deductions and losses are treated as negative income. Thus, for example, if under section 1366(a) an S corporation has $2,000 of ordinary taxable income, $1,000 of deductions described in section 1366(a)(1)(A) of the Code, and $500 of capital loss, the net income of the S corporation is $500 ($2,000–$1,000–$500).

(C) *Shareholder limitations disregarded.* Any limitation on any amount described in section 1366(a) which may be taken into account for purposes of computing the taxable income of a shareholder shall be disregarded in computing the net income of the S corporation.

(iv) *Applicable payments*—(A) *In general.* The term "applicable payment" means any amount deductible in the base year that is includable at any time, directly or indirectly, in the gross income of a taxpayer that during the base year is a partner or shareholder.

(B) *Exceptions.* The term "applicable payment" does not include any guaranteed payments under section 707(c).

(C) *Special rule for corporation electing S status.* If an S corporation was a C corporation for the base year, the corporation shall be treated as if it were an S corporation for the base year for purposes of determining the amount of applicable payments under this section. Thus, amounts deductible by the C corporation in the base year that are includable at any time in the gross income of a taxpayer that is a shareholder during the base year are treated as if from an S corporation, and therefore within the meaning of the term "applicable payments."

(D) *Special rules for certain payments*—(*1*) *Certain indirect payments.* For purposes of paragraph (b)(5)(iv)(A) of this section, an amount is indirectly includable in the gross income of a partner or shareholder of a partnership or S corporation that has a section 444 election in effect (an electing partnership or S corporation) if the amount is includable in the gross income of—

(*i*) The spouse (other than a spouse who is legally separated from the partner or shareholder under a decree of divorce or separate maintenance) or child (under age 14) of such partner or shareholder, or

(*ii*) A corporation more than 50 percent (measured by fair market value) of which is owned in the aggregate by partners or shareholders (and individuals related under paragraph (b)(5)(iv)(D)(*1*)(*i*) of this section to any such partners or shareholders), of the electing partnership or S corporation, or

(*iii*) A partnership more than 50 percent of the profits and capital of which is owned in the aggregate by partners or shareholders (and individuals related under paragraph (b)(5)(iv)(D)(*1*)(*i*) of this section to any such partners or shareholders) of the electing partnership or S corporation, or

(*iv*) A trust more than 50 percent of the beneficial ownership of which is owned in the aggregate by partners or shareholders (and individuals related under paragraph (b)(5)(iv)(D)(*1*)(*i*) of this section to any such partners or shareholders), of the electing partnership or S corporation.

For purposes of this paragraph (b)(5)(iv)(D)(*1*), ownership by any person described in this paragraph (b)(5)(iv)(D)(*1*) shall be treated as ownership by the partners or shareholders of the electing partnership or S corporation. This paragraph (b)(5)(iv)(D)(*1*) does not apply to amounts deductible by a partnership or S corporation that has made a section 444 election (the "deducting partnership") and included in the gross income of a partnership or S corporation defined in paragraphs (b)(5)(iv)(D)(*1*) (*ii*) or (*iii*) of this section (the "including partnership"), if the including partnership has the same taxable year as the deducting partnership and the including partnership has a section 444 election in effect. Furthermore, notwithstanding the general effective date provided in § 1.7519–3T, this paragraph (b)(5)(iv)(D)(*1*) is effective for amounts deductible on or after June 1, 1988.

(*2*) *Payments by a downstream controlled partnership*—(*i*) *In general.* If a partnership or S corporation has made a section 444 election, any amounts

deducted by a downstream controlled partnership will be considered deducted by the partnership or S corporation that has made the section 444 election for purposes of determining the applicable payments of the partnership or S corporation that has made the section 444 election.

(*ii*) *Definition of a downstream controlled partnership.* If a partnership or S corporation that has made a section 444 election owns more than 50 percent of a partnership's profits and capital, such owned partnership is considered a downstream controlled partnership for purposes of paragraph (b)(5)(iv)(D)(*2*)(*i*) of this section. Furthermore, if more than 50 percent of a partnership's profits and capital are owned by a downstream controlled partnership, such owned partnership is considered a downstream controlled partnership for purposes of paragraph (b)(5)(iv)(D)(*2*)(*i*) of this section.

(*3*) *Examples.* The provisions of this paragraph (b)(5)(iv)(D) may be illustrated by the following examples.

Example (1). I1 and I2, calendar year individuals, own 100 percent of the profits and capital of C1, a partnership. In addition to owning C1, I1 and I2 also own 100 percent of the profits and capital of C2, a calendar year partnership. For its taxable years beginning February 1, 1987, 1988, and 1989, C1 has a section 444 election in effect to use a January 31 taxable year. During its base years beginning February 1, 1986, 1987, and 1988, C1 deducted $10,000, $11,000, and $12,000, respectively that was included in C2's gross income. Furthermore, of the $12,000 deducted by C1 for its taxable year beginning February 1, 1988, $7,000 was deducted during the period June 1, 1988 to January 31, 1989. Pursuant to paragraph (b)(5)(iv)(D)(*1*) of this section, the $7,000 deducted by C1 on or after June 1, 1988, and included in C2's gross income is considered an applicable payment for C1's base year beginning February 1, 1988. Amounts deducted by C1 prior to June 1, 1988, are not subject to paragraph (b)(5)(iv)(D)(*1*) of this section.

Example (2). The facts are the same as in example (1), except that I1 and I2 own only 51 percent of C2's profits and capital. Since the two partners in C1 (*i.e.*, I1 and I2) own more than 50 percent of C2's profits and capital, C2 is considered controlled by the partners of C1 pursuant to paragraph (b)(5)(iv)(D)(*1*)(*iii*) of this section. Thus, the conclusions in example (1) are unchanged. Furthermore, if the $7,000 deducted by C1 was included in the income of a partnership more than 50 percent of the profits and capital of which is owned by C2, such $7,000 would be considered an applicable payment for its base year beginning February 1, 1988.

Example (3). The facts are the same as in example (1), except that for its taxable years beginning February 1, 1987, 1988, and 1989, C2 has a section 444 election in effect to use a January 31 taxable year. Since both C1 and C2 have the same taxable year and both have section 444 elections in effect, paragraph (b)(5)(iv)(D)(*1*) of this section does not apply to the $7,000 deducted by C1 for its base year beginning February 1, 1988.

Example (4). I3 and I4, calendar year individuals, own 100 percent of the profits and capital of C3, a partnership. C3 has made a section 444 election to retain a year ending June 30 for its taxable year beginning July 1, 1987. Furthermore, C3 owns more than 50 percent of the profits and capital of C4, a partnership that historically used a June 30 taxable year. Pursuant to § 1.706–3T(b), C4 retains its year ending June 30 for its taxable year beginning July 1, 1987. For its taxable year beginning July 1, 1986, C4 deducted $20,000 that was included in I3's gross income. Pursuant to paragraph (b)(5)(iv)(D)(*2*) of this section, the $20,000 deducted by C4 is considered an applicable payment by C3 for its base year beginning July 1, 1986.

Example (5). The facts are the same as in example (4), except that the $20,000 deducted by C4 is included in the gross income of a calendar year partnership 100 percent owned by I3 and I4. Pursuant to paragraphs (b)(5)(v)(D) (*1*) and (*2*) of this section, the $20,000 deducted by C4 is considered an applicable payment by C3 for its base year beginning July 1, 1986.

Example (6). The facts are the same as in example (4), except that instead of directly owning a portion of C4, C3 owns more than 50 percent of the profits and capital of C5. Furthermore, C5 owns more than 50 percent of the profits and capital of C4. Pursuant to paragraph (b)(5)(iv)(D)(*2*)(*ii*) of this section, both C5 and C4 are considered downstream controlled partnerships of C3. Thus, pursuant to paragraph (b)(5)(iv)(D)(*2*)(*i*) of this section, the $20,000 deducted by C4 is considered an applicable payment by C3 for its base year beginning July 1, 1986.

(v) *Special rule for base year of less than twelve months*—(A) *In general.* If a base year is a taxable year of less than twelve months (a "short base year"), net base year income for such year is an amount equal to the excess, if any, of—

(*1*) The deferral ratio multiplied by the annualized short base year income, over

(*2*) Applicable payments made during the deferral period of the applicable election year following the base year.

(B) *Annualized short base year income.* The annualized short base year income is determined by—

(*1*) Increasing the net income for the short base year by applicable payments deductible in the short base year, and

(*2*) Multiplying the short base year income as increased in paragraph (b)(5)(v)(B)(*1*) of this section by twelve, and dividing the result by the number of months in the short base year.

(vi) *Examples.* The provisions of paragraph (b)(5) of this section may be illustrated by the following examples.

Example (1). D, a partnership, is owned 10 percent by a C corporation with a September 30 taxable year and 90 percent by calendar year individuals. D has historically used a September 30 taxable year. For its taxable year beginning October 1, 1987, D makes a section 444 election to retain its September 30 taxable year. For the base year from October 1, 1986 to September 30, 1987, D has net income of $200,000 and no applicable payments. D's deferral ratio is $^{3}/_{12}$ (the ratio of the number of months in the deferral period to 12 months). Based upon these facts, D has net base year income of $50,000 ($200,000 × $^{3}/_{12}$).

Example (2). The facts are the same as in example (1) except that D's net income for the base year is $140,000, after applicable payments of $60,000. Of the applicable payments $15,000 were deductible during the deferral period of the base year. Based upon these facts, D has net base year income of $35,000, determined as follows:

Net income multiplied by deferral ratio	$140,000 × $^{3}/_{12}$		
			$35,000
Plus the excess, if any, of applicable payments multiplied by deferral ratio	$60,000 × $^{3}/_{12}$		
		$15,000	
Over aggregate amount of applicable payments deductible during deferral period of base year		$15,000	0
Net base year income			$35,000

Example (3). The facts are the same as in examle (2) except that of the $60,000 applicable payments only $10,000 are deductible during the deferral period of the base year. Based on these facts, D has net base year income of $40,000, determined as follows:

Net income multiplied by deferral ratio	$140,000 x 3/12		
			$35,000
Plus the excess, if any, of applicable payments multiplied by deferral ratio	$60,000 x 3/12		
		$15,000	

Over aggregate amount of applicable payments deductible during deferral period of base year		$10,000	$5,000
Net base year income			$40,000

Example (4). E is a C corporation that has historically used a January 31 taxable year. For its taxable year beginning February 1, 1987, E makes an election to be an S corporation and also makes a section 444 election to retain its January 31 taxable year. E's taxable income for the taxable year beginning February 1, 1986 to January 31, 1987 is $120,000. Pursuant to paragraph (b)(5)(iii)(A) of this section, the base year for X's first applicable election year is the taxable year beginning February 1, 1986 and ending January 31, 1987. Thus, E's net income for the base year is $120,000. During the base year, E pays its sole shareholder, A, a salary of $5,000 a month plus a $30,000 bonus on January 15, 1987. Thus, under paragraph (b)(5)(iv)(C) of this section, E's applicable payments for the base year are $90,000, of which $55,000 are applicable payments deductible during the deferral period of the base year (February 1 to December 31, 1986). Based upon these facts, E's net base year income is $137,500, determined as follows:

Net income multiplied by deferral ratio	$120,000 x 11/12		$110,000
Plus the excess, if any, of applicable payments multiplied by the deferral ratio	$90,000 x11/12		
		$82,500	
Over aggregate amount of applicable payments deductible during deferral period of base year		$55,000	$27,500
Net base year income			$137,500

Example (5). E, a corporation that has historically used a taxable year ending July 31, makes an election to be an S corporation for its taxable year beginning August 1, 1987. For that year, E also makes a section 444 election to use a taxable year ending September 30. Thus, E has two applicable election years beginning in 1987, the first beginning August 1, 1987 and ending September 30, 1987, and the second beginning October 1, 1987 and ending September 30, 1988. E's required year under section 1378 is the calendar year. Because E's first applicable election year ends prior to the last day of E's required year (*i.e.*, December 31, 1987), the required payment for E's first applicable election year is zero. However, E is required to file a return for such year as provided in § 1.7519–2T.

Example (6). The facts are the same as in example (5). E's second applicable election year is the year from October 1, 1987 to September 30, 1988, and the base year for the second applicable election year is a period of less than 12 months (i.e., August 1, 1987 to September 30, 1987). Thus, E must compute its net base year income using the special rule for short base years provided in paragraph (b)(5)(v) of this section. Assume E's net income for the short base year is $50,000, and E's applicable payments for the short base year are $15,000. Pursuant to paragraph (b)(5)(v)(B) of this section, E's annualized short base year net income is $390,000 ($65,000 x 12/2). Furthermore, assume E's applicable payments for the deferral period of its second applicable election year are $20,000. Based on these facts, the net base year income for the applicable election year beginning October 1, 1987 is $77,500, computed as follows:

Annualized short base year income multiplied by deferral ratio	$390,000 x 3/12	
		$97,500
Less: Applicable payments for deferral period		$20,000
Net base year income		$77,500

(c) *Refunds of required payments.* A partnership of S corporation is entitled to make a claim for refund, in accordance with the procedures provided in § 1.7519–2T(a)(6), if—

(1) The amount specified in paragraph (a)(3)(i) of this section is less than the amount specified in paragraph (a)(3)(ii) of this section; or

(2) The partnership or S corporation terminates its section 444 election, within the meaning of § 1.444–1T(a)(5).

(d) *Example.* The provisions of this section may be illustrated by the following examples.

Example (1). G, a partnership, is owned 10 percent by a C corporation with a June 30 taxable year, and 90 percent by calendar year individuals. G has historically used a June 30 taxable year. For its taxable year beginning July 1, 1987, G makes a section 444 election to retain its June 30 taxable year. For the base year from July 1, 1986 to June 30, 1987, G has net income of $300,000 and no applicable payments. G's deferral ratio is 6/12 (the ratio of the number of months in the deferral period to 12 months). Based on these facts, G's net base year income is $150,000 ($300,000 x 6/12). Thus, G's required payment for its first applicable election year is $13,500 ($150,000 of net base year income multiplied by 9 percent (the product of the applicable percentage for 1987, 25 percent, and the highest section 1 rate for 1987, 36 percent)).

Example (2). The facts are the same as in example (1). In addition, G continues its section 444 election for the taxable year beginning July 1, 1988, and G's net base year income for the year beginning July 1, 1987 is $150,000. The required payment for G's second applicable election year is $8,250 ($150,000 of net base year income multiplied by 14.5 percent (the product of the applicable percentage for 1988 applicable election years, 50 percent, and the adjusted highest section 1 rate for 1988, 29 percent) less G's $13,500 required payment for the first applicable election year).

Example (3). H, a partnership with a taxable year ending September 30, desires to make a section 444 election for its taxable year beginning October 1, 1987. H is 15 percent owned by I, a partnership with a taxable year ending September 30, and 85 percent owned by calendar year individuals. Assume H and I are qualified to make section 444 elections as a result of the "same taxable year exception" provided in § 1.444–2T(e). If H and I make section 444 elections, they must each make a required payment (assuming the amount computed under paragraph (a)(3) of this section is greater than $500). Pursuant to paragraph (a)(3) of this section, the required payments of H and I are calculated independent of each other. Thus, in determining the amount of its required payment, I may not exclude its income attributable to H, even though H must also make a required payment on the same income.

Example (4). The facts are the same as in example (1) except that H is 90 percent owned by I and 10 percent owned by calendar year individuals. Pursuant to § 1.706–3T, if I makes a section 444 election to retain its taxable year ending September 30, H's required year will be September 30, because H's majority interest partner will have a September 30 taxable year. Thus, H is not required to make a section 444 election and a required payment in order to use a September 30 taxable year. I, however, must make a required payment.

§ 1.7519–2T Required payments—procedures and administration (temporary).

(a) *Payment and return required*—(1) *In general.* With respect to any taxable year for which a partnership or S corporation has a section 444 election in effect (an "applicable election year"), the partnership or S corporation shall file a return as provided in paragraphs (a) (2) and (3) of this section and make a payment, if required, as provided in paragraph (a)(4) of this section.

(2) *Return required*—(i) *In general.* A return showing the required payment shall be made, even if the required payment for the applicable election year is zero. For an applicable election year

beginning in 1987, the return shall be made on Form 720, "Quarterly Federal Excise Tax Return." For an applicable election year beginning after 1987, the return shall also be made on Form 720 unless another form is prescribed by the Commissioner.

(ii) *Procedure if amount for applicable election year (and all proceeding years) is not greater than $500.* If a partnership or S corporation is not required to make a payment under section 7519 for an applicable election year, the partnership or S corporation should type or legibly print "zero" on the appropriate line of the prescribed form.

(3) *Time and place for filing return*—(i) *Applicable election years beginning in 1987.* For an applicable election year beginning in 1987, the Form 720 must be filed with the Service Center indicated by the instructions for the Form 720. The date for filing such form is as follows—

(A) *Taxpayers that would otherwise file Form 720 for the second quarter of 1988.* Taxpayers that are required, without regard to this section, to file Form 720 for the second quarter of 1988 (*e.g.*, taxpayers reporting liability for manufacturers excise tax) must file Form 720 by the normal due date of such form for the second quarter of 1988. Thus, such taxpayers must generally file Form 720 on or before July 31, 1988. However, if such taxpayers must also report tax imposed by section 4251 (relating to communications services tax), sections 4261 and 4271 (relating to air transportation tax), or section 4986 (relating to windfall profits tax) for the second quarter of 1988, they must file Form 720 on or before August 31, 1988.

(B) *Other taxpayers.* Taxpayers that are not described in paragraph (a)(3)(i)(A) of this section (*i.e.*, taxpayers that but for this section would not be required to file Form 720 for the second quarter of 1988) must file Form 720 on or before July 31, 1988.

(ii) *Applicable election years beginning after 1987*—(A) *Return made on Form 720.* [Reserved].

(B) *Return made on form other than Form 720.* For an applicable election year beginning after 1987, the return showing the required payment is to be filed with the Service Center indicated by the instructions for the form prescribed for payment. The return must be filed on or before the date prescribed by the instructions to the form.

(iii) *Special rule for back-up section 444 election.* See § 1.444–3T(b)(4)(iii) for a special rule that may extend the due date for filing a return required by paragraph (a)(2) of this section.

(4) *Time and place for making required payment*—(i) *Applicable election years beginning in 1987.* For an applicable election year beginning in 1987, the required payment is due and payable without assessment and notice on or before the date the taxpayer's Form 720 for the second quarter is due (as specified in paragraph (a)(3) of this section). The required payment must be paid by check or money order, and such check or money order must indicate the partnership's or S corporation's taxpayer identification number and must include the statement: "IRS NO. 11 PAYMENT." The check or money order must be sent, together with Form 720, to the Service Center indicated by the instructions for the Form 720.

(ii) *Applicable election years beginning after 1987.* For an applicable election year beginning after 1987, the required payment is due and payable without assessment or notice, on or before May 15 of the calendar year following the calendar year in which the applicable election year begins.

(iii) *Special rule for back-up section 444 election.* See § 1.444–3T(b)(4)(iii) for a special rule that may extend the due date for making a required payment.

(5) *Penalties for failure to pay.* In the case of any failure by a partnership or S corporation to pay the required payment on or before the date prescribed in paragraph (a)(4) of this section, there shall be assessed on such partnership or S corporation a penalty of 10 percent of the underpayment. For purposes of this section, the term "underpayment" means the excess of the amount of the payment required under this section over the amount (if any) of such payment paid on or before the date prescribed in paragraph (a)(4) of this section.

(6) *Refund of required payment*—(i) *In general.* If a partnership or S corporation is entitled to make a claim for refund pursuant to § 1.7519–1T(c), such partnership or S corporation should file a claim for refund, as provided in paragraph (a)(6)(ii) of this section. However, in no event shall a refund be made prior to April 15 of the second calendar year that follows the calendar year in which an applicable election year begins. For example, assume a partnership made a section 444 election to retain its taxable year for its taxable year beginning October 1, 1987, and as a result made a required payment for such year. Further assume that the partnership terminates its election for its taxable year beginning October 1, 1988. Based on these facts, the partnership will be entitled to a refund, but no earlier than April 15, 1989.

(ii) *Procedures for claiming refund.* [Reserved].

(iii) *Interest on refund.* No interest shall be allowed with respect to any refund of a required payment under § 1.7519–1T(C).

(b) *Assessment and collection of payment.* A required payment shall be assessed and collected in the same manner as if it were a tax imposed by subtitle C. Furthermore, no deduction shall be allowable to a partnership or S corporation (or their owners) with respect to the required payment.

(c) *Termination due to willful failure.* See § 1.444–1T(a)(5)(i)(C), which provides that willful failure to comply with the requirements of this section will result in the termination of the section 444 election.

(d) *Negligence and fraud penalties made applicable.* For purposes of section 6653, relating to additions to tax for negligence and fraud, any payment required by this section shall be treated as a tax.

§ 1.7519–3T Effective date (temporary).

The provisions of §§ 1.7519–1T through § 1.7519–3T are effective for taxable years beginning after December 31, 1986.

Par. 4. Section 1.706–3T is added in the appropriate place.

§ 1.706–3T Temporary regulations under the Tax Reform Act of 1986 and the Revenue Act of 1987 (temporary).

(a) *Certain tax-exempt partners disregarded*—(1) *General rule.* In determining the taxable year (the "current year") of a partnership under section 706(b) and the regulations thereunder, a partner that is tax-exempt under section 501(a) shall be disregarded if such partner was not subject to tax, under chapter 1 of the Code, on any income attributable to its investment in the partnership during the partnership's taxable year immediately preceding the current year. However, if a partner that is tax-exempt under section 501(a) was not a partner during the partnership's immediately preceding taxable year, such partner will be disregarded for the current year if the partnership reasonably believes that the partner will not be subject to tax, under chapter 1 of the Code, on any income attributable to such partner's investment in the partnership during the current year.

(2) *Example.* The provisions of paragraph (a)(1) of this section may be illustrated by the following example.

Example. Assume that partnership A has historically used the calendar year as its taxable year. In addition, assume that A is owned by 5 partners, 4 calendar year individuals (each owning 10 percent of A's profits and capital) and a tax-exempt organization (owning 60 percent of A's profits and capital). The tax-exempt organization

has never had unrelated business taxable income with respect to A and has historically used a June 30 fiscal year. Finally, assume that A desires to retain the calendar year for its taxable year beginning January 1, 1987. Under these facts and but for the special rule in paragraph (a)(1) of this section, A would be required under section 706(b)(1)(B)(i) to change to a year ending June 30, for its taxable year beginning January 1, 1987. However, under the special rule provided in paragraph (a)(1) of this section, and assuming the optional effective date provided in paragraph (c) of this section is chosen, the partner that is tax-exempt is disregarded, and A must retain the calendar year, under section 706(b)(1)(B)(i), for its taxable year beginning January 1, 1987.

(b) *Effect of partner elections under section 444.* For purposes of section 706(b)(1)(B), any section 444 election by a partner in a partnership shall be taken into account in determining the taxable year of the partnership. See example (4) of § 1.7519–1T(d).

(c) *Effective date.* The provisions of this section are generally effective for taxable years beginning after December 31, 1987. However, a partnership may, at its option, apply the provisions of this section for taxable years beginning after December 31, 1986.

Par. 5. Section 706–1T is revised by adding a new sentence at the end of paragraph (a)(1) to read as follows:

§ 1.706–1T Taxable years of certain partnerships (temporary).

(a) * * *

(1) * * * See § 1.706–3T(a) for special rules which provide that certain tax-exempt partners are disregarded.

* * * * *

Par. 6. Sections 1.280H–0T—1.280H–1T are added to Part 1 in the appropriate place.

§ 1.280H–0T Table of contents (temporary).

This section lists the captions that appear in the temporary regulations under section 280H.

§ 1.280H–1T Limitation on certain amounts paid to employee-owners by personal service corporations electing alternative taxable years (temporary).

(a) Introduction.
(b) Limitations on certain deductions of a personal service corporation.
(1) In general.
(2) Carryover of nondeductible amounts.
(3) Disallowance inapplicable for certain purposes.
(4) Definition of applicable amount.
(i) In general.
(ii) Special rule for certain indirect payments.
(iii) Examples.
(c) Minimum distribution requirement.
(1) Determination of whether requirement satisfied.
(i) In general.
(ii) Employee-owner defined.
(2) Preceding year test.
(i) In general.
(ii) Example.
(3) 3-year average test.
(i) In general.
(ii) Applicable percentage.
(iii) Adjusted taxable income.
(A) In general.
(B) Determination of adjusted taxable income for the deferral period of the applicable election year.
(C) NOL carryovers.
(D) Examples.
(d) Maximum deductible amount.
(1) In general.
(2) Example.
(e) Special rules and definition.
(1) Newly organized personal service corporations.
(2) Existing corporations that become personal service corporations.
(3) Disallowance of NOL carryback.
(4) Deferral period.
(5) Examples.
(f) Effective date.

§ 1.280H–1T Limitation on certain amounts paid to employee-owners by personal service corporations electing alternative taxable years (temporary).

(a) *Introduction.* This section applies to any taxable year that a personal service corporation has a section 444 election in effect (an "applicable election year"). For purposes of this section, the term "personal service corporation" has the same meaning given such term in § 1.441–4T(d).

(b) *Limitation on certain deductions of personal service corporations*—(1) *In general.* If, for any applicable election year, a personal service corporation does not satisfy the minimum distribution requirement in paragraph (c) of this section, the deduction otherwise allowable under chapter 1 of the Internal Revenue Code of 1986 (the Code) for applicable amounts, as defined in paragraph (b)(4) of this section, shall not exceed the maximum deductible amount, as defined in paragraph (d) of this section.

(2) *Carryover of nondeductible amounts.* Any amount not allowed as a deduction in an applicable election year under paragraph (b)(1) of this section shall be allowed as a deduction in the succeeding taxable year.

(3) *Disallowance inapplicable for certain purposes.* The disallowance of deductions under paragraph (b)(1) of this section shall not apply for purposes of subchapter G of chapter 1 of the Code (relating to corporations used to avoid income tax on shareholders) nor for determining whether the compensation of employee-owners is reasonable. Thus, for example, in determining whether a personal service corporation is subject to the accumulated earnings tax imposed by section 531, deductions disallowed under paragraph (b)(1) of this section are treated as allowed in computing accumulated taxable income.

(4) *Definition of applicable amount*—(i) *In general.* For purposes of section 280H and the regulations thereunder, the term "applicable amount" means, with respect to a taxable year, any amount that is otherwise deductible by a personal service corporation in such year and includable at any time, directly or indirectly, in the gross income of a taxpayer that during such year is an employee-owner. Thus, an amount includable in the gross income of an employee-owner will be considered an applicable amount even though such employee owns no stock of the corporation on the date the employee includes the amount in income. See example (1) in paragraph (b)(4)(iii) of this section.

(ii) *Special rule for certain indirect payments.* For purposes of paragraph (b)(4)(i) of this section, amounts are indirectly includable in the gross income of an employee-owner of a personal service corporation that has made a section 444 election (an electing personal service corporation) if the amount is includable in the gross income of—

(A) The spouse (other than a spouse who is legally separated from the partner or shareholder under a decree of divorce or separate maintenance) or child (under age 14) of such employee-owner, or

(B) A corporation more than 50 percent (measured by fair market value) of which is owned in the aggregate by employee-owners (and individuals related under paragraph (b)(4)(ii)(A) of this section to such employee-owners), of the electing personal service corporation, or

(C) A partnership more than 50 percent of the profits and capital of which is owned by employee-owners (and individuals related under paragraph (b)(4)(ii)(A) of this section to such employee-owners) of the electing personal service corporation, or

(D) A trust more than 50 percent of the beneficial ownership of which is owned in the aggregate by employee-owners (and individuals related under paragraph (b)(4)(ii)(A) of this section to any such employee-owners), of the electing personal service corporation.

For purposes of this paragraph (b)(4)(ii), ownership by any person described in

this paragraph (b)(4)(ii) shall be treated as ownership by the employee-owners of the electing personal service corporation. Paragraph (b)(4)(ii)(B) of this section will not apply if the corporation has made a section 444 election to use the same taxable year as that of the electing personal service corporation. Similarly, paragraph (b)(4)(ii)(C) of this section will not apply if the partnership has made a section 444 election to use the same taxable year as that of the electing personal service corporation. Notwithstanding the general effective date provision of paragraph (f) of this section, this paragraph (b)(4)(ii) is effective for amounts deductible on or after June 1, 1988.

(iii) *Example.* The provisions of paragraph (b)(4) of this section may be illustrated by the following examples.

Example (1). A is an employee of P, an accrual basis personal service corporation with a taxable year ending September 30. P makes a section 444 election for its taxable year beginning October 1, 1987. On October 1, 1987, A owns no stock of P; However, on March 31, 1988, A acquires 10 of the 200 outstanding shares of P stock. During the period October 1, 1987 to March 31, 1988, A earned $40,000 of compensation as an employee of P. During the period April 1, 1988 to September 30 1988, A earned $60,000 of compensation as an employee-owner of P. If paragraph (b) of this section does not apply, P would deduct for its taxable year ended September 30, 1988 the $100,000 earned by A during such year. Based upon these facts, the $100,000 otherwise deductable amount is considered an applicable amount under this section.

Example (2). I1 and I2, calendar year individuals, are employees of PSC1, a personal service corporation that has historically used a taxable year ending January 31. I1 and I2 also own all the stock, and are employees, of PSC2, a calendar year personal service corporation. For its taxable years beginning February 1, 1987, 1988, and 1989, PSC1 has a section 444 election in effect to use a January 31 taxable year. During its taxable years beginning February 1, 1986, 1987, and 1988, PSC1 deducted $10,000, $11,000, and $12,000, respectively, that was included in PSC2's gross income. Furthermore, of the $12,000 deducted by PSC1 for its taxable year beginning February 1, 1988, $7,000 was deducted during the period June 1, 1988 to January 31, 1989. Pursuant to paragraph (b)(4)(ii)(B) of this section, the $7,000 deducted by PSC1 on or after June 1, 1988, and included in PSC2's gross income is considered an applicable amount for PSC1's taxable year beginning February 1, 1988. Amounts deducted by PSC1 prior to June 1, 1988, are not subject to paragraph (b)(4)(ii)(B) of this section.

Example (3). The facts are the same as in example (2), except that for its taxable years beginning February 1, 1987, 1988, and 1989, PSC2 has a section 444 election in effect to use a January 31 taxable year. Since both PSC1 and PSC2 have the same taxable year and both have section 444 elections in effect, paragraph (b)(4)(ii)(B) of this section does not apply to the $7,000 deducted by PSC1 for its taxable year beginning February 1, 1988.

(c) *Minimum distribution requirement*—(1) *Determination of whether requirement satisfied*—(i) *In general.* A personal service corporation meets the minimum distribution requirement of this paragraph (c) for an applicable election year if, during the deferral period of such taxable year, the applicable amounts (determined without regard to paragraph (b)(2) of this section) for all employee-owners in the aggregate equal or exceed the lesser of—

(A) The amount determined under the "preceding year test" (see paragraph (c)(2) of this section), or

(B) The amount determined under the "3-year average test" (see paragraph (c)(3) of this section).

The following example illustrates the application of this paragraph (c)(1)(i).

Example. Q, an accrual-basis personal service corporation, makes a section 444 election to retain a year ending January 31 for its taxable year beginning February 1, 1987. Q has 4 employee-owners, B, C, D, and E. For Q's applicable election year beginning February 1, 1987 and ending January 31, 1988, B earns $6,000 a month plus a $45,000 bonus on January 15, 1988; C earns $5,000 a month plus a $40,000 bonus on January 15, 1988; D and E each earn $4,500 a month plus a $4,000 bonus on January 15, 1988. Q meets the minimum distribution requirement for such applicable election year if the applicable amounts during the deferral period (*i.e.*, $220,000) equal or exceed the amount determined under the preceding year test or the 3-year average test.

(ii) *Employee-owner defined.* For purposes of section 280H and the regulations thereunder, a person is an employee-owner of a corporation for a taxable year if—

(A) On any day of the corporation's taxable year, the person is an employee of the corporation or performs personal services for or on behalf of the corporation, even if the legal form of that person's relationship to the corporation is that of an independent contractor, and

(B) On any day of the corporation's taxable year, the person owns any outstanding stock of the corporation.

(2) *Preceding year test*—(i) *In general.* The amount determined under the preceding year test is the product of—

(A) The applicable amounts during the taxable year preceding the applicable election year (the "preceding taxable year"), divided by the number of months (but not less than one) in the preceding taxable year, multiplied by

(B) The number of months in the deferral period of the applicable election year.

(ii) *Example.* The provisions of paragraph (c)(2) of this section may be illustrated by the following example.

Example. R, a personal service corporation, has historically used a taxable year ending January 31. For its taxable year beginning February 1, 1987, R makes a section 444 election to retain its January 31 taxable year. R is an accrual basis taxpayer and has one employee-owner, F. For R's taxable year ending January 31, 1987, F earns $5,000 a month plus a $40,000 bonus on January 15, 1987. The amount determined under the preceding year test for R's applicable election year beginning February 1, 1987 is $91,667 ($100,000, the applicable amounts during R's taxable year ending January 31, 1987, divided by 12, the number of months in R's taxable year ending January 31, 1987, multiplied by 11, the number of months in R's deferral period for such year).

(3) *3-year average test*—(i) *In general.* The amount determined under the 3-year average test is the applicable percentage multiplied by the adjusted taxable income for the deferral period of the applicable election year.

(ii) *Applicable percentage.* The term "applicable percentage" means the percentage (not in excess of 95 percent) determined by dividing—

(A) The applicable amounts during the 3 taxable years of the corporation (or, if fewer, the taxable years the corporation has been in existence) immediately preceding the applicable election year, by

(B) The adjusted taxable income of such corporation for such 3 taxable years (or, if fewer, the taxable years of existence).

(iii) *Adjusted taxable income*—(A) *In general.* The term "adjusted taxable income" means taxable income determined without regard to applicable amounts.

(B) *Determination of adjusted taxable income for the deferral period of the applicable election year.* Adjusted taxable income for the deferral period of the applicable election year equals the adjusted taxable income that would result if the personal service corporation filed an income tax return for the deferral period of the applicable election year under its normal method of accounting. However, a personal service corporation may make a reasonable estimate of such amount.

(C) *NOL carryovers.* For purposes of determining adjusted taxable income for any period, any NOL carryover shall be reduced by the amount of such carryover that is attributable to the deduction of applicable amounts. The portion of the NOL carryover

attributable to the deduction of applicable amounts is the difference between the NOL carryover computed with the deduction of such amounts and the NOL carryover computed without the deduction of such amounts. For purposes of determining the adjusted taxable income for the deferral period, an NOL carryover to the applicable election year, reduced as provided in this paragraph (c)(3)(iii)(C), shall be allowed first against the income of the deferral period.

(D) *Examples.* The provisons of this paragraph (c)(3)(iii) may be illustrated by the following examples.

Example (1). S is a personal service corporation that has historically used a taxable year ending January 31. For its taxable year beginning February 1, 1987, S makes a section 444 election to retain its taxable year ending January 31. S does not satisfy the minimum distribution requirement for its first applicable election year, and the applicable amounts for that year exceed the maximum deductible amount by $54,000. Under paragraph (b)(2) of this section, the $54,000 excess is carried over to S's taxable year beginning February 1, 1988. Furthermore, if S continues its section 444 election for its taxable year beginning February 1, 1988, and desires to use the 3-year average test provided in this paragraph for such year, pursuant to paragraph (c)(3)(iii)(A) of this section the $54,000 will not be allowed to reduce adjusted taxable income for such year. See also section 280H(e) regarding the disallowance of net operating loss carrybacks to (or from) any taxable year of a corporation personal service election under section 444 applies.

Example (2). T, a personal service corporation with a section 444 election in effect, is determining whether it satisfies the 3-year average test for its second applicable election year. T had a net operating loss (NOL) for its first applicable election year of $45,000. The NOL resulted from $150,000 of gross income less the sum of $96,000 of salary, $45,000 of other expenses, and $54,000 of deductible applicable amounts. Pursuant to paragraph (c)(3)(iii)(C) of this section, the entire amount of the $45,000 NOL is attributable to applicable amounts since the applicable amounts deducted in arriving at the NOL (*i.e.*, $54,000) were greater than the NOL (*i.e.*, $45,000). Thus, for purposes of computing the adjusted taxable income for the deferral period of T's second applicable election year, the NOL carryover to that year is $0 ($45,000 NOL less $45,000 amount of NOL attributable to applicable amounts).

(d) *Maximum deductible amount*—(1) *In general.* For purposes of this section, the term "maximum deductible amount" means the sum of—

(i) The applicable amounts during the deferral period of the applicable election year, plus

(ii) An amount equal to the product of—

(A) The amount determined under paragraph (d)(1)(i) of this section divided by the number of months in the deferral period of the applicable election year, multiplied by

(B) The number of months in the nondeferral period of the applicable election year. For purposes of the preceding sentence, the term "nondeferral period" means the portion of the applicable election year that occurs after the portion of such year constituting the deferral period.

(2) *Example.* The provisions of paragraph (d)(1) of this section may be illustrated by the following example.

Example. U, an accrual basis personal service corporation with a taxable year ending January 31, makes a section 444 election to retain a year ending January 31 for its taxable year beginning February 1, 1987. For its applicable election year beginning February 1, 1987, U does not satisfy the minimum distribution requirement in paragraph (c) of this section. Furthermore, U has 3 employee-owners, G, H, and I. G and H have been employee-owners of U for 10 years. Although I has been an employee of U for 4 years, I did not become an employee-owner until December 1, 1987, when I acquired 5 of the 20 outstanding shares of U stock. For U's applicable election year beginning February 1, 1987, G earns $5,000 a month plus a $40,000 bonus on January 15, 1988, and H and I each earn $4,000 a month plus a $32,000 bonus on January 15, 1988. Thus, the total of the applicable amounts during the deferral period of the applicable election year beginning February 1, 1987 is $143,000. Based on these facts, U's deduction for applicable amounts is limited to $156,000, determined as follows—$143,000 (applicable amounts during the deferral period) plus $13,000 (applicable amounts during the deferral period, divided by the number of months in the deferral period, multiplied by the number of months in the nondeferral period).

(e) *Special rules and definition*—(1) *Newly organized personal service corporations.* A personal service corporation is deemed to satisfy the preceding year test and the 3-year average test for the first year of the corporation's existence.

(2) *Existing corporations that become personal service corporations.* If an existing corporation becomes a personal service corporation and makes a section 444 election, the determination of whether the corporation satisfies the preceding year test and the 3-year average test is made by treating the corporation as though it were a personal service corporation for each of the 3 years preceding the applicable election year.

(3) *Disallowance of NOL carryback.* No net operating loss carryback shall be allowed to (or from) any applicable election year of a personal service corporation.

(4) *Deferral period.* For purposes of section 280H and the regulations thereunder, the term "deferral period" has the same meaning as under § 1.444–1T(b)(4).

(5) *Examples.* The provisions of this paragraph (e) may be illustrated by the following examples.

Example (1). V is a personal service corporation with a taxable year ending September 30. V makes a section 444 election for its taxable year beginning October 1, 1987, and incurs a net operating loss (NOL) for such year. Because an NOL is not allowed to be carried back from an applicable election year, V may not carry back the NOL from its first applicable election year to reduce its 1985, 1986, or 1987 taxable income.

Example (2). W, a personal service corporation, commences operations on July 1, 1990. Furthermore, for its taxable year beginning July 1, 1990, W makes a section 444 election to use a year ending September 30. Pursuant to paragraph (e)(1) of this section, W satisfies the preceding year test and the 3-year average test for its first year in existence. Thus, W may deduct, without limitation under this section, any applicable amounts for its taxable year beginning July 1, 1990.

Example (3). The facts are the same as in example (2). For its taxable year beginning October 1, 1990, W incurs an NOL and is not a personal service corporation. Furthermore, W desires to carry back the NOL to its preceding taxable year (a year that was an applicable election year). Pursuant to paragraph (e)(3) of this section, W may not carry back an NOL "to" its taxable year beginning July 1, and ending September 30, 1990, because such year was an applicable election year.

(f) *Effective date.* The provisions of this section are effective for taxable years beginning after December 31, 1986.

OMB Control Numbers Under the Paperwork Reduction Act

PART 602—[AMENDED]

Par. 7. The authority for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 8. Section 602.101(c) is amended by inserting in the appropriate place in the table "§ 1.444–3T . . . 1545–1036."

There is need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impractical to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

O. Donaldson Chapoton,

Assistant Secretary of the Treasury.

May 12, 1988.

[FR Doc. 88–11884 Filed 5–24–88; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[LR-53-88]

Income Taxes; Election of Taxable Year Other Than Required Year By Partnerships, S Corporations and Personal Service Corporations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: In the rules and regulations portion of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to the election of a taxable year other than the required year by a partnership, S corporation or personal service corporation. Changes to the applicable law were made by the Revenue Act of 1987. In addition, the regulations include conforming and clarifying rules regarding the determination of the taxable year of a partnership under section 706. The text of those temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATES: The amendments to the regulations are proposed to be effective generally for taxable years beginning after December 31, 1986. Written comments and requests for a public hearing must be delivered or mailed by July 26, 1988.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR-53-88), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Arthur E. Davis III of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, Attention: CC:LR:T, (202) 566-3918 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations (designated by a "T" following the section citations) in the Rules and Regulations portion of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR Part 1) to provide temporary rules relating to the election by a partnership, S corporation, or personal service corporation to use a taxable year other than the year required (the "required year") under the applicable provision of the Internal Revenue Code of 1986 (the "Code"). The temporary regulations reflect the amendment of the Code by section 10206 of the Revenue Act of 1987 (Pub. L. 100-203, 101 Stat. 1330), which added sections 444, 7519 and 280H. Section 444 provides for the election (a "section 444 election") to use a taxable year other than the required year. A partnership or S corporation that makes or continues a section 444 election must make the payment required by section 7519. A personal service corporation that makes or continues a section 444 election is subject to the deduction limitations imposed by section 280H. This document proposes to adopt the temporary regulations as final regulations. Accordingly, the text of the temporary regulations serves as the comment document for this notice of proposed rulemaking. In addition, the preamble to the temporary regulations explains the proposed and temporary rules.

For the text of the temporary regulations, see FR Doc. (T.D. 8205) published in the Rules and Regulations portion of this issue of the **Federal Register**.

Special Analyses

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required. Although this document is a notice of proposed rulemaking that solicits public comments, the Internal Revenue Service has concluded that the proposed regulations are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations are not subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

The reporting requirements contained in this notice of proposed rulemaking have been submitted in accordance with the requirements of the Paperwork Reduction Act of 1980 to the Office of Management and Budget (OMB) for review. OMB has approved these requirements (control number 1545-1036).

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Arthur E. Davis III of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations on matters of both substance and style.

List of Subjects

26 CFR 1.441-1—1.483-2

Income taxes, Accounting, Deferred compensation plans.

26 CFR 1.7519-OT—1.7519-3T

Income taxes, Administrative and procedure, Miscellaneous, Required payments.

26 CFR 1.701-1—1.771-1

Income taxes, Partnerships.

26 CFR 1.61-1—1.281-4

Income taxes, Taxable income, Deductions, Exemptions.

26 CFR Part 602

Reporting and recordkeeping requirements.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 88-11883 Filed 5-24-88; 8:45 am]

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Federal Register

Friday
May 27, 1988

Part V

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 870

Surface Coal Mining Reclamation Operations; Initial and Permanent Regulatory Programs; Excess Moisture Content Allowance; Reclamation Fees; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 870

Surface Coal Mining Reclamation Operations; Initial and Permanent Regulatory Programs; Excess Moisture Content Allowance; Reclamation Fees

March 16, 1988.

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is amending its regulations governing how the weight of each ton of coal produced is determined for reclamation fee purposes. This action is being taken to permit a deduction for excess moisture that is the calculated difference between the estimated inherent moisture in the coal at the time of production and the amount of total moisture estimated to be contained in the coal at the point of fee assessment.

EFFECTIVE DATE: July 1, 1988.

FOR FURTHER INFORMATION CONTACT: Jane E. Robinson, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone 202–343–2826 (Commercial or FIS).

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of Public Comments and Description of the Final Rule
III. Procedural Matters

I. Background

Title IV of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1231–1243 (the Act), provides for the collection of a fee from coal mining operators subject to the Act on each ton of "coal produced." The funds are to be used for the reclamation of lands mined and abandoned or left in an inadequate reclamation status before the enactment date of the Act, August 3, 1977. Neither the Act nor the legislative history explicitly defines the term "coal produced" or indicates the Congressional intent as to how the term should be implemented. See *Drummond Coal Company v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 1593 (1987) (hereafter *Drummond*). As Congress did not determine the point in time at which the reclamation fee should be assessed or what the weight of the coal should include, the Secretary of the Interior (Secretary) has wide discretion to consider a number of alternatives for determining fee liability.

OSMRE first promulgated regulations governing reclamation fee collections on December 13, 1977, at 30 CFR Part 837 (42 FR 62713). Those regulations provided that the fee be paid on each ton of coal produced for sale, transfer, or use and that the fee be determined at the time of initial bona fide sale, transfer of ownership, or use by the operator. The 1977 regulations were later renumbered as Part 870 without any editorial changes (43 FR 49940). On June 30, 1982, OSMRE promulgated regulatory language "to clarify the point in time of fee determination, as well as the value and weight parameters for calculating reclamation fees" (47 FR 28577). The 1982 regulation identifies "the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit" as the point in time of fee assessment (30 CFR 870.12(b)(1)).

The weight of the coal taxed included "impurities, including water, that *have not* been removed prior to the initial bona fide sale, transfer of ownership or use by the operator" (30 CFR 870.12(b)(3)(i) (1982)). Therefore, pursuant to that rule, the fee was collected on the gross weight of all materials, including moisture, extracted with the coal by the process of mining, other than materials removed prior to the first disposition of the coal. In addition, any moisture added to the coal after severance, and not removed prior to the first disposition, was also included in the weight.

The U.S. Court of Appeals for the District of Columbia Circuit held in *Drummond* that the Secretary did not act in an arbitrary or capricious manner in promulgating the prior rule, and that the rule was not inconsistent with the Act or its legislative history. The Supreme Court declined, without explanation, to review this decision.

The proposed rule in this rulemaking was published on May 18, 1987 (52 FR 18680). As explained in the preamble to the proposal, an inconsistency in the taxation of coal weight under various Federal statutes now exists. Although operators are required to include the coal's excess moisture weight in their abandoned mine land (AML) fee liability, under a 1986 Internal Revenue Service (IRS) Revenue Ruling (86–96), operators can reduce their Black Lung tax liability by taking a deduction based upon the weight of the coal's excess moisture content. As this situation is different from the one that existed at the time OSMRE's rule was adopted in 1977 and clarified in 1982, OSMRE decided to reconsider the issue of including the weight of excess moisture in its assessment of the AML fees.

On July 21, 1987, the comment period was reopened and extended until August 7, 1987 (52 FR 27419). OSMRE conducted one public hearing on July 31, 1987, in Birmingham, Alabama. In response to this proposal, OSMRE received numerous comments from State and national coal associations, coal mining operators, public utilities, coal certification laboratories, and an environmental organization.

II. Discussion of Public Comments and Description of the Final Rule

Section 870.5—Definitions.

OSMRE proposed to add a definition for excess moisture to identify the basis on which an operator could estimate a reduction in coal weight for reclamation fee calculation purposes. The proposed rule would have defined "excess moisture" as noninherent water which accumulates in coal after extraction. Inherent water would have been defined in the proposed rule as natural bed moisture contained in the coal.

The final rule defines the term "excess moisture" as being the difference between "total moisture" and "inherent moisture." "Inherent moisture" is defined as moisture that exists as an integral part of the coal seam in its natural state, including water in pores but not that present in macroscopically visible fractures. "Total moisture" is defined as the moisture that is the loss in weight in an air atmosphere under rigidly controlled conditions of temperature, time and air flow.

Several commenters asserted that the proposed definition of excess moisture was misleading, since it allowed for moisture in coal which could be interpreted to include moisture trapped within the fracture planes and surface pores from outside the natural coalification process (e.g. rain, coal-processing moisture, ground water, drilling fluids, etc.) that should not be considered inherent to the coal. One commenter objected to the use of the term "inherent water" and other undefined terms, such as "noninherent water," in the definition, as these terms are not well defined or understood in the industry. This commenter added that these terms are complementary only in an operational sense when it is understood that extraction includes disturbance of the bed (e.g. blasting) that may allow additional water to penetrate the bed from aquifers, and that water released from the aquifer

would not be inherent water even though it penetrated the bed.

Another commenter criticized the use of the words "after extraction," stating that the true geological definition of excess moisture must not be limited to moisture accumulated after coal is extracted and that excess or "free" water can be found along the cracks in the in-place coal bed, as well as on the chunks of extracted coal, and can come from water flowing through rock strata, from the surface or ground water systems, into and onto the in-place coal. Another commenter recommended that OSMRE use an independent definition of "inherent moisture" to identify it as the water present at the time of the coal formation, which is intrinsically part of the coal structure, to preclude any surface waters from being interpreted as inherent in the coal.

A majority of the commenters agreed that excess moisture, also known as "surface moisture" and "free moisture," is the difference between total moisture and inherent moisture as those terms are defined by the American Society for Testing and Materials (ASTM). Twenty-two commenters recommended that OSMRE adopt ASTM definitions for inherent moisture and total moisture, as defined in ASTM "Standard Definition of Terms Relating to Coal and Coke," D 121–85, since these terms are well recognized and accepted throughout the coal community. Several commenters noted that ASTM standard definitions and test methods are used by laboratories owned and operated by commercial coal operations as well as by independent laboratories which conduct tests and analyses for coal companies and consumers of coal. One commenter cited the industry-wide recognition of the ASTM for its procedural work and the large amount of time it has devoted to development of precise definitions of inherent and total moisture.

OSMRE has analyzed these comments and agrees that the proposed definition of excess moisture was deficient and could have caused confusion among members of the coal industry. In response to the comments, OSMRE is adopting the recommendation of many commenters by defining the term "excess moisture" as being the difference between "total moisture" and "inherent moisture." Therefore, OSMRE has found it necessary to define the terms "inherent moisture" and "total moisture" as well. The definitions OSMRE has selected are the ASTM definitions which were recommended by almost all of the commenters commenting on the issue. "Inherent moisture" is defined as moisture that exists as an integral part of the coal seam in its natural state, including water in pores but not that present in macroscopically visible fractures. "Total moisture" is defined as the moisture that is the loss in weight in an air atmosphere under rigidly controlled conditions of temperature, time and air flow.

Section 870.12—Reclamation Fee.

Section 870.12 in 30 CFR is the regulatory provision requiring operators to pay reclamation fees. Paragraph (b) of that section specifies how the fee is determined. Section 870.12(b)(3)(i) disallows deductions for impurities that are not removed prior to the time of initial bona fide sale, transfer of ownership or use by the operator. The rule adopted today creates an exception in § 870.12(b)(3)(i) and allows a weight reduction for determining AML fee liability for excess moisture present at the time of initial bona fide sale, transfer of ownership or use by the operator.

The proposed rule would have amended 30 CFR 870.12(b)(3)(i) by deleting the phrase "including water" and adding the phrase "including excess moisture for which a reduction is not taken pursuant to paragraph B of this section" and would have redesignated the section as 30 CFR 870.12(b)(3)(i)(A). This provision provided that excess moisture would be included in the weight of coal for determining AML fee liability unless the operator made the reduction pursuant to the proposed 30 CFR 870.12(b)(3)(i)(B). Paragraph (b)(3)(i)(B) would have specified the terms of the allowable reduction.

The final rule is reorganized from the proposal for editorial convenience. In the final rule, OSMRE has decided not to redesignate 30 CFR 870.12(b)(3)(i). Instead of specifying the parameters for implementing the excess moisture content allowance in 30 CFR 870.12(b)(3)(i)(B) as proposed, OSMRE has added a new Section, 30 CFR 870.18, as an administrative convenience. The provisions of § 870.18 are explained below.

In the final rule, the clause "excluding excess moisture for which a reduction has been taken pursuant to section 870.18" is substituted for the proposed statement "including excess moisture for which a reduction is not taken pursuant to paragraph (B) of this section."

The phrase "excess moisture" is included, rather than the term "water," because the latter could be construed within the context of the rule to include two other types of coal moisture: total moisture and inherent moisture. The new language specifically employs the term "excess moisture," which is defined in 30 CFR 870.5, to avoid confusion and to ensure consistency in the implementation of the excess moisture content allowance. Thus, under the rule, a reduction may be taken only for excess moisture.

One commenter suggested that the first phrase of proposed 30 CFR 870.12(b)(3)(i)(A) be changed to clarify the intent and relationship between proposed subparagraphs (A) and (B) by "excluding excess moisture for which a reduction has been taken pursuant to subparagraph (B) of this section." OSMRE has incorporated this clarification in 30 CFR 870.12(b)(3)(i), and cites new 30 CFR 870.18, which replaces proposed 30 CFR 870.12(b)(3)(i)(B).

This final rule does not otherwise alter the general rule which requires all impurities not removed from coal to be included in its gross weight for AML fee assessment purposes. It remains the operator's responsibility to seek a calculated weight reduction under 30 CFR 870.18 if an excess moisture content allowance is desired.

Section 870.18—Excess Moisture Content Allowance.

The proposed rule, in § 870.12(b)(3)(i)(B), required an operator seeking the allowance to establish the percentage of excess moisture by standardized laboratory analyses (but did not specify which standard test was to be employed), to retain the results of this testing for a period of six years from the date of the analysis, and to verify the reduction taken by annually updating the documentation of the laboratory analysis. The analysis was to be performed by a certified testing laboratory acceptable to OSMRE.

The final rule has been modified in certain respects from the proposal. Section 870.18 establishes the standards by which an operator may take a calculated weight reduction allowance for the excess moisture in coal. Specific requirements for such a reduction are set forth in § 870.18 (a) through (e), described below. As set forth in the proposal, this allowance is only valid for coal produced on or after the effective date of the rule. For ease in administering the rule and to accord with 5 U.S.C. 553(d), the rule will be effective at the beginning of the first calendar quarter after 30 days from promulgation of this rule.

No Retroactive Applicability

One commenter stated that the rule should be applied retroactively to all coal produced and shipped after January

1, 1985, to make "excess moisture" deductions for AML fees consistent with Black Lung tax deductions taken pursuant to the decision in *A.J. Taft Coal Co. v. United States*, 605 F.Supp. 366 (N. D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985). If the rule were applied retroactively, several commenters stated that operators who have properly calculated the excess moisture portion of these fees and paid them under protest would be rewarded. One commenter asserted that operators in Alabama who have not paid AML fees, or who have deducted an excess moisture allowance from their past AML fees, should be given a credit against future fees, and not have to repay fees assessed after January 1, 1985. This commenter stressed that these operators paid AML fees on their understanding of the law, and that small coal operators in Alabama who have taken an excess moisture allowance over the years may be denied future permits by OSMRE's permit blocking system due to any deficiencies in payment. Another commenter encouraged OSMRE to apply the rule retrospectively, arguing that certain Federal court decisions validate an excess moisture deduction for AML fee determination without the restriction of prospective application.

OSMRE does not agree that the rule should be applied retroactively to 1985. On June 30, 1982, OSMRE amended its regulations to clarify the point in time at which fees are to be assessed, as well as the weight parameters on which fee payments are to be made. The 1982 rules are valid and explicitly require fee payment based on the weight of the coal at the time of initial sale, transfer of ownership, or use. Any operator who took an unauthorized deduction for excess moisture prior to the date this rule becomes effective has failed to comply with the law and will not be excused. No compelling circumstances to the contrary have been provided.

Section 870.18(a)

Section 870.18(a) requires an operator to demonstrate through competent evidence that there is a reasonable basis for determining the existence and amount of excess moisture. OSMRE believes that the final rule clarifies the standard that was implicit in the proposal. It is incumbent upon the operator to be able to provide OSMRE with sufficient documentation to fulfill the purpose of this subsection. For instance, such documentation could include a detailed written narrative description of methods of sampling and analytical procedures used at each mine with an explanation of any deviations made from standard acceptable sampling and analytical procedure. Also, the source or sources of excess moisture should be identifiable. It is incumbent upon the operator to update such documentation as necessary to establish the continuing validity of the excess moisture allowance. This may involve repeated tests for inherent moisture, and will likely involve total moisture measurements for most shipments.

In adopting § 870.18(a), OSMRE has considered a suggestion from the IRS as to the test to use until adequate and fully reliable testing procedures become available. IRS recommended that "[i]n the interim, we would suggest a facts and circumstances test allowing the reduction for excess moisture where the taxpayer can demonstrate through competent evidence that there is a reasonable basis for determining the existence and amount of excess moisture." IRS November 18, 1987 letter, p.2.

Many commenters objected to OSMRE's proposal that standardized laboratory test results be updated annually in order to establish the percentage of excess moisture. Several commenters stated that a "total moisture" test of the coal is performed on every shipment, and that total moisture can vary from shipment to shipment, due to processes employed at the mine. These commenters added that inherent moisture is a property of coal which does not have large variances, and therefore the inherent moisture need not be tested as frequently. One commenter stated the total moisture determination should be a test of relative high frequency. Another commenter stated that a particular coal bed over an area of many square miles should not have an appreciable variance in inherent moisture. Another commenter remarked that annual updates are unnecessary and burdensome for smaller companies that mine in a specific area longer than one year and suggested that updates be made only when there is a geological change in the strata from which the coal is extracted.

One commenter remarked that testing should be performed on an as-needed basis, rather than annually, explaining that the surface moisture component of total moisture is variable, whereas inherent moisture tends to remain constant. Another commenter stated that, due to the significant variability of coal, annual laboratory testing is grossly insufficient. One commenter said that it is reasonable to require any mine claiming this allowance to determine equilibrium (inherent) moisture on a periodic basis, either monthly or when new seam or pit is opened. The commenter stated that many mines do this routinely, and that routine representative samples used to determine other coal characteristics may be used for this purpose.

OSMRE has considered the diverse opinions expressed by these commenters, various options for establishing testing frequency, and the ongoing work of the ASTM Committee on Coal and Coke, which is currently considering which tests have the greatest reliability. Many of the comments have merit. OSMRE will not specify an annual update of the laboratory analysis as proposed because the variability of conditions make it infeasible for the agency at this time to prescribe a specific frequency for testing inherent or total moisture.

Under the final rule, the operator must be able to provide OSMRE with sufficient documentation to sustain the weight reduction. Although the final rule does not specify a uniform frequency for performing tests, the operator must update such documentation as necessary to establish the continuing validity of the excess moisture allowance. For example, to account for the concern that one test may provide different results an operator may need to test for the inherent moisture of a coal seam frequently during the initial period of operation so as to establish sufficient baseline data to develop an accurate estimate of the seam's inherent moisture content. Also, because of the variability of each shipment, an operator may have to test total moisture at the time of each initial bona fide sale, transfer of ownership, or use of the coal by the operator. The operator may choose the time frame from which to sample and test the excess moisture of its coal under the final rule. However, it remains the responsibility of the operator to prove through competent evidence that it has chosen reasonable time frames in which to measure the existence and amount of excess moisture.

The proposed rule did not specify the point or points in time when sampling and testing must be performed. Several commenters stated that the sample should be taken at the point of initial bona fide sale, transfer of ownership, or use by the operator, to facilitate sampling. These commenters asserted that a sample taken at this point would represent the coal in its "as shipped" or "salable product" state. One commenter stated that sampling and testing should take place when the coal is first weighed for invoicing control purposes, prior to sale and shipment. That commenter

recommended that this requirement should be in the rule and not merely discussed in the preamble. The same commenter remarked that this "first weighed" approach and the alternative "fresh tipple" sampling technique will result in the use of a proper inherent moisture analysis to reflect the sale and shipment of coal, rather than the coal in place. This commenter advised that this approach would resolve a potential problem for operators who wash some or all of their coal and account for a change in inherent moisture that results from the loss of ash during the washing process. Another commenter stated it the ASTM D 1412–85 method is used to sample inherent moisture on the end-use sample, the results would be representative of the coal at the point of bona fide sale and of the coal shipped.

Under § 870.12(b), reclamation fees are determined by the weight and value at the time of initial bona fide sale, transfer of ownership or use by the operator. This rule is not intended generally to change the practices which OSMRE has accepted as valid with regard to when the operator weighs the coal. What this rule does is allow the operator to take a weight reduction for excess moisture that the coal contains when the weight of the coal is determined. Typically, this will involve determination of both the inherent moisture and the total moisture.

The final rule allows the operator to determine when sampling and testing is needed, so long as the operator can establish by competent evidence the existence and amount of the excess moisture allowance. OSMRE expects to issue guidance to inform operators of the practices which would be acceptable. This guidance will evolve as the agency gains experience on this issue and as reliable testing standards are developed.

One commenter stated the cost to OSMRE would be substantial because of the complexity of enforcing the proposed rule. This commenter stated that certain minimum analyses will now have to be conducted at the point of severance, as well as the point of fee assessment. The commenter added that the rule would increase enforcement problems in assuring proper testing and reporting of assessments, since the agency cannot merely audit transfer operation records (e.g., tipples) or sales records, but would have to investigate the testing of the coal both at point of severance and end use.

OSMRE disagrees with the comment that OSMRE's cost of enforcing the rule will be substantial. OSMRE intends to modify its quarterly Coal Production and Reclamation Fee Report (Form OSM–1) so that each operator who takes an excess moisture weight reduction will have to report the amount of the reduction, as well as the inherent and total moisture percentages upon which the reduction is based. In this manner, OSMRE will be able to keep track of operators taking an excess moisture weight reduction. OSMRE can use its audit resources to monitor documentation retained by operators claiming the allowance. The audit efforts should be able to focus on whether the reduction was taken correctly rather than whether the operator took any allowance for moisture. In each instance, the operator will have to show that the weight reduction was proper and provide the requisite documentation.

Section 870.18(b)

Section 870.18(b) requires inherent and total moisture to be tested using standard laboratory analyses. OSMRE has not adopted in this rule any requirement as to who must perform the analysis or where it has to be performed.

The requirement for standardized laboratory analysis appeared in proposed § 870.12(b)(3)(i)(B), together with a requirement that the analysis be performed by a certified testing laboratory acceptable to OSMRE.

Standard Tests

In the proposed rule, OSMRE solicited comments on the adequacy of procedures for testing the moisture content of coal and ways to ensure the accuracy of excess moisture measurements. One commenter stated that implementation of the proposed rule could lead to inaccurate measurements and a disproportionate allocation of the burden of AML fees to companies using more accurate procedures. The commenter asserted that the proposed rule failed to require an acceptable measurement method, and pointed out that the accuracy of the testing procedures will determine the uniformity of the results obtained from the application of this rule. This commenter asserted that OSMRE's recognition of the ASTM methods in the final rule should help avoid disputes regarding proper measurement of moisture. Many commenters generally agreed that ASTM standard test methods, which specify procedures of the method, as well as its accuracy, are well established in the industry and should be adopted in the final rule.

One commenter questioned the reference in the proposal's preamble to ASTM Standard Test Method for Total Moisture in Coal, D 3302–74, explaining that the proposed rule failed to recognize a second test method, to test for inherent moisture, must also be performed. Another commenter described the proposal to require only one test to calculate excess moisture as clearly insufficient because a test run once provides no comparative data upon which to calculate inherent versus excess moisture. A number of commenters argued that excess moisture, also known as surface moisture and free moisture, can only be established after two tests are performed, a test for inherent or bed moisture, ASTM Standard Test Method for Equilibrium Moisture of Coal at 96 to 97 Percent Relative Humidity and 30 degrees Centigrade (ASTM D 1412–85), and the ASTM Standard Test Method for Total Moisture in Coal (ASTM D 3302–82). These commenters opined that the existence and amount of excess moisture would be the difference between the ASTM D 302–82 and the ASTM D 1412–85 test results.

Several commenters cautioned that the ASTM D 1412–85 test method may yield erratic results on some subbituminous and lignite coals. One commenter recommended the exclusion of equilibrium moisture test results as estimates of inherent moisture in low rank coal. The same commenter also recommended the elimination of channel samples for determining inherent moisture unless the effect of out-of-seam dilution is taken into account. Another commenter stated that the operator may be able to differentiate between bed moisture and total moisture by performing a test on fresh channel samples for the former, and tippled coal for the latter.

OSMRE recognizes that some low rank coals have equilibrium moisture values below bed moisture, and that the ASTM Committee on Coal and Coke, whose membership includes representatives of the IRS, is currently working to develop and/or confirm precision statements for ASTM D 1412–85, as this test applies to all ranks of coal. OSMRE expects that deviations from standard laboratory test methodologies to account for low rank coals would be noted and fully described in the operator's records. OSMRE will work with the ASTM Committee on Coal and Coke in its effort to further refine an inherent moisture test methodology for all coal ranks.

In its November 18, 1987 letter commenting on the rule, the IRS expressed concern that even use of the ASTM D 1412–85 Equilibrium Moisture Test may have problems. Specifically,

IRS stated that although using such a test "might provide a reasonable measure of inherent moisture for coals of high rank, * * * the results obtained under this test may differ each time the test is run. This problem is particularly evident in coals of low rank where test results are especially erratic." IRS recommended that "the results of the ASTM or a similar study should be received before one test is prescribed for use by all taxpayers." November 18, 1987 letter from the IRS, p.2.

Nevertheless, the amount of total moisture and inherent moisture must be established in order to determine the estimated amount of excess moisture present in a particular coal seam. The operator must be able to show through competent evidence that inherent and total moisture figures used in calculating excess moisture weight deductions are valid and have been derived properly. In most instances, OSMRE will currently accept the standard test methods adopted by the ASTM to determine inherent moisture, ASTM D 1412–85, and total moisture, ASTM D 3302–82, because of the lack of more suitable alternatives. Because existing standard test sampling and analytical methods may not always be reliable for testing inherent moisture of some subbituminous and lignite coal, other testing methods may be needed for certain low rank coals. The agency also acknowledges that other standard laboratory test methods could possibly be used to determine the existence and extent of excess moisture present in the coal. For instance, in certain situations the test for proximate analysis, ASTM D 3172–73, may be appropriately used.

Some commenters expressed concern that OSMRE's discussion regarding moisture found with the coal as removed from the seam suggests that only "pit or channel" sampling, a time-consuming and expensive sampling technique, would be acceptable. These commenters stated that "fresh tipple" sampling is equally valid for inherent moisture testing and should be available as an alternative testing technique. OSMRE agrees that standard acceptable sampling and analytical procedures may allow the operator to use fresh tipple sampling to establish inherent moisture.

One commenter stated that although in theory the inherent moisture subtracted from the total moisture would yield the free or excess moisture, it is inappropriate to compare absolute weights when the calculation to determine the adjusted weight is based on percentages. This commenter recommended that one adjustment factor be applied to the total weight of coal and that the fee be assessed on the adjusted weight. OSMRE disagrees with this commenter's proposal. To ensure a comparable measurement of the estimated amount of inherent and total moisture, OSMRE recommends that weight reductions be based on the weighted average of each.

For instance, if the inherent moisture of a coal seam is measured monthly and varies from month to month and the coal produced during more than one month is commingled, OSMRE would expect that the percentage of inherent moisture of the commingled coal would be based on a weighting factor reflective of the differing monthly amounts of coal produced. Similarly, if one total moisture percentage is applied for a shipment of coal, it should reflect a weighting factor for different total moisture percentages of component batches.

OSMRE recognizes that varying circumstances could require different sampling and testing frequencies and averaging techniques to establish reliable results. OSMRE intends to develop technical guidance to assist operators and to assure fair and consistent application of the excess moisture allowance.

Certified Laboratories Not Required

One commenter asserted that OSMRE's proposal to require that moisture analyses be prepared by independent certified testing laboratories acceptable to OSMRE was unnecessarily restrictive because many large coal producers regularly perform these tests in their own laboratories. Several commenters noted that the ASTM is presently examining how to implement a certification process for coal laboratories. These commenters agreed that some commercial services "certify" laboratories outside the coal industry which are not widely accepted or used by the industry. These commenters stated that it would be costly and burdensome for OSMRE to certify laboratories.

One commenter urged that the operator be allowed to select a sampling and testing laboratory, and to assume the risk that OSMRE will disallow any deduction if the operator is unable to establish the appropriateness of the methodologies, equipment, and training of its own laboratory or any commercial laboratory it selects. Another commenter stated that the rigid ASTM standards provide accurate analysis and that a company should be allowed to certify its own analysis, as the Act provides criminal penalties for false certification. This commenter added that it is unclear what was meant by the proposed phrase "acceptable to the Office," and that Revenue Ruling 86–96 allows a deduction based upon "competent evidence," with no restriction similar to that proposed by OSMRE.

OSMRE agrees with the concerns raised by commenters about only "certified" laboratories being able to perform analyses of coal. Based on the comments, the final rule allows the operator to select who performs the laboratory analysis, but makes the operator responsible for demonstrating that sampling and testing were performed properly.

Section 870.18(c)

Section 870.18(c) requires an operator to test the inherent moisture in each seam mined when coal produced from multiple seams is blended prior to the initial sale, transfer or use by the operator.

Commenters addressed the need to test coal prior to blending where it is produced from different seams and commingled after mining and prior to sale. One commenter suggested that operators engaging in such practices should calculate the variation in inherent moisture, if any, between seams and pits, and, should this variation exceed 10 percent, the operator should also be required to provide separate calculations for the approximate tonnages mined from each seam or pit. OSMRE agrees that an operator who blends coal from multiple seams should determine the inherent moisture of each seam. A weighted average of the inherent moisture test results for each seam should be used to determine the excess moisture allowance where any variation in inherent moisture is found.

The rule does not contain the "10 percent" factor suggested by the commenter, or expressly impose separate testing requirements for each pit. Whether separate inherent moisture tests are required for separate pits in which the same seam is mined depends upon the proximity of the pits and other factors which could cause the percentages to differ from one another.

Section 870.18(d)

Section 870.18(d) requires an operator to retain the results of all laboratory analyses and all other relevant documentation (including the operator's books and records) for not less than six years after the date of each analysis. This provision is similar to the proposed rule which required that analyses be retained for six years.

The operator is responsible for adequate quality control over the sample collection and preparation process, verification of the validity and frequency of all sampling and testing, and maintenance of the documentation for not less than six years. Specification of a minimum six-year retention period is not intended to limit an operator's responsibility to pay, or limit the Secretary's right to collect improperly deducted AML fees after the six-year period.

Section 870.18(e)

Section 870.18(e) cross-references 30 CFR 870.15(c), which allows OSMRE to collect interest upon delinquent AML fee payments. It makes explicit what was implicit in the proposal, namely, that OSMRE can disallow an incorrectly taken weight reduction and compute interest from its point of delinquency.

Discussion of General Comments

OSMRE sought comments on specific economic hardships caused by the prior rule, and the degree to which the proposed rule would alleviate such impacts. Also, OSMRE solicited comments on the likely impact of the proposed rule on the coal industry, as well as information on changes in the industry since 1982.

Many commenters asserted that bituminous and anthracite coal operators were treated differently than lignite coal operators under the prior regulations, because, in their view, for reclamation fee purposes OSMRE excluded water from the computation of tonnage for lignite produced.

There has been no preferential regulatory treatment of lignite operators by OSMRE, as alleged by these commenters. Section 701(30) of the Act defines lignite coal to mean "consolidated lignitic coal having less than 8,300 British thermal units per pound, moist and mineral matter free." Lower-rank coal is classified "according to gross calorific value on the moist basis," as stated in ASTM Standard Classification of Coals by Rank, D 388–84. Under the definition of "lignite coal" in 30 CFR 870.5 the word "moist" refers to coal containing its natural inherent or bed moisture, but not including water adhering to the surface of the coal. However, once coal is determined to be of the lignite rank, the fee is assessed on the same basis (tonnage or value) as any other coal, although at a lower rate. Thus, prior to the promulgation of this rule, lignite producers were not allowed a moisture deduction.

Commenters stated that foreign countries impose little, if any environmental regulation or taxes on coal production. They argued that the Federal Government should not unnecessarily burden the U.S. coal producer with unfair and illogical fees or taxes. Several commenters viewed the proposed rule as a way to make coal more competitive and reduce the need for foreign oil to meet the energy needs of this country. One commenter thought that the sampling and testing procedures would alleviate economic hardships on coal suppliers by eliminating numerous record retention requirements. However, the rule requires operators to retain all documentation concerning any claimed excess moisture allowance for at least six years.

One commenter noted that purchasers of coal pay for it based on its calorific value (heat content), rather than its delivered gross weight and that this pattern automatically compensates for excess moisture. A public utility commented that AML fees paid on the gross weight of the coal at the point of first disposition, including total moisture, inflate the taxable tonnage by the amount of additional moisture accumulated during mining, processing, and delivery. This commenter, stated that it paid $9 million per year in AML fees, noted that reclamation fees are ultimately "passed through" to the consumers, through open market or contract price adjustment, and estimated that the proposed rule could reduce its annual costs by $350,000. One commenter characterized the market for coal as weaker and more competitive than in 1982, claiming that it is now more difficult for coal producers to pass on reclamation fees to consumers. The commenter suggested that the excess moisture allowance would provide some relief to industry because it would permit operators to use that money in their businesses. All of these comments have been considered in formulating the final rule.

User Fee Not Adopted

At the request of the Office of Management and Budget, OSMRE also requested comments on whether a user fee should be imposed on operators taking the allowance. One commenter remarked that, if OSMRE's "policing" of proposed laboratory certification procedures would be the reason for imposing an operator's user fee, then abandonment of such a procedure would obviate any need for the fee. Another commenter stated that, since the proposed rule would place the burden of documenting the allowance claimed on the producer, OSMRE's costs to administer the allowance claim process should be minimal. Still another commenter asserted that, if the rule proposed that OSMRE perform the calculation, there might be some logic in requiring the payment of a user fee, but that this is not the case. One commenter asserted that there is no statutory authority to require payment of monies because an operator has taken an allowance authorized by regulation, and argued that a user fee would penalize a company for complying with the law. This commenter claimed that most companies would forgo the allowance due to the expense of determining total and inherent moisture, if it would not save them a substantial amount of money. In addition, the commenter stated that such a fee would again require coal producers to make two calculations, only one of which would exclude surface moisture. Finally, a commenter suggested that OSMRE's consider all its user fees together, to ensure consistency and rationality in any user fee schedule it adopts.

OSMRE agrees that its justification for the imposition of a user fee upon operators who take an excess moisture allowance was not fully explained in the proposed rule. Section 412(a) gives OSMRE the authority to impose a user fee to offset the cost of agency services. OSMRE has evaluated the advantages and disadvantages of imposing a user fee on operators who take the allowance. Under final 30 CFR 870.18, an operator is required to establish the basis for the excess moisture allowance through standardized laboratory tests. OSMRE is not required to certify laboratories. The operator must pay for the tests, ensure that they are valid, and retain documentation to support the claimed excess moisture allowance. Therefore, OSMRE's cost to administer the rule should not be substantial and no user fee is needed.

If in the future, OSMRE observes that administrative costs of implementing this rule are significantly higher than currently estimated, OSMRE will propose a rule to establish a user fee.

Regional Effects

OSMRE also sought comments on the regional application of the prior rule and whether the final rule could more equitably address regional differences in climate, business practices, or other factors. One commenter stated that there is no need to apply the rule differently in different regions. The commenter added that the natural geological makeup of coals will compensate for differences in the minerals, and that any differences in mineral constituents is geological, not geographical. Another commenter stated that the rule will only benefit operators

if the coal is processed prior to marketing, and would have very limited benefit in regions where coal preparation routinely is not required.

Several commenters observed that the amount of tax calculated under the present rule varies from region to region due to variations in climate, the amount of rainfall, and the preparation or washing required for an operator to sell coal. One commenter stated that regional differences in excess moisture content result from the climatic conditions under which the coal is mined, type of mining, proximity to markets, and mode of transportation. Another commenter stated that an operator should not be penalized or required to pay a premium with respect to reclamation fees simply because its operation includes a coal washing operation or because the coal contains additional noninherent moisture from rainfall or other sources. A commenter stated that the proposed rule should be applied on a national basis and that there should be consistency within a mining district or region with regard to the allowable inherent moisture. This commenter recommended the use of uniform standard values for inherent moisture to reduce the need for expensive exploration, sampling, testing, and retention of records. OSMRE generally agrees with these commenters.

The final rule will apply on a national basis. In part, it is intended to reduce regional disparities based upon climatic and other conditions which affect amounts of excess moisture. At this time OSMRE is not willing to specify uniform standard values for inherent moisture and prefers to base the deduction on site-specific determinations. OSMRE recognizes that it may be possible to develop uniform standards that could be valid for particular coal seams in local geographic areas. Such standards would have to evolve over time.

Comments on Congressional Intent

A commenter asserted that Congress chose a 15-year period for the imposition of AML fees "in order to assure the availability of monies for program purposes," and that any reduction in the amount of AML fees would negatively impact the reclamation of eligible lands, contrary to Congressional intent. One commenter stated that there is no Congressional intent to allow any adjustments to be made prior to calculation and assessment of the fee, and that Congressional intent was to assess the fee on the gross weight of coal, including both inherent and excess moisture. The commenter stated that Congress where it intended to differentiate or adjust the fee, such as in the case of lignite, stated so explicitly.

OSMRE disagrees with the commenter's view that Congressional intent can be discerned on this issue. In the *Drummond* case, cited earlier, the court concluded that the Act is ambiguous and the legislative history is silent on the issue. Regarding the Act, the court observed that "Congress, however, did not define 'coal' in the statute—still less the term 'coal produced,' upon which the fee is levied. Like the district court, we do not find the ordinary meaning of that term unambiguous * * *." *Drummond, supra,* at 505. As to the legislative history, the court stated that "[t]he legislative history simply does not disclose the requisite specific intent upon which a court could properly rely to overturn the Secretary's regulations. Congress in fact never addressed the particular issue that we confront in this case." *Id.* at 506 (footnote omitted).

One commenter stated that Congress established the rate of assessment for AML fees based on assumptions which the commenter believed are inconsistent with the proposed rule. The commenter asserted that Congressional projections concerning the yield of the fee were based upon tonnage figures compiled by the U.S. Bureau of Mines, based on a methodology with no reduction of gross weight for excess moisture. The commenter asserts that, had Congress contemplated such a deduction, the matter certainly would have appeared of record since such a deduction would impact the fund by approximately 10 percent, and Congress would likely have offset that deduction by an increase in the assessment rate. The commenter, quoting the Act's legislative history, stated that the projections were "based on the most recent annual coal statistics concerning tonnage."

Again, OSMRE agrees with the court of appeal's conclusion that the legislative history does not address the issue of a moisture deduction. Additionally, OSMRE disagrees with the analysis presented by the commenter. The complete quote, which was not presented by the commenter is: "It is estimated that the reclamation fee adopted by the committee would yield approximately $140–$160 million per year based on the most recent annual coal statistics concerning tonnage, method of mining and estimated average value at the mine." H.R. Rep. 95–218, 95th Cong. 1st Sess. 137 (1977). Thus, more than just tonnage was a factor in setting the fee structure. In fact, actual receipts to the fund, over its ten year history, have been greater than $200 million per year, more than 25 percent higher than Congressional projections. The House Report does include the following principal Congressional considerations concerning the basis for AML fees: "First, to set the fee at such a level that it is not a burden on the industry; second, to provide at the same time sufficient funds for meeting program objectives within a reasonable timeframe; and third, to structure the fee so it would not exert an inflationary influence in the economy." *Id.* There is little evidence that a moisture deduction figured in these considerations.

Coordination With IRS

One commenter asserted that consistency with IRS treatment of Black Lung taxes is insufficient to support OSMRE's policy because the IRS and OSMRE programs are not required to be consistent and serve different purposes.

Under Section 201(c)(12) of the Act, the Secretary is required to cooperate with other Federal agencies to minimize duplication of inspections, enforcement and administration of the Act. As a step towards more consistent treatment, this rule fosters cooperation between OSMRE and IRS and is intended to reduce duplication of both enforcement and administration. In its November 18, 1987 letter to the Department of the Interior, the IRS stated: "The DOI proposed regulation recognizes the importance of consistent positions between the DOI and the IRS rules. We agree that the calculations for the AML fees and the Black Lung tax ideally should be based on the same measurement system * * *."

Although the IRS cannot generally provide information to OSMRE on specific taxpayers, 26 U.S.C. 6103, such information may be disclosed in certain circumstances. For instance, under 26 U.S.C. 6103(c), if a taxpayer consents to such disclosure, the IRS may disclose information to OSMRE. An operator may consent if such information would benefit the operator. Also, under 26 U.S.C. 6103(i), upon request, certain information may be disclosed to OSMRE employees for use in criminal investigations, such as under Section 402(d) of the Act. Moreover, where the two agencies have consistent regulations, the IRS can provide technical advice and training to OSMRE.

OSMRE has been coordinating its AML reclamation fee compliance with IRS Black Lung tax enforcement efforts for years. Since 1982, the Interior Department has had a Memorandum of Agreement with the IRS and routinely sends its audit results to the IRS Assistant Commissioner (Examination).

The importance of the assistance that can be provided to IRS by OSMRE's AML fee auditors was expressly recognized in testimony by the National Wildlife Federation (NWF) on July 14, 1987 before the U.S. House of Representatives Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs. NWF noted that both the AML fund and the Black Lung Tax are based on payments by coal operators for each ton of coal produced. NWF suggested an expanded use of AML auditors to check whether Black Lung payments are appropriately made.

One commenter stated that the proposed definition of "excess moisture" understates the allowance permitted under Revenue Ruling 86–96. This commenter urged that, to conform to that Revenue Ruling and the *Taft* decision, the allowance must cover all moisture in excess of inherent moisture. The commenter stated that, because proper application of the IRS ruling requires the use of ASTM analytic methods and definitions, OSMRE should substitute the term "free moisture" in coal for "excess moisture." Another commenter noted that coal producers are currently working with the IRS to develop a consensus on the method to be used to measure excess moisture content in coal for Black Lung tax purposes. This commenter suggested that the OSMRE and the IRS explore the possibility of implementing the same testing procedures to avoid confusion.

To the extent the revised rule offers a coal operator an opportunity to reduce an estimated excess moisture amount from the weight of coal tonnages on which a reclamation fee is paid, it is consistent with IRS Revenue Ruling 86–96.

OSMRE considered joint rulemaking with the IRS to prescribe a standard test to calculate excess moisture for both Black Lung tax and AML fee purposes. The IRS advised that it could not use the ASTM D 1412–85 Equilibrium Moisture Test as a universal standard for determining excess moisture due to the controversial nature of that test. Further, the IRS does not plan at this time to prescribe any specific tests or definitions for use in determining excess moisture. They will instead rely on the competent evidence requirement discussed above. Coal operators should be aware that an excess moisture determination accepted or acceptable under this rule for purposes of the AML fee may not meet the IRS requirements for the Black Lung tax.

Relation to 1982 Rule

One commenter pointed out that the current proposal was considered and rejected by the agency in the 1982 revisions to 30 CFR Part 870 (47 FR 28578, June 30, 1982). OSMRE has reevaluated its 1982 statements on this issue. The basis for rejecting an excess moisture deduction in 1982 was the following:

> If moisture deductions were allowed, audit of operator records would be further complicated and laboratory analyses required to document moisture content. Moreover, such deductions could reduce fee collections by many millions of dollars over the 15-year life of the Fund.
>
> 47 FR 28578 (June 30, 1982).

The earlier concerns about auditing can be resolved. Under this final rule and the anticipated change to the OSM–1 Form, operators will have to report the amount of the excess moisture weight reduction and the inherent and total moisture percentages upon which it is based. Although OSMRE auditors will have to examine these factors, § 870.18(a) requires operators to demonstrate that the deduction is properly taken and § 870.18(d) requires the operators to retain the relevant documentation. Thus auditing can be successfully achieved.

As to the requirement for laboratory analysis, alluded to in 1982, that is a cost of taking the deduction. If an operator wishes to avoid laboratory analyses, he or she is not obligated to take an excess moisture weight reduction.

Regarding the concern that an excess moisture weight reduction will reduce fee liability over the life of the AML fund, the prospective nature of this rule will limit its applicability to less than five years. Although this could mean an effect of several million dollars, no overriding reason exists as to why operators should pay a fee on excess moisture. The amount actually lost to the fund will depend on the number of operators who claim the allowance, and the amount of the allowances they claim. All operators will not claim an allowance because coal is not always exposed to conditions under which excess moisture may accumulate prior to the point of bona fide sale, transfer of ownership, or use. Therefore, no one can precisely predict the impact of the final rule on the fund.

In 1982, OSMRE also rejected a proposal which would have allowed operators to take moisture deductions in particular States where similar deductions were allowed for state coal severance tax purposes. OSMRE rejected such an approach because it believed that to be equitable the Federal rules should be applied uniformly. Because of the wide variety of State severance tax approaches, OSMRE was concerned that a rule based upon State taxing mechanisms could result in considerable competition among the States and encourage similar proposals for other deductions. See 47 FR 28578 (June 30, 1982).

One commenter asserted that, because State severance tax programs generally have not changed since 1982 with regard to allowing moisture deductions, OSMRE's earlier concerns about interstate competition and the effect on other programs remain valid.

OSMRE agrees that its earlier concerns are valid, but disagrees that this rule will have such deleterious effects. The competition among states about which OSMRE was concerned would have resulted, not from allowing the moisture deduction generally, but from allowing it only in those states with particular taxing structures. This final rule grants an excess moisture allowance nationwide, and it should not encourage competition among States that might have resulted from a State-by-State allowance. Moreover, OSMRE does not intend to encourage proposals for other deductions.

Although in 1982 the agency rejected the excess moisture allowance contained in this final rule, circumstances have changed. In 1982, the IRS did not recognize the excess moisture weight reduction for Black Lung Tax purposes. Since the *Taft* decision in 1985, cited earlier, and the 1986 revenue ruling, IRS does allow such a reduction.

A moisture deduction is a rational policy choice within the bounds of the Secretary's discretion. Since Congress did not determine what the weight of coal should include, the Secretary has discretion to adopt a reasonable option for determining fee liability. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question * * * is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). A reviewing court will need not conclude that the agency's interpretation of the statute was the only permissible one, only that it was reasonable, and not arbitrary, capricious, or contrary to law.

In the case of *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983), the court stated that

"[r]egulatory agencies do not establish rules of conduct to last forever, and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." The agency is obliged to articulate a reasonable basis for its current position. It has done so.

III. Procedural Matters

Federal Paperwork Reduction Act

The information collection requirements in the rule have been approved by the Office of Management and Budget in accordance with 44 U.S.C. 3501 *et seq.* and assigned clearance no. 1029–0090. The information is needed to meet the requirements of section 402 of the Act, and will be used by OSMRE to fulfill its statutory mission to collect reclamation fees. The obligation is imposed to obtain a benefit.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The rule does not distinguish between small and large entities. These determinations are based on the findings that the regulatory additions in the rule will not change costs to industry or to the Federal, State or local governments. The rulemaking will provide an economic benefit to the fee payer. Therefore, the rule should not add appreciably to the cost of operating a mine in compliance with a regulatory program. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

National Environmental Policy Act

OSMRE has prepared a final environmental assessment (EA) and has determined that the final rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 102(2)(C). A Finding of No Significant Impact has been approved for the final rule in accordance with OSMRE procedures under NEPA. The EA is on file in the Administrative Record (see **"ADDRESSES"**). Because potential impacts of this rule on the AML Fund are speculative and, in any case, not related to any identifiable reclamation projects, the programmatic environmental impact statement, OSM–EIS–2, covering the implementation of program policies should also be consulted for discussions of the impacts of varying allocation approaches.

Authors

The principal authors of this rule are Jane E. Robinson and Dr. Kewal K. Kohli, Office of Surface Mining Reclamation and Enforcement, Address: 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202–343–2826 (Commercial or FTS)

List of Subjects in 30 CFR Part 870

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, Part 870 is amended to read as follows:

Dated: April 13, 1988.

J. Steven Griles,

Assistant Secretary—Land and Minerals Management.

PART 870—ABANDONED MINE LAND RECLAMATION FUND—FEE COLLECTION AND COAL PRODUCTION REPORTING

1. The authority citation for Part 870 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, and Pub. L. 100–34.

2. Section 870.5 is amended by adding the following definitions of "excess moisture," "inherent moisture," and "total moisture" in alphabetical order:

§ 870.5 Definitions.

* * * * *

Excess moisture means moisture determined to be the difference between total moisture and inherent moisture.

* * * * *

Inherent moisture means moisture that exists as an integral part of the coal seam in its natural state, including water in pores, but not that present in macroscopically visible fractures.

* * * * *

Total moisture means the moisture determined as the loss in weight in an air atmosphere under rigidly controlled conditions of temperature, time and air flow.

* * * * *

3. Section 870.12(b)(3)(i) is revised to read as follows:

§ 870.12 Reclamation fee.

* * * * *

(b) * * *

(3)(i) Impurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, excluding excess moisture for which a reduction has been taken pursuant to § 870.18, shall not be deducted from the gross weight.

* * * * *

4. Section 870.18 is added as follows:

§ 870.18 Excess moisture content allowance.

For coal produced on or after July 1, 1988, the operator may take a calculated weight reduction to allow for the weight of excess moisture in the coal, subject to the following requirements:

(a) The operator shall demonstrate through competent evidence that there is a reasonable basis for determining the existence and amount of excess moisture. Documentation shall be updated as necessary to establish the continuing validity of the excess moisture content allowance taken by the operator.

(b) Inherent and total moisture shall be tested using standard laboratory analyses.

(c) The operator shall test for variations in inherent moisture amounts for different seams of coal produced which are blended prior to the initial bona fide sale, transfer of ownership, or use of the coal by the operator.

(d) The operator shall retain the results of all laboratory analyses and all other relevant documentation (including the operator's books and records) for not less than six years after the date of each analysis.

(e) If the Office disallows all or part of the allowance, the operator shall submit the additional fee, together with interest computed under § 870.15(c).

[FR Doc. 88–11932 Filed 5–26–88; 8:45 am]

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federal register

Friday,
May 27, 1988

Part VI

Federal Trade Commission

16 CFR Part 305

Rules for Using Energy Cost and Consumption Information Used in Labeling and Advertising of Consumer Appliances Under the Energy Policy and Conservation Act; Ranges of Comparability for Central Air Conditioners and Heat Pumps; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 305

Rules for Using Energy Cost and Consumption Information Used in Labeling and Advertising of Consumer Appliances Under the Energy Policy and Conservation Act; Ranges of Comparability for Central Air Conditioners and Heat Pumps

AGECY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission amends its Appliance Labeling Rule by publishing the ranges of comparability to be used on required labels for central air conditioners and heat pumps and by updating the annual national average cost figure for electricity to be used in the cost calculation formula required on fact sheets and in directories for consumers to use to calculate their own heating and cooling costs. The Commission also issues an enforcement policy statement regarding delays in complying with the rule's fact sheet/directory requirement.

On December 10, 1987 (52 FR 46888), the Federal Trade Commission amended its Appliance Labeling Rule by extending coverage to central air conditioners and heat pumps. This rule publishes the new range figures for those appliances, which, under §§ 305.10, 305.11, and 305.14 of the rule, must be used in the labeling and advertising of central air conditioners and heat pumps beginning June 7, 1988.

The amendments require manufacturers to provide energy usage disclosure labels on each covered product and to provide additional energy usage and cost disclosure requirements by either preparing fact sheets or by being listed in an industry directory that contains the required information. The Air Conditining and Refrigeration Institute (ARI) is currently producing a directory that will be used by most industry members instead of fact sheets, but it will not be published until nine weeks after the effective date of the amendments. The Notice announces that, in making its enforcement decisions, the Commission will take into account the fact that publication of ARI's Directory will not be possible until August 15, 1988.

The rule also updates the national average cost for electricity that must be used in the cost calculation formulas that manufacturers must provide on fact sheets or in directories.

EFFECTIVE DATE: June 7, 1988.

FOR FURTHER INFORMATION CONTACT: James Mills, 202–326–3035, or Neil J. Blickman, 202–326–3038, Attorneys, Division of Enforcement, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Ranges and Cost Figures

Section 324 of the Energy Policy and Conservation Act of 1975 ("EPCA") [1] requires the Federal Trade Commission to consider labeling rules for the disclosure of estimated annual energy cost or alternative energy consumption information for at least thirteen categories of appliances classified as "covered products" by section 322(a) of EPCA: (1) Refrigerators and refrigerator-freezers; (2) freezers; (3) dishwashers; (4) clothes dryers; (5) water heaters; (6) room air conditioners; (7) home heating equipment, not including furnaces; (8) television sets; (9) kitchen ranges and ovens; (10) clothes washers; (11) humidifiers and dehumidifiers; (12) central air conditioners; and (13) furnaces. Before these labeling requirements may be prescribed, the statute requires the Department of Energy ("DOE") to develop test procedures that measure how much energy the appliances use. In addition, DOE is required to determine the representative average costs a consumer pays for the different types of energy available.

On November 19, 1979, the Commission issued a final Rule covering seven of the thirteeen appliance categories that were then covered by DOE test procedures: refrigerators and refrigerator-freezers, freezers, dishwashers, water heaters, clothes washers, room air conditioners and furnaces.[2]

The Rule requires that energy efficiency ratings or energy costs and related information be disclosed on labels and in retail sales catalogs for all covered products, except furnaces, manufactured on or after May 19, 1980. For furnaces, the energy usage information must be disclosed on separate fact sheets, while the labels on the products disclose energy-saving tips and direct consumers to the fact sheets. Certain point-of-sale promotional materials must disclose the availability of energy cost or energy efficiency rating ("EER") information. The required disclosurers and all claims concerning energy consumption made in writing or in broadcast advertisements must be based on the results of the DOE test procedures.

On December 10, 1987 (52 FR 46888), the Federal Trade Commission amended the Appliance Labeling Rule by extending coverage to include a new category of appliances—central air conditioners and heat pumps. For these products the Commission adopted a disclosure scheme that consists of labels showing simple energy efficiency and range information, together with a requirement to disclose further efficiency and cost information by means of either fact sheets or a listing in a general directory containing such information.

Pursuant to § 305.8 of the rule, manufacturers originally submitted reports to the Commission by January 21, 1980. Manufacturers of central air conditioners and heat pumps made their first submission on February 8, 1988. These reports contained information on the estimated annual cost or energy efficiency rating for the eight categories of appliances derived from tests performed pusuant to the DOE test procedures. The reports also contained the model, the number of tests performed on each model, and the capacity of each model. From that information, the Commission compiled and published [3] ranges of comparability for each product (except central air conditioners and heat pumps), as required by § 305.10 of the rule.

Section 305.8(b) of the rule requires manufacturers, after filing this initial report, to report annually by specified dates for each product type.[4] Because manufacturers regularly add new models to their lines, improve existing models and drop others, the data base from which the ranges of comparability of costs or energy efficiency ratings are calculated is constantly changing. To keep the required information in line with these changes, the Commission is empowered, under § 305.10 of the rule, to publish new ranges (but not more often than annually), if an analysis of the new data indicates that the upper or lower limits of the ranges have changed by more than 15%.

The figures for the energy efficiency ratings for central air conditioners and heat pumps have been submitted and

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[1] Pub. L. 94–163, 89 Stat. 871 (Dec. 22, 1975).

[2] 44 FR 66466, 16 CFR Part 305 (Nov. 19, 1979). The Statement of Basis and Purpose for the final Rule describes the reasons the Commission declined to cover the other categories of covered products. *Id.* at 66467–69.

[3] 45 FR 13998 (Mar. 3, 1980), 45 FR 19520 (Mar. 25, 1980), 45 FR 26036 (Apr. 17, 1980), 46 FR 3829 (Jan. 16, 1981).

[4] Reports for clothes washers are due by Mar. 1; reports for water heaters, room air conditioners and furnaces are due by May 1; reports for dishwashers are due by June 1; reports for central air conditioners and heat pumps are due by July 1 and reports for refrigerators, refrigerator-freezers and freezers are due by Aug. 1.

have been analyzed by the Commission. After analyzing the thousands of individual efficiency figures that were submitted by the industry for the units they produce, the Commission has determined to publish separate sets of ranges for single package units and split system units.[5] Because the decision as to which type to select depends, to a great extent, on the physical setup of the consumer's home, consumers who are shopping for one type of system are not likely to be interested in the other. Since the two categories have differing ranges of efficiencies, the two sets of ranges are necessary to give consumers the best information for their specific purchasing decisions. The new ranges published today are for the two types of systems.

In addition to establishing the ranges for these products, the Notice provides an updated figure for the annual national average cost of electricity. This figure, along with national average cost figures for natural gas, propane, heating oil and kerosene, is published annually by the Department of Energy for the industry's use in calculating the cost figures required by the Commission's Rule. The cost figure for electricity must be used in the cost calculation formulas that appear in Appendices H and I. These formulas must be provided on fact sheets and in directories so consumers can calculate their own costs of operation for the central air conditioners and heat pumps that they are considering purchasing. The figure that was current when the rule amendments were published was 7.94 cents per kilowatt-hour, and the updated figure, which DOE published on December 23, 1987 (52 FR 48563), is 8.04 cents per kilowatt-hour. The formulas (and calculations) in both Appendices have been changed to reflect this.

II. Enforcement Policy Statement

When the Commission extended the rule's coverage to include central air conditioners and heat pumps, it provided for a disclosure scheme consisting of labels attached to the products that show the efficiency of the individual product and the range of efficiencies of all products of that basic type (split system heat pump, single package air conditoner, etc.). As an additional requirement, manufacturers must disclose cost information. They can accomplish this in either of two ways: by providing fact sheets for each model they sell, or by having each model included in a directory that shows the required information.

Most of the manufacturers of central air conditioners and heat pumps are members of the Air Conditioning and Refrigeration Institute, which produces a directory showing efficiency and cost information for the models its members manufacture and sell. At this point, the only directory that the Commission knows will be used instead of fact sheets is the ARI Director. This means that almost all members of this industry will be disclosing cost information in the AIR Directory, instead of preparing fact sheets.

By letter of March 21, 1988, counsel for ARI requested that there be an accommodation to allow persons covered by the rule until August 15, 1988 to comply with the rule, which will become effective on June 7, 1988. As the result of meetings between Commission staff and ARI representatives since March 21, ARI has refined its request to apply *only* to publication of the ARI Directory on August 15, and *not* to the affixing of labels to products.

In support of its request, ARI noted that the August 15th date would enable manufacturers to come into compliance with the "directory option" to the fact sheet requirement simultaneously with publication of ARI's Directory. ARI explained that coordination between the rule's effective date and the publication date was impossible due to the difficulty in ascertaining, in advance, the exact time of the rule's issuance. ARI also noted that the Directory is a one-inch thick book with detailed entries for tens of thousands of models, and that it would be impossible to move the publication date up to coincide with the effective date of the rule.[6]

In view of the foregoing considerations, the Commission has decided that, in making its enforcement policy decisions concerning compliance with the rule's fact sheet/directory requirements, it will take into account the fact that publication of ARI's Directory will not be possible until August 15, 1988.

III. Amendments

In consideration of the foregoing, the Commission revises Appendices H (1) and (2) and I (1) and (2) of its Appliance Labeling Rule by publishing the following ranges of comparability and cost figures for use in the labeling and advertising of central air conditioners and heat pumps beginning June 7, 1988.

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

PART 305—[AMENDED]

Accordingly, 16 CFR Part 305 is revised as follows:

1. The authority citation for Part 305 is revised to read as follows:

Authority: Sec. 324 of the Energy Policy and Conservation Act, (Pub. L. 94–163) (1975), as amended by the National Energy Conservation Policy Act, (Pub. L. 95–619) (1978), and as amended by the National Appliance Energy Conservation Act, (Pub. L. 100–12) (1987), 42 U.S.C. 6294; section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

2. Appendices H and I of Part 305 are revised to read as follows:

Appendix H.—Cooling Performance and Cost for Central Air Conditioners

1. *Range Information:*

SINGLE PACKAGE UNITS

Manufacturer's rated cooling capacity (BTU/hr.)	Range of EER's	
	Low	High
Central air conditioners (cooling only): All capacities	5.60	10.20
Heat pumps (cooling function): All capacities	6.50	10.50

SPLIT SYSTEM UNITS

Manufacturer's rated cooling capacity (BTU/hr.)	Range of EER's	
	Low	High
Central air conditioners (cooling only): All capacities	5.85	15.00
Heat pumps (cooling function): All capacities	7.25	13.05

2. *Yearly Cost Information:*

For each model, display three annual operating costs, based on 8.04¢ per kilowatt hour, rounded to the nearest $10, corresponding to the three building heat gains from the chart below:

Manufacturers rated cooling capacity (BTU/hr)	Building heat gain (in 1000's BTU's/hr)		
Up to 9,000	3	6	9
9,100 to 15,000	9	12	15

[5] With single package systems, both of the main components of the system—the compressor and the evaporater coil—are in a single unit. With split systems, the compressor is most commonly outside, while the evaporator coil is inside the ductwork. As published, the rule contemplated separate ranges for single package and split system units.

[6] Because the labels (which will alert consumers to the fact sheet/directory requirements) only have to be placed on products manufactured on and after June 7, and because of the time that it will take for those products to reach the retail level, it is likely that there will be only a short period of time between the appearance of the labels and the availability of the Directory.

Manufacturers rated cooling capacity (BTU/hr)	Building heat gain (in 1000's BTU's/hr)		
15,100 to 21,000	15	18	21
21,100 to 27,000	21	24	27
27,200 to 33,000	27	30	33
33,200 to 39,000	33	36	39
39,500 to 45,000	39	42	45
45,500 to 51,000	45	48	51
51,500 to 57,000	51	54	57
57,500 to 63,000	57	60	63
63,500 and over	63	66	69

The values of building heat gain are to be considered cooling capacities in the calculation of annual operating cost in accordance with 10 CFR 430.22 (m)(1)(i).

Include the following note on every fact sheet page that lists annual operating costs.

Note: These figures are based on U.S. Government standard tests and are for national averages of 1000 cooling load hours and 8.04¢/KWH. Your cost will vary depending on your local energy rate and how you use the product. A method for estimating your cost of operation is given [direct user to location].

The methodology referred to in the note is provided below. This information shall be included a least once in all compendiums of fact sheets. If separate fact sheets are prepared for individual distribution to consumers, this methodology must be provided on or with the unbound fact sheets.

How to Estimate Your Cooling Cost

To estimate your actual cost of operation, find your cooling load hours from the map, your average annual operating cost from the National Average Annual Operating Cost Table, and determine your electrical rate in cents per kilowatt hour (KWH) from your electric bill.

$$\text{Your estimated cost} = \text{Listed average annual operating cost}^{*} \times \frac{\text{Your cooling load hours}^{**}}{1{,}000} \times \frac{\text{Your electrical rate in cents per KWH}}{8.04¢}$$

* From the National Average Annual Operating Cost Table.
** From the map.

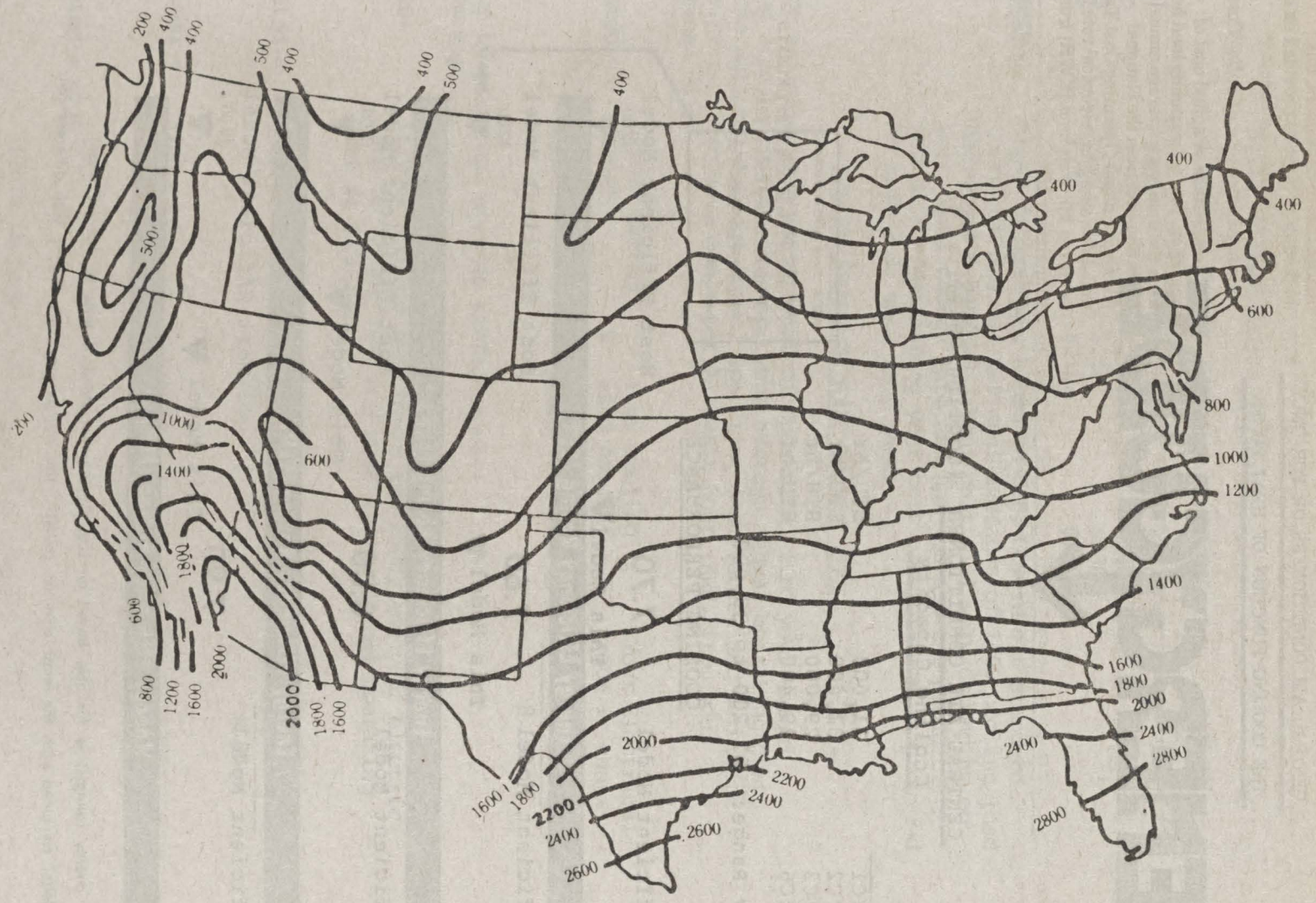
Example: If your cooling load hours = 1500, and your electric rate is 12.06¢/KWH and your listed annual operating cost is $100, then:

$$\text{Your estimated cost} = \$100 \times \frac{1{,}500}{1{,}000} \times \frac{12.06¢}{8.04¢}$$

Your estimated cost = $100X1.5X1.5 = $225
Your estimated cost = $225

BILLING CODE 6750-01-M

Cooling Load Hour Map



Alaska	– 0	Cooling	Load	Hours
Canal Zone	– 6,000	"	"	"
Guam	– 6,600	"	"	"
Hawaii	– 2,300	"	"	"
Puerto Rico	– 6,000	"	"	"
Samoa	– 6,600	"	"	"
Virgin Island	– 6,000	"	"	"

This map must be included at least once in all compendiums of fact sheets. If separate fact sheets are prepared for individual distribution to consumers, this map must be provided on or with the separate fact sheets.

AN EXAMPLE OF A FACT SHEET FOR
CENTRAL AIR CONDITIONERS OR FOR ONLY
THE COOLING FUNCTION OF HEAT PUMPS

ENERGYGUIDE

CENTRAL AIR CONDITIONER (Cooling only)

Cooling Capacity

MODELS	XXX/C1	31,000	BTU/hr
	XXX/C2	31,400	BTU/hr
	YYY/C3	29,000	BTU/hr
	YYY/C6	29,400	BTU/hr

Comparability Range: 27,200 to 33,000

NOTE Since product-specific labels showing ranges are required on each product, the inclusion of ranges on fact sheets is optional.

COOLING PERFORMANCE

Least Efficient Model 6.00 — This Model 7.70 — Most Efficient Model 12.00

Model XXX/C1 Energy Efficiency Rating (EER)

Least Efficient Model 6.00 — This Model 7.60 — Most Efficient Model 12.00

Model XXX/C2 Energy Efficiency Rating (EER)

Least Efficient Model 6.00 — This Model 8.00 — Most Efficient Model 12.00

Model YYY/C3 Energy Efficiency Rating (EER)

Least Efficient Model 6.00 — This Model 7.90 — Most Efficient Model 12.00

Model YYY/C6 Energy Efficiency Rating (EER)

This (or these) energy rating(s) is (or are) based on U.S. Government standard tests of this (or these) condenser model(s) combined with the most common coil(s) The ratings may vary slightly with different coils.

(This is Page 1 of Sample Fact Sheet)

NATIONAL AVERAGE ANNUAL OPERATING COST TABLE ($ PER YEAR)

MODEL	Building Heat Gain (BTU/hour)		
	27,000	30,000	33,000
XXX/C1	$200	$220	$240
XXX/C2	$200	$220	$240
XXX/C3	$190	$210	$230
XXX/C6	$190	$210	$230

NOTE: These figures are based on U.S. Government standard tests and are for national averages of 1000 cooling load hours and 8.04¢/KWH. Your cost will vary depending on your local energy rate and how you use the product. A method for estimating your cost of operation is provided on page 2 of this fact sheet.

HOW TO ESTIMATE YOUR COOLING COST:

To estimate your actual cost of operation, find your actual cooling load hours from the map, your average annual operating cost from the National Average Annual Operating Cost Table, and determine your electrical rate in cents per kilowatt hour (KWH) from your electrical bill.

$$\text{Your Estimated Cost} = \text{Listed average annual operating cost*} \times \frac{\text{Your cooling load hours**}}{1000} \times \frac{\text{Your Electrical rate in cents per KWH}}{8.04¢}$$

* From the national average table, above
** From map

Example: If your cooling load hours are 1500, and your electric rate is 12.06¢/KWH, and your listed annual operating cost is $100, then

$$\text{Your Estimated Cost} = \$100 \times \frac{1500}{1000} \times \frac{12.06¢}{8.04¢}$$

$$\text{Your Estimated Cost} = \$100 \times 1.5 \times = \$225$$

Your Estimated Cost = $225

(This is page 2 of sample fact sheet)

BILLING CODE 6750-01-C

Appendix I.—Heating Performance and Cost for Central Air Conditioners

1. *Range Information:*

SINGLE PACKAGE UNITS

Manufacturer's rated heating capacity (BTU/hr.)	Range of EER's	
	Low	High
Heat pumps (heating function): all capacities	5.05	7.80

The EER shall be the Region IV value based on the appropriate average design heat loss from the table below.

SPLIT SYSTEM UNITS

Manufacturer's rated heating capacity (BTU/hr.)	Range of EER's	
	Low	High
Heat pumps (heating function): All capacities	5.30	8.90

The EER shall be the Region IV value based on the appropriate average design heat loss from the table below.

2. *Yearly Heating Cost Information:* For each model, display a regional annual operating cost, based on 8.04¢ per kilowatt hour, rounded to the nearest $10, calculated according to 10 CFR § 430.22(m)(3)(ii) for each region. The heat loss of home values given in the chart below are to be considered standardized design heating requirements in the calculation of annual operating cost in accordance with 10 CFR § 430.22(m)(3)(ii).

Capacity	Region	Average design heat loss (in 1000's Btu's/hr.)	Heat loss of home values used on the grid (in 1000's Btu's/hr.)
Up to 9,000	1	10	5, 10
	2		5, 10, 15
	3		5, 10, 15
	4		10, 15, 20
	5		10, 15, 20
	6		5, 10, 15
9,100 to 15,000	1	20	5, 10, 15
	2		5, 10, 15, 20
	3		10, 15, 20, 25
	4		10, 15, 20, 25, 30
	5		10, 15, 20, 25, 30
	6		5, 10, 15, 20
15,100 to 21,000	1	25	10, 15, 20
	2		10, 15, 20, 25
	3		15, 20, 25, 30
	4		15, 20, 25, 30, 35, 40
	5		15, 20, 25, 30, 35, 40
	6		10, 15, 20, 25, 30, 35
21,100 to 27,000	1	30	10, 15, 20, 25
	2		15, 20, 25, 30
	3		15, 20, 25, 30, 35, 40
	4		20, 25, 30, 35, 40, 50
	5		20, 25, 30, 35, 40, 50, 60
	6		15, 20, 25, 30, 35, 40
27,100 to 33,000	1	35	15, 20, 25, 30
	2		20, 25, 30, 35, 40
	3		20, 25, 30, 35, 40, 50
	4		25, 30, 35, 40, 50, 60
	5		25, 30, 35, 40, 50, 60, 70, 80
	6		20, 25, 30, 35, 40, 50, 60
33,200 to 39,000	1	50	15, 20, 25, 30, 35
	2		25, 30, 35, 40, 50
	3		30, 35, 40, 50, 60
	4		35, 40, 50, 60, 70, 80, 90
	5		35, 40, 50, 60, 70, 80, 90
	6		25, 30, 35, 40, 50
39,500 to 45,000	1	60	20, 25, 30, 35, 40
	2		25, 30, 35, 40, 50, 60
	3		30, 35, 40, 50, 60
	4		40, 50, 60, 70, 80, 90, 100
	5		40, 50, 60, 70, 80, 90, 100, 110
	6		25, 30, 35, 40, 50, 60, 70, 80
45,500 to 51,000	1	70	20, 25, 30, 35, 40
	2		30, 35, 40, 50, 60
	3		35, 40, 50, 60, 70, 80
	4		50, 60, 70, 80, 90, 100, 110
	5		50, 60, 70, 80, 90, 100, 110, 130
	6		30, 35, 40, 50, 60, 70, 80, 90, 100, 110, 30
51,500 to 57,000	1	70	25, 30, 35, 40, 50
	2		35, 40, 50, 60, 70
	3		40, 50, 60, 70, 80, 90
	4		50, 60, 70, 80, 90, 100, 110
	5		50, 60, 70, 80, 90, 100 ,110, 130
	6		35, 40, 50, 60, 70, 80, 90, 100
57,500 to 63,000	1	80	25, 30, 35, 40, 50
	2		35, 40, 50, 60, 70
	3		50, 60, 70, 80, 90
	4		60, 70, 80, 90, 100, 110

Capacity	Region	Average design heat loss (in 1000's Btu's/hr.)	Heat loss of home values used on the grid (in 1000's Btu's/hr.)
	5		60, 70, 80, 90, 100, 110, 130
	6		35, 40, 50, 60, 70, 80, 90, 100
63,500 and over	1	90	30, 35, 40, 50, 60
	2		40, 50, 60, 70, 80
	3		50, 60, 70, 80, 90, 100
	4		70, 80, 90, 100, 110, 130
	5		70, 80, 90, 100, 110, 130
	6		40, 50, 60, 70, 80

Include the following note on every fact sheet page that lists annual operating costs.

Note: These annual heating costs are based on U.S. Government standard tests and on a national average cost of electricity of 8.04¢/KWH. Your cost will vary depending on your local energy rate and how you use the product. A method for estimating your cost of operation is given [direct user to location].

The methodology referred to in the note is provided below. This information shall be included at least once in all compendiums of fact sheets. If separate fact sheets are prepared for individual distribution to consumers, this methodology must be provided on or with the unbound fact sheets.

How To Estimate Your Heating Costs

To estimate your heating cost, determine your cost of electricity in cents per kilowatt hour (KWH) from your electric bill, your listed average annual heating cost from the National Average Annual Heating Cost Table, and use that number in the following equation:

$$\text{Your estimated cost} = \text{Listed annual heating cost}^{*} \times \frac{\text{Your electric cost in cents per KWH}}{8.04¢/\text{KWH}}$$

*From the National Average Annual Heating Cost Table.

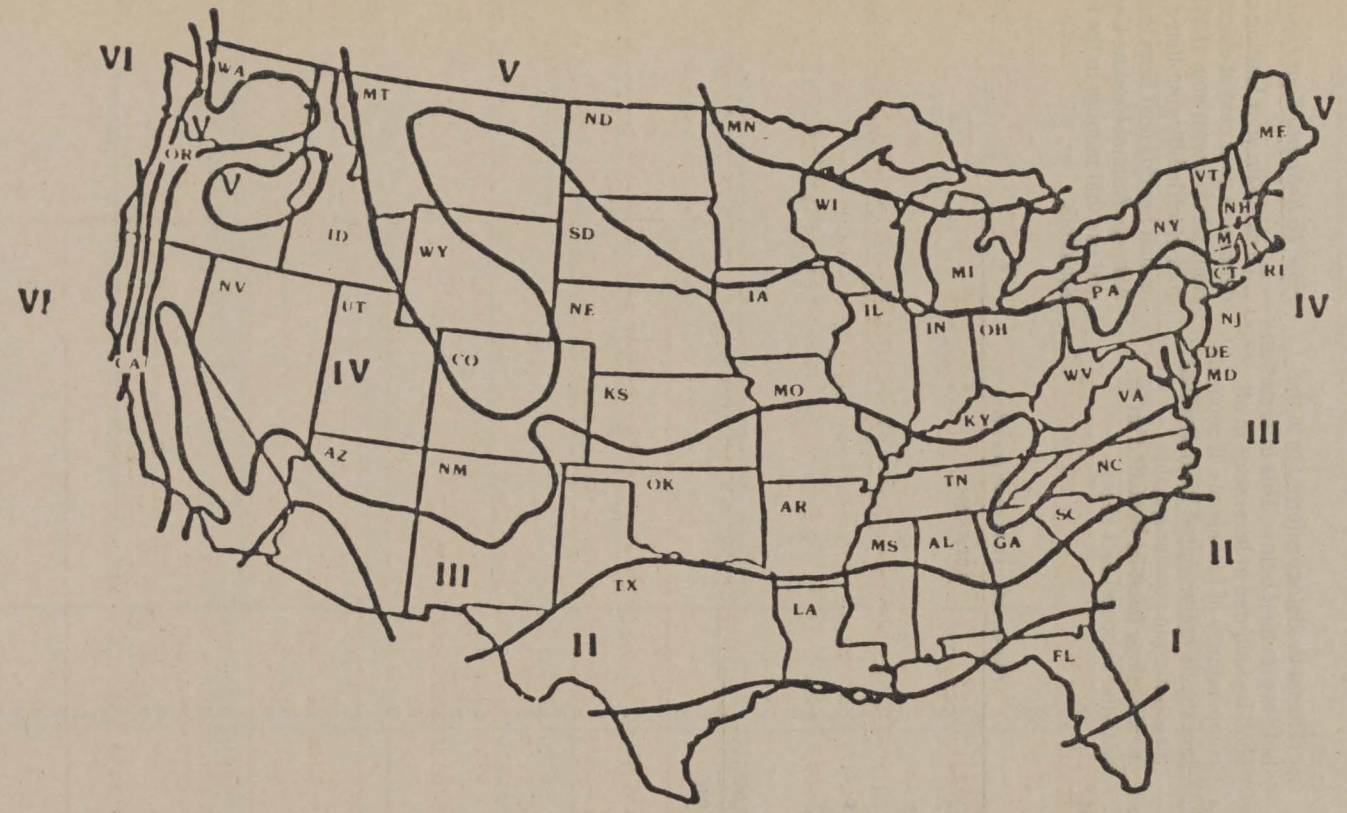
Example: If your electric rate is 12.06¢/KWH and the annual heating cost listed in the chart is $200:

$$\text{Your estimated cost} = \$200 \times \frac{12.06¢}{8.04¢}$$

Your estimated cost=$200×1.5=$300
Your estimated cost=$300

BILLING CODE 6750-01-M

Heating Region Map



This map must be included at least once in all compendiums of fact sheets. If separate fact sheets are prepared for individual distribution to consumers, this map must be provided on or with the separate fact sheets.

AN EXAMPLE OF A FACT SHEET SHOWING ONLY

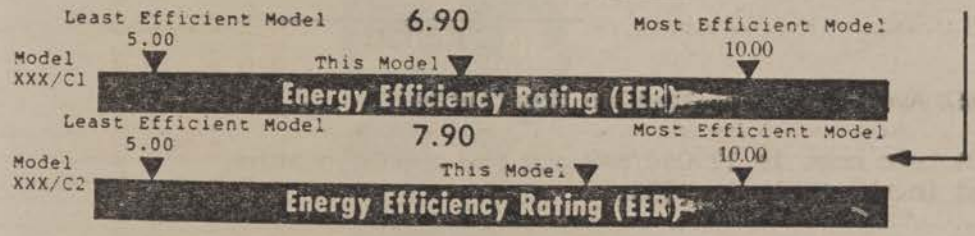
THE HEATING FUNCTION FOR HEAT PUMPS

ENERGYGUIDE

MODEL	HEATING CAPACITY (BTU's/hr.)
XXX/C1	33,000
XXX/C2	35,000

NOTE: Since product-specific labels showing ranges are required on each product the inclusion of ranges on fact sheets is optional

HEATING PERFORMANCE FOR REGION IV:



This (or these) energy rating(s) is (or are) based on U.S. Government standard tests of this (or these) condenser model(s) combined with the most common coil(s). The ratings will vary slightly with different coils and in different geographic regions.

NATIONAL AVERAGE ANNUAL HEATING COST TABLE ($ per year)

MODEL XXX/C1	Heat Loss of Home (in 1000's Btu's/hr.)									
	15	20	25	30	35	40	50	60	70	80
* Region 1	$60	$80	$100	$120						
" 2		$140	$170	$200	$240	$280				
" 3			$250	$300	$350	$400	$520			
" 4			$350	$410	$480	$550	$710	$910	$1110	$1330
" 5				$560	$660	$750	$970	$1200	$1460	$1720
" 6		$300	$370	$430	$500	$590				

MODEL XXX/C2	Heat Loss of Home (in 1000's Btu's/hr.)									
	15	20	25	30	35	40	50	60	70	80
* Region 1	$50	$70	$90	$110						
" 2		$130	$160	$190	$220	$260				
" 3			$240	$280	$330	$400	$500			
" 4			$330	$400	$450	$520	$580	$880	$1020	$1230
" 5				$540	$640	$730	$940	$1100	$1300	$1620
" 6		$300	$350	$400	$470	$560				

*From Heating Region Map

(This is Page 1 of Sample Fact Sheet)

NOTE: These annual heating costs are based on U. S. Government standard tests and on a national average cost of electricity of 8.04¢/KWH. Your cost will vary depending on your local energy rate and how you use the product. A method for estimating your cost of operation is given below.

HOW TO ESTIMATE YOUR HEATING COST

To estimate your heating cost, determine your cost of electricity in cents per kilowatt hour (KWH) from your electric bill, your listed average annual heating cost from the National Average Annual Heating Cost Table, and substitute that number in the following equation:

$$\text{Your Estimated Cost} = \text{Listed annual heating cost*} \times \frac{\text{Your electrical cost in cents}}{8.04¢/KWH}$$

* From the National Average Annual Heating Cost Table

Example: If your electric cost is 12.06¢/KWH and the annual heating cost listed in the table is $200:

$$\text{Your Estimated Cost} = \$200 \times \frac{12.06¢}{8.04¢}$$

$$\text{Your Estimated Cost} = \$200 \times 1.5 = \$300$$

Your Estimated Cost = $300

(This is page 2 of sample fact sheet)

* * * * *

By direction of the Commission.

Emily H. Rock,

Secretary.

[FR Doc. 88-11873 Filed 5-26-88; 8:45 am]

BILLING CODE 6750-01-M

Federal Register

Friday
May 27, 1988

Part VII

Department of Transportation

Federal Aviation Administration

14 CFR Part 71

Establishment of Airport Radar Service Areas; Washington and Wisconsin; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 87-AWA-49]

Establishment of Airport Radar Service Areas; Washington and Wisconsin

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action designates Airport Radar Service Areas (ARSA) at Green Bay Austin Straubel Field, WI, and Whidbey Island Naval Air Station (NAS), WA. Each location is an airport at which a nonregulatory Terminal Radar Service Area (TRSA) is currently in effect. Establishment of these ARSA's will require that pilots maintain two-way radio communication with air traffic control (ATC) while in the ARSA. Implementation of ARSA procedures at these locations will reduce the risk of midair collison in terminal areas and promote the efficient control of air traffic.

EFFECTIVE DATE: 0901 u.t.c., June 30, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Joe Gill, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9252.

SUPPLEMENTARY INFORMATION:

History

On April 22, 1982, the National Airspace Review (NAR) plan was published in the **Federal Register** (47 FR 17448). The plan encompassed a review of airspace use and the procedural aspects of the air traffic control (ATC) system. The FAA published NAR Recommendation 1-2.2.1, "Replace Terminal Radar Service Areas (TRSA) with Model B Airspace and Service (Airport Radar Service Areas)," in Notice 83-9 (48 FR 34286, July 28, 1983) proposing the establishment of ARSA's at Columbus, OH, and Austin, TX. Those locations were designated ARSA's by SFAR No. 45 (48 FR 50038, October 28, 1983) in order to provide an operational confirmation of the ARSA concept for potential application on a national basis. The original expiration dates for SFAR 45, December 22, 1984, for Austin and January 19, 1985, for Columbus were extended to June 20, 1985 (49 FR 47176, November 30, 1984).

On March 6, 1985, the FAA adopted the NAR recommendation and amended Parts 71, 91, 103 and 105 of the Federal Aviation Regulations (14 CFR Parts 71, 91, 103 and 105) to establish the general definition and operating rules for an ARSA (50 FR 9252), and designated Austin and Columbus airports as ARSA's as well as the Baltimore/Washington International Airport, Baltimore, MD (50 FR 9250). Thus far the FAA has designated 109 ARSA's as published in the **Federal Register** in the implementation of this NAR recommendation.

On December 22, 1987, the FAA proposed to designate ARSA's at Green Bay Austin Straubel Field, WI, and Whidbey Island Naval Air Station (NAS), WA (52 FR 48484). This rule designates ARSA's at these airports. Interested parties were invited to participate in this rulemaking proceeding by submitting comments on the proposal to the FAA. Additionally, the FAA has held informal airspace meetings for each of these proposed airports. Section 71.501 of Part 71 of the Federal Aviation Regulations was republished in FAA Handbook 7400.6D dated January 4, 1988.

Discussion of Comments

Twenty-five comments were received concerning this rulemaking action. One commenter supported both locations. The Soaring Society of America (SSA), while finding no evidence of any local soaring activity, objected to both locations. Their stated objection was based on a related rulemaking issue, Notice 88-2; Docket 25531. They stated that, in accordance with Pub. L. 100-223, section 203, the final rule would invalidate the ARSA Regulatory Evaluation.

The FAA does not agree. The probable effect of a proposed rule has no bearing on this action until that rule is in effect. In addition, the interpretation of public law is outside the purview of this rulemaking action. If the FAA were to proceed as suggested by the SSA and take no action on airspace matters when there are related issues which may have an effect, it would find that no action could be taken. The FAA does not believe that this is the intent of the SSA.

Green Bay, WI

Three commenters wrote in objection to the Green Bay ARSA. One commenter's objection was based on the floor of the 5-10-mile area. He stated that he would only have 200 feet in which to fly since he must operate 1,000 feet above ground level (AGL) over congested areas. The FAA finds no foundation for raising the 5-10-mile area based on this objection. The FAA has found that pilots will not routinely fly under this area unless they desire to operate at an airport which underlies this area.

Another commenter suggested that there was not enough traffic to warrant taking this airspace and that several small general aviation entities around the sides of the ARSA would be adversely impacted. The FAA finds that Green Bay not only meets the initial National Airspace Review criteria of having a TRSA and being a Level III Facility but also meets the follow-on criteria. Additionally, the ARSA rule made provisions for local agreements with small entities to minimize any potential impact. History has shown that these agreements work very well in reducing or eliminating any impact.

The last commenter objected to the ARSA stating there was no need based on the fine safety record already attained at Green Bay. The commenter stated that the concentric circles ignored the common practice of straight in approaches/departures for the aircraft that operate from Austin Straubel Field. In addition, the commenter suggested this was more airspace than necessary, placing an ever-increasing burden on the private pilots. The FAA finds no foundation to the stated objections. Even with a good safety record, the FAA still has a need to know of all aircraft operating in this close proximity to the airport at these critical altitudes.

Whidbey Island NAS, WA

The FAA received 20 written comments to the Whidbey proposal. One wrote in support of the proposal while the remainder offered objections and/or recommendations.

Three hot air balloon pilots submitted a recommendation that all of the airspace east of the Swinomish Slough be cutout of the ARSA or that they be exempted from the ARSA requirements. The FAA finds a need to know of all aircraft operating at these criteria altitudes in such close proximity to the airport. However, the ARSA rule made provisions for agreements with small entities and the local facility to preclude adverse impacts on these types of organizations.

Three of the commenters suggested that the comment period was too short and should be extended. The FAA believes the period for notice and comment was sufficient to permit full public comment on the proposed rule.

Four commenters wrote in objection stating that Whidbey was not busy enough. The FAA finds that Whidbey

NAS had 162,713 instrument operations during calendar year 1987 which far exceeds the ARSA establishment criteria of 75,000 annual instrument operations at the primary airport or 100,000 annual instrument operations at the primary and secondary airports or 250,000 annual enplaned passengers.

One commenter objected stating that there was already protected airspace and restricted Military Operations Areas (MOA) at Whidbey NAS. The FAA does not agree that this relieves the need for the ARSA at this facility. The FAA finds that ARSA's and special use airspace are distinctly different types of airspace. Restricted Areas, for example, which are used for hazardous activity like bombing, preclude certain operations, while MOA's are important as a method of alerting pilots to unusual or heavy military training operations. ARSA's, on the other hand, are established because the air traffic facility has a need to know of all traffic operating in close proximity to the airport. ARSA's are not designed to exclude aircraft but simply to ensure that the air traffic facility has knowledge of all traffic operating in this area.

Several commenters suggested that the floor of the northeast quadrant should be expanded or raised to 2,500 feet or higher. The FAA determined that there was validity to these recommendations and made modifications to the northeast quadrant. The area is expanded around to the 050° bearing from the airport and the floor is raised to 2,000 feet MSL. This rule reflects those changes.

Two commenters suggested that the ARSA would force pilots to fly low over open water. The FAA does not agree. The FAA finds that pilots will not routinely choose to operate under the 5-10-mile area unless they wish to utilize an airport in this area. Pilots may simply choose to circumnavigate to the north and down the I–5 corridor or overfly the ARSA above the ceiling which is only 4,000 feet above airport elevation, or establish two-way radio communication and fly through the ARSA.

Another commenter supported the ARSA and suggested that the FAA should establish climb/descent corridors and chart them so that pilots could locate where high-performance aircraft would be exiting the top of the ARSA. The FAA finds this recommendation is outside the purview of this rulemaking action.

One commenter suggested the ARSA was too small and that the FAA should develop a type of airspace where either Mode C or two-way communication was required but not both. The FAA finds that any new type of airspace is outside the purview of this rulemaking action. The FAA finds that the charged ARSA size simply establishes where mandatory communications are required. The services to which pilots have become accustomed in TRSA's will for the most part still be available outside of the ARSA. Therefore, we find that the ARSA is optimum size and does not place any more burden than necessary on pilots who do not wish to participate.

A couple of commenters suggested that the controllers were already too busy and that there were not enough radio frequencies to handle all of the traffic. The FAA does not agree. As stated by other commenters, the current high rate of participation indicates that there will not be a significant increase in the volume of traffic when the ARSA is implemented. In addition, the facility recognized the need for more frequencies due to existing traffic and has already initiated action to obtain them. The facility and region have instituted action, and the frequencies will be operational prior to the implementation of the ARSA.

Several commenters suggested that the FAA require Mode C in the Whidbey area but retain the voluntary communication and participation. The FAA finds this recommendation to be outside the purview of this rulemaking action, because Mode C is not an equipment requirement for an ARSA and it was not raised in the notice.

Two commenters suggested climb/descent corridors in lieu of the ARSA. The FAA finds that aircraft do not only operate in departure/final approach paths. This recommendation would preclude the facility having knowledge of aircraft operating in the vicinity of the downwind and base legs of the traffic pattern.

Regulatory Evaluation

Those comments that addressed information presented in the Regulatory Evaluation of the notice have been discussed above. The Regulatory Evaluation of the notice, as clarified by the "Discussion of Comments" contained in the preamble to the final rule, constitutes the Regulatory Evaluation of the final rule. Both documents have been placed in the regulatory docket.

Briefly, the FAA finds that a direct comparison of the costs and benefits of this rule is difficult for a number of reasons. Many of the benefits of the rule are nonquantifiable, especially those associated with simplification and standardization of terminal airspace procedures. Further, the benefits of standardization result collectively from the overall ARSA program, and as discussed previously, estimates of potential reductions in absolute accident rates resulting from the ARSA program cannot realistically be disaggregated below the national level. Therefore, it is difficult to specifically attribute these benefits to individual ARSA sites. Finally, until more experience has been gained with ARSA operations, estimates of *both* the efficiency improvements resulting in time savings to aircraft operators, and the potential delays resulting from mandatory participation, will be quite preliminary.

ATC personnel at some facilities anticipate that the process will go very smoothly, that delays will be minimal, and that efficiency gains will be realized from the start. Other sites anticipate that delay problems will dominate the initial adjustment period.

FAA believes these adjustment problems will only be temporary, and that once established, the ARSA program will result in an overall improvement in efficiency in terminal area operations at those airports where ARSA's are established. These overall gains which FAA expects for the ARSA sites established by this rule typify the benefits which FAA expects to achieve nationally from the ARSA program. These benefits are expected to be achieved without additional controller staffing or radar equipment costs to the FAA.

In addition to these operational efficiency improvements, establishment of these ARSA sites will contribute to a reduction in midair collisions. The quantifiable benefits of this safety improvement could range from less than $100 thousand, to as much as $300 million, for each accident prevented.

For these reasons, FAA expects that the ARSA sites established in this rule will produce long term, ongoing benefits which will exceed their costs, which are essentially transitional in nature.

Regulatory Flexibility Determination

Under the terms of the Regulatory Flexibility Act, the FAA has reviewed this rulemaking action to determine what impact it may have on small entities. FAA's Regulatory Flexibility Determination was published in the NPRM. Some of the small entities which could be potentially affected by implementation of the ARSA program include the fixed-base operators, flight schools, agricultural operations and other small aviation businesses located at satellite airports located within 5 miles of the ARSA center. If the mandatory participation requirement

were to extend down to the surface at these airports, where under current regulations participation in the radar services and radio communication with ATC is voluntary, operations at airports inside the core might be altered, and some business could be lost to airports outside of the ARSA core. Because FAA is excluding some satellite airports located within the 5-mile ring to avoid adversely impacting their operations, and in other cases will achieve the same purposes through Letters of Agreement between ATC and the affected airports establishing special procedures for operating to and from these airports, FAA expects to eliminate virtually any adverse impact on the operations of small satellite airports which potentially could result from the ARSA program. Similarly, FAA expects to eliminate potential adverse impacts on existing flight training practice areas, as well as soaring, ballooning, parachuting, ultralight, and banner towing activities, by developing special procedures which will accommodate these activities through local agreements between ATC facilities and the affected organizations. For these reasons, the FAA has determined that this rulemaking action is not expected to affect a substantial number of small entities. Therefore, the FAA certifies that this regulatory action will not result in a significant economic impact on a substantial number of small entities.

The Rule

This action designates Airport Radar Service Areas (ARSA) at Green Bay Austin Straubel Field, WI, and Whidbey Island Naval Air Station (NAS), WA. Each location designated is a public airport at which a nonregulatory Terminal Radar Service Area (TRSA) is currently in effect. Establishment of these ARSA's will require that pilots maintain two-way radio communication with air traffic control (ATC) while in the ARSA. Implementation of ARSA procedures at these locations will reduce the risk of midair collision in terminal areas and promote the efficient control of air traffic.

For the reasons discussed above, the FAA has determined that this regulation (1) is not a "major rule" under Executive Order 12291; and (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

List of Subjects in 14 CFR Part 71

Aviation safety, Airport radar service areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.501 [Amended]

2. Section 71.501 is amended as follows:

Green Bay Austin Straubel Field, WI [New]

That airspace extending upward from the surface to and including 4,700 feet MSL within a 5-mile radius of the Green Bay Austin Straubel Field (lat. 44°29'17" N., long 88°18'58" W.); and that airspace extending upward from 1,900 feet MSL to and including 4,700 feet MSL within a 10-mile radius of the airport.

Whidbey NAS, WA [New]

That airspace extending upward from the surface to and including 4,000 feet MSL within a 5 mile radius of Whidbey Island (lat. 48°21'06" N., long. 122°39'12" W.); and that airspace exending upward from 1,300 feet MSL to and including 4,000 feet MSL within a 10-mile radius of the airport from the 050° bearing from the airport clockwise to the 345° bearing from the airport; and that airspace extending upward from 2,000 feet MSL to and including 4,000 feet MSL within a 10-mile radius of the airport from the 345° bearing from the airport clockwise to the 050° bearing from the airport.

Issued in Washington, DC., on May 19, 1988.

Temple H. Johnson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 88-11936 Filed 5-26-88; 8:45 am]

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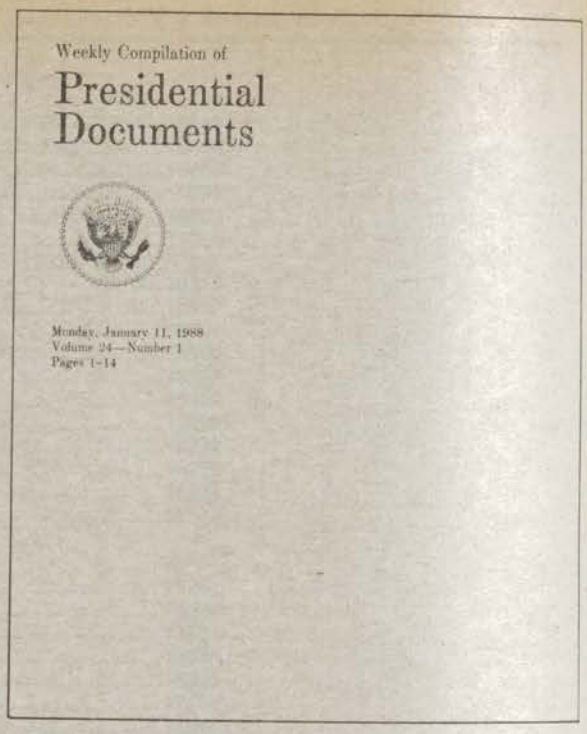
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